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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL N0. AAU0006 OF 2005S
(High Court Cr. Appeal N0. HAC0007 of 2001

BETWEEN:

MOSESE RAWAQA

APPELLANT

A N D:

T H E S T A T E

RESPONDENT

Coram: Ward, P.
Gallen, JA
Scott, JA

Counsel: Appellant in person
Mr. D. Goundar for the respondent

Hearing: Wednesday 27 July 2005

Judgment: Friday 29 July 2005

JUDGMENT OF THE COURT

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[1] The appellant was convicted of manslaughter and sentenced to 9 years imprisonment. He appeals against that sentence.

[2] The brief facts were that the appellant whilst heavily affected by alcohol beat his partner to death. He told the court he lost control because he believed that she had taken some money out of his pocket and the learned trial judge advised the assessors on the law relating to provocation. One assessor found it was a case of murder but the majority returned an opinion that he was guilty of manslaughter. The evidence showed that his partner had died from injuries inflicted in a very severe attack and, indeed, the accused's

own account described a prolonged and extremely vicious attack. The evidence also showed that, with another person, it was the appellant who took her to hospital but she was found to be dead on arrival.

[3] In sentencing the appellant the learned judge said:

> "I would class this as one of the gravest types of manslaughter to come before the court. The fact that one of the assessors gave her opinion that you should be found guilty of murder is significant. The facts show that while assaulting Asilika, she never fought back nor tried to defence herself. You continued to assault her after you knew that she was bleeding from a cut on her forehead. You banged her head against the floor and walls of the room, knowing she was already badly hurt. And you did so because you wanted her to confess to stealing your money and because you thought she had taken it. Your actions showed a callous disregard for your partner's life. ...
>
> Taking into account the nature of the assault in this case, I consider this case to be one of extreme violence with minimal provocation. ...
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> She was your partner and should have been able to trust you not to assault her. I would be failing in my duty to the public if I did not pass a sentence on you which reflected the abhorrence of society to the violent attack on a defenceless woman. Asilika was not your chattel, to do as you pleased with her, and her life, as with all human life was precious."

[4] The appellant has represented himself in this Court and has raised a number of grounds which we can summarise:

1. that the appellant was provoked by the conduct of the deceased;
2. that the appellant was heavily intoxicated at the time and that caused his loss of self control
3. that the learned judge did not take into account the time he had already spent in custody;

4. that the charge was one of murder and, had the appellant been charged with manslaughter at the outset, he would have pleaded guilty and had the benefit of such a plea, and
5. that the sentence was harsh in comparison with other manslaughter cases.

[5] We can deal with the first three grounds shortly. The issue of provocation was raised in the trial and the learned judge, in her summing up to the assessors, dealt with it carefully and accurately. The effect of provocation would be to reduce the offence from murder to manslaughter and the judge clearly took that view as did the majority of the assessors. She also specifically mentioned it as a matter she had taken into account when deciding the appropriate sentence.

[6] The evidence at the trial demonstrated plainly that the appellant was extremely drunk at the time. It has been stated many times by this Court and the High Court that self induced intoxication does not mitigate an offence. Any person who drinks, especially where he drinks to excess, knows that the effect of the alcohol will be to reduce his self control. If he still drinks and as a result commits an offence, he must understand that it will be regarded as an aggravating feature of the crime and the learned judge was correct to treat it as such in the present case.

[7] The appellant was arrested in January 2001 and remanded in custody until his sentence on 1 November 2001. Thus he had been in custody for a little over nine months which, taking possible remission into account, is the equivalent of a sentence of thirteen and an half months. Such a period should always be considered by the sentencing court. It was in the present case, the learned judge including it as one of the factors which reduced the sentence.

[8] The fourth and fifth grounds can be taken together. Although we do not have the full record of the trial before us, it is clear from the summing up that the accused did not deny causing the injuries, relying instead on the defence of provocation. He was represented by counsel who, knowing the nature of the defence, might be expected to have offered a plea to manslaughter. Whether that was done or not, the manner in which

the defence was conducted could not have resulted in a complete acquittal. The best result for which the defence could have hoped was a conviction for manslaughter.

[9] Had the appellant when he pleaded not guilty to murder added that he pleaded guilty to manslaughter, we have no doubt the learned judge would have treated the subsequent conviction of that offence as an effective plea of guilty. We note that the learned judge in her summing up, correctly directed the assessors that the only decisions open to them were guilty either of murder or of manslaughter but there is no reference in the sentencing remarks to an allowance for the fact the appellant's admissions in the trial indicated an acknowledgment of guilt of manslaughter.

[10] The learned judge gave a careful summary of the levels of sentence in previous cases of manslaughter and concluded that the tariff is between 12 years and a suspended term of imprisonment, adding that sentences in the lower range are usually reserved for cases where the provocation was severe and the violence negligible. Her conclusion on the evidence she had heard in this case was that it was one of extreme violence with minimal provocation and she clearly put it well to the top of the tariff. The suggestion that there was minimal provocation must be read and was presumably meant to be read as meaning the minimum provocation that is still sufficient to reduce the offence from murder to manslaughter.

[11] Counsel for the respondent correctly points out that a court must take care when making comparisons as each case is decided on its own particular facts. In the end, the judge must make an assessment of the relative seriousness of the case in which he is determining sentence.

[12] This was, as the judge stated, a very grave case. An apparently defenceless woman had been battered to death. The provocation the appellant relied on was an unproveable and, on the evidence, possibly incorrect allegation that the victim had stolen his money. We agree that the fact the victim was the appellant's partner is an aggravating factor.

[13] As has been stated, the judge took the time the appellant had been in custody into account and so it would appear she considered the proper sentence was one of ten years imprisonment and then deducted a year for the time in custody. We would agree that is an appropriate sentence in a case of this nature but the omission of any mention of the fact the appellant had clearly acknowledged his guilt of manslaughter suggests that it was possibly overlooked by the judge. We consider an allowance of two years should have been made for that leaving a sentence of eight years. Allowing for the time already served before sentence, that is reduced to seven years.

[14] We therefore allow the appeal, quash the sentence of nine years imprisonment and substitute a sentence of seven years.

[15] We would mention one further aspect of the case. It is correct, as the learned judge found that this was an attack on a defenceless woman and the sentence must reflect the obvious abhorrence of society to such attacks. However, the further comment that the deceased was not a chattel of the appellant might suggest the case was being categorised to some extent as a "wife battering" case where the attack resulted from the appellant's opinion that he was entitled to assault her.

[16] From the account of the evidence in the summing up, there does not appear to be any support for that suggestion. The reason given by the appellant throughout was that he had lost his temper with this partner because she had stolen money from him. There is nothing in that to support a suggestion that he was acting out of a belief he had the right to beat her simply because, as his partner, he regarded her as his property. Had there been it would undoubtedly have been a seriously aggravating factor.

Order:

Appeal against sentence allowed. Sentence reduced to seven years imprisonment.

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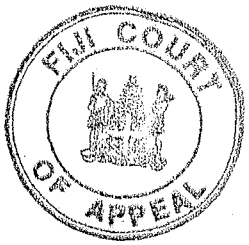
Ward, P



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Gallen, JA

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Scott, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent