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

CRIMINAL APPEAL NO. AAU0032 OF 2006
(High Court Criminal Case No. HAA126 of 2006)

BETWEEN:	**SACHIDA NAND MUDALIAR**	*Appellant*
A N D :	**THE STATE**	*Respondent*

Coram: **Ward, President**
McPherson JA
Ford, JA

Hearing: **Thursday 15th March 2007**

Counsel: **J Haigh QC with R Naidu for appellant**
R Gibson with H Tabete for respondent

Date of Judgment: **Friday 23rd March 2007**

JUDGMENT OF THE COURT

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[1] The appellant was convicted of manslaughter in the High Court and sentenced to three years imprisonment. He is a highly qualified and experienced medical practitioner specialising in Obstetrics and Gynaecology. In March 2003, when the events the subject of the charge occurred, he was in private practice in Samabula.

[2] The deceased, Poonam Kumar, was a 22 year old university student and her boyfriend, Abhikesh Kumar, was a fellow student. In March 2003, Poonam realised she was pregnant. The prosecution case is that she consulted a Dr Hazratwala who considered that she was in the 20th week of pregnancy and referred her to the appellant. The deceased and her boyfriend visited him the same day, Wednesday, 19 March 2003. Poonam did not want to have the baby and the appellant prescribed some medicine and told her to return on Friday 21st when he would carry out an abortion.

[3] On Friday they went to the surgery at about 2.00pm and Abhikesh was told the procedure would take some hours. When he returned at about 9.00pm, he told the court that Poonam's clothing was bloodstained and she was not conscious. Two receptionists also called by the prosecution, said that she was conscious and was able, with their assistance, to walk to the recovery room which accorded more with the appellant's case.

[4] The doctor asked Abhikesh to stay for two hours and then to take her home but he was unwilling to do so because she lived in a hostel which closed at 11.00pm. He was told to return instead in the morning and collect her at 7.00am. The doctor eventually left the deceased in the recovery room of his surgery, locked the premises and went home.

[5] Abhikesh returned the next morning at 8.00am to find the surgery still locked. He spoke to the appellant on his mobile telephone and was told to wait for the receptionist. When she arrived, she let Abhikesh in and they found Poonam lying on the bed, dead.

[6] The appellant arrived and confirmed she was dead and told the boyfriend to tell the police she had had a miscarriage. The prosecution case was that she had died from medical shock caused by a haemorrhage resulting from a severe tear in the uterine wall. The injury had also allowed an air embolism to occur. The opinion

of the medical witnesses called by the prosecution was that this was the result of a badly conducted abortion.

[7] The prosecution called a number of witnesses including four medical witnesses, in addition to Dr Hazratwala, and Abhikesh who had been granted immunity from prosecution.

[8] The appellant read a lengthy unsworn statement and called no witnesses. The defence case was that, when the appellant examined the deceased on Wednesday, he concluded that she was twelve weeks pregnant but that she was miscarrying at the time. He gave her medicine to prevent infection and told her to return on Friday. When she did, the miscarriage had occurred. As a result, he carried out a procedure to evacuate the products of the pregnancy.

[9] When Abhikesh returned on Friday evening, Poonam was conscious and able to walk. Unfortunately, Abhikesh refused to take her because of the problem at the hostel and so the doctor had no option but to allow her to stay in the surgery for the night. When the appellant was contacted by his receptionist the following morning to say that Poonam was not responding, he immediately went to the surgery but she was already dead. He considered she had probably died from an air embolism caused by the patient moving her legs so that air was taken into the uterus and then entered the blood stream.

[10] The opinion of each assessor was that the appellant was guilty and the judge then delivered judgment in which he came to the same conclusion and gave his reasons for doing so.

[11] A number of grounds of appeal were filed but Mr Haigh has helpfully grouped them into five main topics. We shall take them in the same order.

1. Duplicity

[12] The offence of manslaughter is defined in section 198 of the Penal Code:

> *"198. Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter.*
> .. "

[13] The indictment was drafted in accordance with the suggested forms of information in the schedule to the Criminal Procedure Code so that the particulars of offence simply stated that the appellant:

> "between the 21st day of March 2003 and the 22nd day of March 2003, at Suva in the Central Division, unlawfully caused the death of Poonam Pritika Kumar".

[14] Section 198 clearly distinguishes two acts either of which can independently constitute the offence. The appellant suggests, therefore, that the charge was defective for duplicity and the prosecution should have elected the basis upon which they were to proceed. That did not occur and the judge's summing up was confused in consequence. The result, counsel claims, is that it is impossible to know which limb of section 198 the assessors considered had been proved. Further, that difficulty extended to the sentencing by the judge because the appropriate sentence for either of the two limbs of the offence might differ significantly.

[15] The record shows that the prosecution made it clear from the outset of the hearing that it was basing its case on both limbs of the section, i.e. that the death was the result of an unlawful act, namely an abortion, and also an omission, namely the failure to render adequate care to an extent that was grossly negligent.

[16] The general rule in respect of statutory offences is that there is a distinction to be drawn between statutory provisions that create one offence which may be committed in a number of alternative ways and a provision which creates, within itself, a number of separate offences. In the case of the former, they may both be

included in the same count whilst, in the latter, they should be the subject of separate counts each charging a separate offence. The wording of section 198 clearly places manslaughter in the former category. Application of that rule would allow a single count and, in the present case, the prosecution was not required to rely on only one basis upon which to proceed.

[17] In Fiji the drafting of charges is subject to the provisions of section 122 of the Criminal Procedure Code. The second schedule to the Act sets out forms which shall be used in cases in which they are applicable (section 122 (a) (iv)), and the count in this case followed that form. However, the same provision also allows variation of the particulars according to the circumstances of each case.

[18] The purpose of providing particulars is to ensure an accused person knows the nature of the allegation against him. Slavishly following the forms in the second schedule may fail to achieve that purpose. Manslaughter is a particular example. To particularise the offence solely with the words "unlawfully killed" the victim, gives little or no more information about the allegation than did the statement of offence except for the name of the victim, the date and, sometimes, the place. In a case like this, it would have been fairer and far more likely to ensure proper, timely preparation for trial if details of what the prosecution intended to prove had been added after the brief words in the schedule. If that had been done the two bases of the charge would have been clearly indicated at a very early stage.

[19] Such a course is clearly anticipated by section 122 (b) (i):

> *"where an enactment constituting an offence states the offence to be the doing or the omission to do any one of any different acts in the alternative ... the acts [or] omissions ... may be stated in the alternative in the count charging the offence."*

[20] Having said that, it is clear that there can be no suggestion that, in the present case, the prosecution at the trial tried to hide anything. Indeed the record shows that it, properly, made its intention clear from the outset.

[21] Mr Haigh suggests that this still leaves open the question of latent uncertainty, referred to in the case of *John Richard Walsh* [2002] 131 A Crim R 299,309:

> *"[The submission] was that the count was bad for duplicity or tainted by latent uncertainty; or, as each count alleged more than one discrete act by the applicant, that the jury were not directed sufficiently on the need for unanimity, and so the trial miscarried.*
>
> *As we apprehend it, a count is bad for duplicity if it charges more than one offence; on the other hand, if the count charges but one offence and the evidence is led of more than one instance of such offending, then the verdict, if against the accused, will be uncertain. This last is sometimes called latent uncertainty because it depends, not so much upon the terms of the count, as upon the case to be made by the Crown."*

[22] When, as occurs in Fiji, the verdict is reached by the judge alone and not the assessors, any latent uncertainty may be cured by the terms of the judgment. That would appear to be the case here and this ground must fail.

[23] However, this issue still gives rise to some practical difficulties to which both counsel referred in this Court. In his summing up, the judge pointed out:

> "The State puts its case on two bases. First it alleges the accused had performed an unlawful act, an abortion, upon the deceased as a result of which she died. Second it is said the overall medical treatment, care and management of the deceased was grossly negligent such that the accused should be held criminally responsible for her death."

[24] After reminding the assessors of the evidence, he returned to the issue:

> "Whether or not you are satisfied that there had been an abortion, you should go on to consider the second basis for the charge. This is that the accused was guilty by virtue of the mismanagement of the deceased's medical care and treatment since it was grossly negligent. ...Consider both bases of the State's case. Consider first whether the accused did carry out an unlawful procedure, and then consider the allegation of gross negligence both bases alleging that such acts or omissions caused Poonam's death."

[25] After receiving the opinions of the assessors the judge wrote a carefully reasoned judgment. His conclusion was:

> "On the first basis I find beyond reasonable doubt that the State has proved its case, that the accused committed an unlawful act on the deceased and as a result she died. I concur with the opinions of the assessors and convict the accused of manslaughter.
>
> On the second basis I also find the accused guilty as charged. He had a duty towards his patient Poonam to exercise a proper standard of care towards her. He breached that duty. The breach, consisting of several gross failures, made a significant contribution towards her death. I accept the opinions of the assessors that the doctor's conduct was so grossly negligent that it deserved the sanction of the criminal law."

[26] As we have said, in our criminal procedure, it is the judge who decides the verdict. By section 299 of the Criminal Procedure Code, he is not bound to conform to the assessors' opinions but they are a significant part of the trial process and, if he does not agree with them, he is obliged to state his reason for so doing.

[27] If as in this case, he concurs with or accepts their opinions, it is clear that he must consider he knows what they have decided. Yet, although the assessors reached apparent unanimity, they may have formed different opinions from each other within the overall decision that the appellant was guilty of manslaughter. Such an opinion may have been that the appellant carried out an unlawful abortion but was not guilty of conduct amounting to gross negligence or that he carried out a lawful evacuation procedure but did so grossly negligently or that he did both. Whilst the judge clearly considered both had been proved and based his judgment on that decision, the terms of the charge to assessors did not allow him to assume that the assessors' opinions conformed with his own. The difficulty is illustrated by the next sentence following the judge's finding that the appellant had been grossly negligent, quoted above:

> "To carry out an abortion or even an evacuation procedure where complications arise are incidents involving dangerous risk."

[28] No objection has been taken to the second part of that sentence but it was unfortunate because it appeared to be raising a fresh issue. Incompetent performance of a lawful operation may well give rise to civil liability but it does not necessarily amount to criminal conduct and unavoidable complications may not give rise to any liability. However, in this case, his concluding remarks showed that the negligence he found proved arose from the total circumstances in which the operation was carried out including the lack of suitable facilities and the abandonment of the patient overnight.

[29] These are, we suggest, real problems but they do not give us ground to interfere with the verdict. A further problem arising from the wording of the charge relates to sentence and we will return to that aspect later.

2. The need for an accomplice warning

[30] The appellant's case is that Abhikesh was an accomplice and the judge should therefore have warned the assessors of the danger of convicting on his evidence unless it was corroborated. The respondent does not accept he was an accomplice.

[31] In *Davies v DPP* [1954] 38 C App R 11, 32 the House of Lords, in explaining who would fall within the definition, included:

> *"On any view, persons who are participes criminis in respect of the actual crime charged, whether as principals or accessories before or after the fact (in felonies) or persons committing, procuring or aiding and abetting (in the case of misdemeanours). This is surely the natural and primary meaning of the term "accomplice"."*

[32] The judgment then confirmed three propositions:

> *"First, in a criminal trial where a person who is an accomplice gives evidence on behalf of the prosecution, it is the duty of the judge to warn the jury that, although they may convict upon his evidence, it is dangerous to do so unless it is corroborated. Second, this rule,*

although a rule of practice, now has the force of a rule of law. Third, where the judge fails to warn the jury in accordance with this rule, the conviction will be quashed, even if in fact there be ample corroboration of the evidence of the accomplice, unless the appellate court can apply the proviso ..."

[33] Those propositions also apply in Fiji as was confirmed in Swadesh Kumar Singh v The State; [2006] Crim App CAV 7/05, 19 October 2006, in which the Supreme Court accepted the reasons for the rule as stated by the High Court of Australia in Jenkins [2004] 211 ALR 116,121:

"The rule exists for a reason. The reason is related to the potential unreliability of accomplices, an unreliability thought to be so well known in the experience of courts that judges are required, not merely to point it out to jurors, but to tell them that it would be dangerous to convict upon the evidence of an accomplice unless it is corroborated. ... Accomplices are regarded by the law as a notoriously unreliable class of witness, having a special lack of objectivity. The warning to the jury is for the protection of the accused. The theory is that fairness of the trial process requires it. It is a warning that is to be related to the evidence upon which the jury may convict the accused. The reference to danger is to be accompanied by reference to a need to look for corroboration."

[34] When the judge gives the warning, it is also incumbent on him to point out to the assessors the evidence which may be capable of corroborating the witness; Nanise Wati v The State; [2003] Crim. App AAU 6/95, 19 March 2004; Jeet v The State;[2005] Crim. App 39/03, 25 November 2005.

[35] There can be no doubt that the evidence of Abhikesh, the deceased's boyfriend, was a substantial part of the prosecution case. It was he who, in what Mr Haigh described as an extraordinary array of hearsay on hearsay, was able to tell the court of what was alleged to have occurred when Poonam went to see Dr Hazratwala including the suggestion she had assessed the term to be twenty weeks and had advised her to go and see the appellant. It was Abhikesh who told of events at the appellant's surgery on each visit and the condition of the deceased. The evidence was that he had withdrawn $950 from the bank but it was he who

was able to tell that it was to pay for the abortion. It was no doubt in order to make that evidence available that he was granted immunity from prosecution.

[36] Whether a particular witness is an accomplice is a matter for the assessors and they should be directed accordingly; *Davies v DPP* at p35. There was no such direction or warning in this case but Mr Gibson, for the State, points out that Abhikesh was not particeps criminis in the offence of manslaughter, only in procuring an abortion. He was not, therefore, an accomplice to the offence charged and so a warning on the desirability of corroboration was not necessary.

[37] There is a further aspect under the law in Fiji. Section 21 of the Penal Code provides that a person who counsels or procures any other person to commit the offence is deemed to have taken part in the offence and to be guilty of the offence. Counselling another to commit an offence is further defined in section 23:

> *"When a person counsels another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one, or whether the offence is committed in the way counselled or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.*
>
> *In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by him.*
>
> *If the facts constituting the offence actually committed are not a probable consequence of carrying out the counsel, the person who gave the counsel is not deemed to be responsible."*

[38] It is only under this provision that Abhikesh might be an accomplice to the charge of manslaughter. However, whilst there must be a small risk of death from any abortion, the evidence in this case is that Abhikesh counselled a qualified gynaecologist only to perform that and had no reason to consider Poonam's death even a likely, let alone a probable, consequence.

[39] Having, in our opinion taken the correct view of that, he was right still to give a direction pointing out the dangers and risks of such evidence. In his summing up, the judge described some of the differences between Abhikesh's evidence and the appellant's account and continued:

> "Before I go on to deal with other differences between what these two say, I need to give you two directions. First your approach to Abhikesh as a witness. At the outset you should ask yourself whether he has told you the truth. We know the Director of Public Prosecutions granted him immunity from prosecution. That letter was not exhibited but both counsel read it to you. No doubt this immunity was in connection with whether Abhikesh might have aided and abetted the commission of an unlawful act, the abortion, upon Poonam.
>
> It was never suggested to Abhikesh that he had been pressed by the police to deny that this was a case of miscarriage and the removal of remnants procedure. Nor was it suggested that they had said he was only to have immunity from prosecution if he kept to the story that the accused had performed an abortion. Ask yourselves had Abhikesh come and told you the plain truth or was he sticking to some story so as to avoid getting himself into trouble with the police. Abhikesh answered Mr Raza in cross examination by saying he did not wish to depart from his police statement and that he wanted to tell the truth. The condition of the immunity was for him to tell the truth. Of course, if the couple had only gone to the accused because of a miscarriage which had already occurred and for removal of remnants, why would they need to deny it? Neither Poonam or Abhikesh would have done anything unlawful or wrong.
>
> My direction to you is to scrutinise the evidence of Abhikesh with care. Approach it with caution. Look for items of evidence independent from his own evidence that would confirm parts of his account. Although it is not entirely clear how his position would be improved by saying it was an abortion procedure rather than an attendance to a miscarriage, it is possible he may have wished to please the police rather than to tell the truth."

[40] The condition of the immunity was not, as the judge stated there, to tell the truth. The letter granting immunity was read to the court and included:

> "... on the basis of your statement to the police dated 22 May 2003 in the interest of justice, I am prepared to grant you immunity from prosecution in respect of the offence of manslaughter. ... This offer is made on the basis that you give your evidence for the State in accordance with your aforesaid statement."

[41] If Mr Gibson's submission that he was not an accomplice to manslaughter is correct, the immunity from prosecution for manslaughter would appear to be worthless but that is not a matter we need to determine.

[42] The appellant also maintains that the judge did not adequately point out the inherent dangers of evidence given by a witness for the prosecution only because of a grant of immunity. As the Supreme Court pointed out in *Swadesh Singh's* case; "The reason that such as warning is required is that a person seeking immunity from prosecution may be tempted to implicate another person falsely in order to achieve his objective."

[43] That risk is also intricately linked with the fact that, whether or not Abhikesh was an accomplice to the offence charged, he was certainly an accomplice in the abortion if such an offence was committed. That would have given him the same or a very similar incentive to implicate the appellant in that offence if, by so doing, he could reduce his role. Thus there is a serious risk arising from both that he would underplay his part and equally overplay that of the appellant. Similarly, the conditional nature of the immunity carries the risk that the witness will adhere to his statement, whether or not it was true, because of the fear he would face prosecution if he did not.

[44] As the passage set out above shows, the judge gave a warning of the dangers of such evidence but we consider it was sparse to the stage of inadequacy and its efficacy was further compromised by the manner in which the judge countered the warnings he gave in the last two sentences in the second paragraph and the last sentence in the third paragraph set out above. The judge' remark that it had not been suggested to Abhikesh that he had been pressed by the police was, unfortunately, incorrect. Further, the evidence was that he had initially told the

police that Poonam had had a miscarriage and only changed his account after the police officer had slapped him.

[45] Finally we should point out that, if the defence considered Abhikesh was an accomplice, counsel should have asked the judge to give a warning before the assessors retired to consider the case. Defence counsel at the trial (who was not counsel on appeal) did not raise the issue. Counsel may sometimes overlook such an omission by the judge but, if he is aware of it, his duty does not allow him to remain silent and hold it for the appeal.

[46] In this case we note that counsel for the State raised the accomplice issue before counsel's closing addresses. Counsel for the defence had nothing to add. At the conclusion of the summing up, defence counsel raised a number of issues one of which resulted in the assessors being brought back for a further direction but counsel did not raise the failure to give an accomplice warning.

[47] However, the record shows that, immediately after sentence, when counsel was asking for bail pending an appeal, he suggested that very failure was to be one of the grounds of appeal. That suggests to this Court that counsel was deliberately keeping the point for appeal rather than trying to ensure a fair trial. He should not have done so.

3. Deficiencies in the summing up

[48] Mr Haigh suggested that there were a number of inadequacies and deficiencies in the summing up which, individually, may not be fatal to the conviction but which in total and in conjunction with the above grounds are such that there is a serious risk of injustice. We deal with each in turn.

[49] (i) Burden of proof

First are the references to the standard and burden of proof. The judge gave a correct and adequate direction at the outset of his summing up and referred to it

again on a number of occasions. However, in some, the words used had the effect of diluting the earlier direction. We refer to two:

> "My second direction to you when considering whether you accept Abhikesh's account or that of the accused is in connection with the form in which the accused related his account to you. I have already told you that the accused carries no burden. He does not have to prove his account is the correct one. He may prove to you his innocence or you may have a reasonable doubt as to the validity of the prosecution case. In both these cases you should acquit him."

[50] The suggestion that the assessors should consider which account to accept does not accurately express the burden and the penultimate sentence omits to mention that they should also acquit if they consider the accused's account may be true.

[51] Similarly his direction:

> "If you accept that the accused was carrying out a lawful procedure as he told you ... or you have a reasonable doubt about the abortion allegation, you should acquit him."

could be seen as suggesting that the accused's account that he was carrying out a lawful procedure had to be proved to the extent that the assessors accepted it.

[52] Finally the appellant points out that once the judge passes to consider the second limb of manslaughter he never gives a direction on the way in which the burden of proof applies to gross negligence.

[53] This Court has frequently pointed out that a judge, when reaching his verdict, is assumed to have directed himself in the terms of the summing up. These directions were unfortunate but the terms in which the judge reached his conclusions in his judgment were correctly stated and followed the initial direction he had given in the summing up.

[54] (ii) Summary of evidence

The next ground of complaint is that the judge failed adequately to summarize the evidence to the assessors. The summary was especially important because of the unfortunate fact that, at the conclusion of counsels' closing addresses, the court adjourned for 18 days before the judge summed up. It is clear that the judge had arranged to go abroad and the trial clearly took longer than anticipated. The risk he might need to alter his travel dates must have been apparent well before the end especially as the court would not have known in advance that the defence was calling no evidence. We do not know the reasons why the judge still took the break but such a delay is unfortunate in a trial with assessors. Counsel for the appellant suggests that delay rendered it all the more important that the judge summarised the evidence fully when the trial resumed for the summing up.

[55] It is not necessary to refer to all the instances indicated by counsel but two call for specific mention. The first is that the judge did not adequately put the defence case. Apart from cross examination, it was presented entirely in the statement from the dock. In such a case, the judge should always ensure that the accused's statement is put clearly to the assessors, if necessary by reading it to them. The medical evidence was of critical importance in this case and the account the appellant gave in his unsworn statement had dealt in some detail with medical matters. It would undoubtedly have been better if the judge had repeated and explained their significance.

[56] The prosecution fared better in the summing up. When dealing with the evidence of events leading to the death, the judge properly summarised the accounts given by Abhikesh and Dr Harazatwala together with that given by the appellant. He then passed to the evidence of the expert witnesses:

> "I turn next to the expert evidence. This was the evidence of the doctors called by the State. Part of what the accused told you concerned the facts, but some of his unsworn statement amounted to expert opinion on medical procedures. You should consider all of the opinions of the doctors and of Dr Mudaliar in helping you to arrive as the correct facts. All of these persons were clearly highly

> qualified skilled and experienced, Dr Mudaliar included. The evidence is not more sound solely because of the number of eminent doctors who testify. You must decide whose evidence you can rely on when considering it against all the other circumstances."

[57] That was a careful and proper direction. However, it was followed by an analysis of the evidence of the prosecution experts running, in the transcript, to five and a half pages of typescript. Following that, there was no analysis of the technical parts of the appellant's account. The total reference to those aspects appears in three separate passages:

> "If you accept that the accused was carrying out a lawful procedure as he told you, the evacuation of the remnants, or have a reasonable doubt about the abortion allegation on this first basis of the charge you should acquit him. If you concluded that he had carried out an abortion and in doing so had caused the haemorrhaging you could conclude that the bleeding was a significant contribution to her death. Whether there was sepsis or air embolism caused in an unrelated way, you could still so conclude since the bleeding on the evidence *[i.e. of the prosecution experts]* was a significant contributing cause,"

> "You have heard what the accused told you as to his approach to his patient."

> "The accused gave his explanation as to why he considered air embolism the cause of death. He did not say how the laceration and the defect were caused. Of course it is for the State to show you and to prove to you that it was the accused who caused those injuries in the course of an unlawful procedure."

This clearly did not amount to a fair summary of the appellant's medical explanation.

[58] The appellant suggests that the judge also failed to mention a matter described, by counsel for the appellant at the trial, as being at the 'very heart of the defence'. The contested evidence of the prosecution was that the foetus was 20 weeks old. A foetus of that development would, it was agreed, have had a head of approximately five centimetres diameter. The prosecution case was that it would have to be crushed to enable it to be removed. A special type of forceps would be

required and defence counsel pointed out that despite a search of the surgery no such forceps were found.

[59] (iii) Balanced account

In addition to these suggested shortcomings the appellant contends that there was a general overemphasis on the prosecution evidence and understatement of the defence case. That there was a difference in the statement of the two opposing cases is apparent, but that is not necessarily a sign of unfairness in the summing up. As was said in *Ali Ali* [1981] 6 A Crim R161,165:

> *"It is frequently said that a summing up must present a balanced account of the conflicting cases. But when one case is strong and the other is weak it does not follow that a balanced summing up will be achieved by under-weighting the strong case and over-weighting the weak case. If one case is strong and the other is weak, then a balanced account inevitably will reflect the strength of the one and the weakness of the other."*

[60] There was a considerable body of evidence called by the prosecution in contrast to the single unsworn statement of the appellant. We do not accept that the manner in which the judge dealt with it as a whole, apart from the matters already described, was unbalanced.

[61] (iv) Section 234

Counsel suggests that the judge gave an incorrect or at least an inadequate direction on the effect of section 234 of the Penal Code:

> *"234. A person is not criminally responsible for performing in good faith and with reasonable care and skill a surgical operation upon any person for his benefit, or upon an unborn child for the preservation of the mother's life, if the performance of the operation is reasonable, having regard to the patient's state at the time, and to all the circumstances of the case."*

[62] The judge dealt with that section and another (section 221(1)) and directed the assessors:

> "It is not part of the defence case that the accused made any attempt to bring on a miscarriage or to carry out an abortion, so you are not concerned to consider whether such operations were done in good faith or in the interests of the health and life of Poonam."

[63] That was incorrect. The defence case was that the deceased had already miscarried and so the operation the appellant performed was simply to remove the remnants to prevent any risk of infection to the mother. That was a surgical operation for the benefit of Poonam and was, therefore, a matter to which the section was relevant. The clause referring to an unborn child is an alternative to the principal proposition and was not relevant to the defence case. The judge should have directed the assessors on the need to consider that, if they considered it was a possibility that the appellant had carried out the procedure he claimed for the benefit of Poonam, he would not be criminally liable if it was done in good faith and with reasonable care and skill. Those were clearly matters which should have been left for the assessors to consider and the manner in which the judge dealt with them amounted to a misdirection.

[64] (v) Dr Hazratwala

Dr Hazratwala was in the judge's opinion "at times vague and evasive". Further, the appellant suggests her evidence was unreliable because it was little more than an apparent repetition and acceptance of the account given by Abhikesh of what the deceased had told him – the array of hearsay on hearsay described above. It required, Mr Haigh suggests, a strong direction that she was inherently unreliable. We agree that the judge might have given such a direction to the assessors but, despite that omission, it was essentially a matter for the assessors to decide and we do not consider his direction in respect of her evidence was incorrect.

[65] (vi) Gross negligence

The manner in which the judge directed the assessors on gross negligence is suggested to be inadequate. Whilst we would agree that it was given, in a sense,

as an afterthought to unlawful act manslaughter, we consider it was accurate and adequate.

[66] (vii) The delay

The delay between the end of counsel's addresses and the summing up has been referred to already.

Conclusion on Appeal against conviction.

[67] Mr Haigh asks the Court to find that all these matters aggregated together suggest there is a real risk that an injustice has occurred in this case. We accept that the form of the summing up and the individual directions give cause for disquiet. However, there are two factors to be considered in respect of that. First is the procedure in our law whereby the judge has the sole responsibility to determine the verdict. Section 299 of the Criminal Procedure Code provides:

> *"299. – (1) When the case on both sides is closed, the judge shall sum up and shall then require each of the assessors to state his opinion orally ...*
> *(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors:*
> *Provided that ... where the judge's summing up of the evidence under the provisions of subsection (1) is on record, it shall not be necessary for any judgment, other than the decision of the court which shall be written down, to be given ... except that , when the judge does not agree with the majority opinion of the assessors, he shall give his reasons ... for differing with such majority opinion and in every such case the judge's summing up and the decision of the court together with, where appropriate, the judge's reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for the purposes of this subsection ..."*

[68] In the present case, the judge concurred with the assessors' opinions and did not, under section 299, need to give any reasons beyond his decision. However, he did do so and, in those, explained how he reached the verdict he did. Many of the problems with the summing up are cured by his reasoning in his judgment and we

consider they must be taken by this Court as the basis for the ultimate finding of guilt.

[69] The second factor is the evidence which was presented in the trial. However the assessors were directed, the unchallenged evidence of the manner in which a qualified doctor left an indisputably seriously injured woman alone and she died as a result, as the judge found, is sufficient, in itself, to find a conviction of manslaughter.

[70] We do not consider that these matters are sufficient to set the conviction aside and the appeal against conviction is dismissed.

4. The application of the proviso and the appropriateness of ordering a retrial

[71] In view of the decision we have reached in respect the appeal against conviction, it is unnecessary to consider these.

5. Sentence

[72] The judge gave a reasoned sentencing judgment in which he explained the aggravating and mitigating factors he was taking into account. He considered sentences for similar offences from other jurisdictions and concluded:

> "Sentences in manslaughter cases vary greatly depending on their facts. This much is commonplace.
>
> The carrying out of the abortion at a late stage was by medical opinion dangerous. This must have been known to the accused. I start on the tariff at 2 years imprisonment. I reduce it by half to take account of the strong mitigation.
>
> However, the accused's failure to respond to the victim's obvious and increasingly serious symptoms constituted an extremely grave departure from reasonable community standards. The abandonment of his patient in that condition in the locked surgery overnight,

> completely alone, means that any term of imprisonment must be sufficiently substantial in the hope that it will deter others from engaging in such objectively dangerous and unacceptable conduct. For that I raise the sentence by a further two years to order a term of 3 years imprisonment."

[73] It was suggested that the judge had, in that passage passed a sentence of two years reduced to one for the unlawful act manslaughter and then added three years for the gross negligence manslaughter. As such he was effectively sentencing twice for the one offence. The wording is unfortunate but we consider it is clear that the judge was setting a starting point of two years which was then reduced for the mitigation and increased for the aggravating factors. What he did was to pass a single sentence for the offence for manslaughter and, in so doing, was taking into account both limbs of that offence.

[74] As mentioned above, the inclusion of both limbs presents problems arising from the difficulty of knowing the basis of the assessors' opinions. There can be no doubt that the judge has the responsibility for sentencing and he will base that on the verdicts he has reached. In the present case, the judge gave, as we have said, a reasoned judgment, followed by similarly constructed reasons for sentence.

[75] However, he was guided by opinions of the assessors which he interpreted as being based on the appellant's guilt on both limbs of manslaughter. If they were treated separately, it would be likely that the appropriate sentence for unlawful act manslaughter, when it was the result of an illegal abortion carried out by a medical practitioner, would attract a heavier sentence than one passed for gross negligence manslaughter where a lawful medical procedure was carried out negligently and it is possible that the assessors' opinions were based on the latter situation only.

[76] Our concern about the manner in which the judge explained his conclusion is that all the aggravating factors relate to the second limb of the offence. In his judgment, he had already found the appellant guilty of unlawful act manslaughter before he passed on to the question of guilt of the second limb. Passing to

sentence, he appears to have fixed the starting point on the basis of the unlawful act manslaughter. The aggravating circumstances should, we consider, be seen as aggravation of that only. However, seen in that light, we do not consider that the increase of two years for the manner in which he failed to care for his patient was inappropriate and the total sentence of three years is not manifestly excessive or wrong in principle.

[77] The appeal against sentence is dismissed.

[78] Before leaving the case, we would make further mention of the practice, followed by criminal judges in Fiji, of fixing a starting point and then making adjustments for aggravating and mitigating factors.

[79] Where the Court of Appeal has fixed a starting point, as is the case with rape, the process is understandable but where, as is especially the case with manslaughter, the appropriate sentence can vary so widely according to the facts of the individual case, it is not clear the basis upon which the initial starting point is set.

[80] In the present case, we presume that it was based on the nature of the appellant's culpability and the details of the offence yet those are the very factors which are then used to increase or reduce it. It appears that the initial fixing of a starting point is artificial and the sentencing judge should consider the mitigating and aggravating factors and decide the appropriate final sentence in relation to the total sentence prescribed by Parliament. The sentences passed in other cases may act as a guide but they cannot be more than that. This Court has frequently dismissed appeals against sentence based on a comparison with other cases involving a similar offence because no two cases are alike. The same must apply if other cases are used to assess an appropriate starting point.

[81] Finally the record in this case was transcribed from a verbatim record made by court reporters. The court reporters fulfil a very difficult role and the court is frequently grateful for the manner in which they learn and correctly transcribe

legal language. However, even the most seasoned court reporter may find technical evidence difficult to transcribe accurately. In this case there was a great deal of critically important medical evidence but large parts of that evidence were impossible to understand from the record.

[82] The trial judge is asked to certify the record of the proceedings as accurate. We have noticed that transcripts by the court reporters are often simply certified by the trial judge as being the transcript of the verbatim notes or are not certified at all. That is not satisfactory. We fully appreciate the pressure under which many High Court judges work and the checking of records for appeals is an extra and tiresome burden. When the evidence is of everyday events, even a badly transcribed record is unlikely to present any great difficulty but, whenever there is technical, scientific, medical or otherwise specialist evidence, the judge must ensure it is checked and corrected thoroughly.

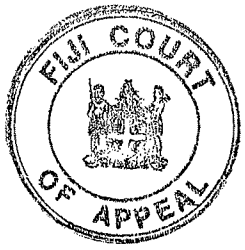
Result

Appeal against conviction dismissed.

Appeal against sentence dismissed.

Ward, President

McPherson, JA



Ford, JA

Solicitors:

Naidu Law for the appellant
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