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

CRIMINAL APPEAL NO. AAU0002 OF 2006
(High Court Criminal Case No. HAC020 of 2003L)

BETWEEN:	**VILIMONI NAVAMOCEA**	***Appellant***
A N D :	**THE STATE**	***Respondent***

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

Hearing: **20 June 2007**

Counsel: **Appellant in person**
P Bulamainivalu for the respondent

Date of Judgment: **Monday 25th June 2007**

JUDGMENT OF THE COURT

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[1] The appellant was tried in the High Court at Lautoka before Connors J and three assessors on charges of murder and robbery with violence committed in September 2003. He was acquitted of murder but two assessors found him guilty of manslaughter and robbery. The third assessor found him not guilty of manslaughter but guilty of robbery. The learned judge then gave judgment finding the appellant guilty of manslaughter and robbery with violence. On 17

November 2005, he was sentenced to eight years for the manslaughter and four years concurrent for the robbery.

[2] This appeal is against a sentence for manslaughter, the appellant having been given leave to appeal out of time.

[3] The facts of the case can be summarised from the judge's sentencing judgment. The appellant and two others were drinking alcohol and smoking marijuana. The appellant had a discussion with one Epi and then went to where the appellant had earlier that day been cutting wood. They selected two pieces and agreed to go and rob an Indian man in order to be able to purchase more beer.

[4] The two men then went and lay in wait. The deceased approached along the road and the two attacked him although the pieces of wood were not used. The deceased was able to escape, leaving behind his watch and shoes.

[5] The two men then ran to the deceased's house and reached it before the deceased. Entry was effected by removing louvre blades. When the deceased arrived, he was hit on the head with the wood and then robbed of his money. His attackers left throwing the wood away a short distance from the house.

[6] A neighbour, who had been alerted by finding the deceased's watch and shoes by the road, found the deceased lying in a pool of blood. He died shortly afterwards in hospital. The cause of death was acute blood loss secondary to a depressed fracture of the skull.

[7] The grounds of appeal maybe summarised:

1. that he is a first offender
2. that the judge did not give due consideration to his plea of guilty
3. that a custodial sentence should have been avoided because the prisons are overcrowded

4. that the court should have appreciated that the killing was a robbery gone wrong

5. That the courts should have taken into account that he came from a broken home.

6. That had he been represented at the trial he would have entered a plea of guilty to manslaughter.

[8] Most can be dealt with shortly. The sentencing remarks of the judge show that he specifically noted that the appellant was a first offender and dealt in some detail with his family circumstances, both past and present. The fact the prisons are overcrowded is not a matter the court can or should take into account in determining the appropriate sentence for a particular offence. The appellant did not plead guilty but was found guilty by the court. However, the apparent inconsistency between this ground and the last was explained by the appellant. He pleaded not guilty to murder but, had he realised or been advised that he could enter a plea to guilty to manslaughter, he would have done so. Such a plea would have helped reduce the sentence. We accept that, as an unrepresented first offender, he may not have realised he had that option. We would give him some credit for that ground, however, as will become apparent, we consider the sentence passed by the court was lenient and we do not consider that we can reduce it.

[9] The last ground refers to the killing having been the result of a robbery gone wrong. That phrase has become common in such cases and is even referred to by sentencing courts as a matter which, in some way, should be taken as a reason for reducing the sentence.

[10] All it can mean is that the initial intention of the accused was to rob. That offence includes the use of intentional violence. In cases where death results it is that violence which caused it irrespective of whether or not there was a conscious anticipation that it would do so.

[11] In formulating the sentence, the learned judge took a starting point of ten years imprisonment and then reduced it to eight years on account of his previous good behaviour and the role he had hitherto fulfilled to his family. The judge makes no mention of aggravating circumstances.

[12] As we have stated, we consider that sentence lenient.

[13] A clear trend has developed whereby the courts are ordering shorter sentences for manslaughter cases than for such offences as robbery with violence and rape where sentences of excess of ten years are not unusual. In the case of *Kim Nam Bae v the State* [1999] Criminal Appeal AAU 15/98, 26 February 1999, this Court pointed out the difficulty in setting any tariff for manslaughter because of the almost infinite range of circumstances found in such cases and continued:

> "The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal."

[14] The Court was summarising the cases which had been drawn to its attention and was not professing to indicate a starting point for manslaughter sentences. Indeed such a wide range could never be of assistance in that respect. However, it has almost become standard for courts to regard twelve years as the upper limit for sentences for manslaughter. This may be one factor which accounts for sentences which are frequently disproportionately low when compared with those for robbery and rape, particularly the latter.

[15] It has taken some years for the courts to recognise the seriousness of violent robberies and rapes and to pass appropriate sentences. Over the same period this Court has seen a general decline in the level of sentences passed for manslaughter resulting from similarly violent robberies to as low as five and six years. That is clearly wrong.

[16] In 1990 in the case of *Navitalai Rauve v State*, this Court reduced a sentence of twelve years to ten years. More recent sentences passed in the High Court show the reduced levels e.g. *Sailosi Serukalou V State* [1999] AAU 17/98, 27 August 1999, five years; *Joeli Tikolevu and Jonetani Rokoua v State* [1996] AAU 21/96, 12 November 1999, six years; *Kim Nam Bae's case*, six years; *Mosese Tawake v State* [2005] AAU 37/04, 11 November 2005, six years.

[17] There can be no more serious offence than one which needlessly takes away the life of an innocent person. In other crimes the court will have seen and heard the victim and been able to asses the horror of what he or she has experienced. In manslaughter cases that is, of necessity, impossible. Yet utter devastation to the victim's family will be inevitable. How can an offence which results in taking an innocent life be sentenced less severely than an offence of violence which does not?

[18] We suggest that, in all cases of manslaughter where the death is the result of a deliberate infliction of violence in the course of committing another offence such as robbery in which grave violence was anticipated and any form of weapons used, the court should use a starting point of between ten and fourteen years imprisonment.

[19] The facts of this case showed a young man who for the sake of continuing drinking, was willing to attack an innocent man. Having failed to obtain the money he and his accomplice needed they lay in ambush in the victim's own home; the place where above all other he has a right to feel safe. They then attacked him again with such violence that his skull was fractured. Having taken the cash, they left the victim dying on the floor and returned to their drinking. We consider those factors could have merited a starting point of more than ten years imprisonment.

[20] Although the judge properly allowed for mitigating factors, he did not cite any aggravating circumstances yet there were many. The offence was committed by more than one person, the attackers were willing to pursue their victim and repeat the offence with increased violence, they were armed with weapons and used them with sufficient force to cause the fatal injury and they left with no apparent concern for the offence they had committed or the welfare of their victim. We should suggest that those would more than off set the effect of the mitigation considered by the judge.

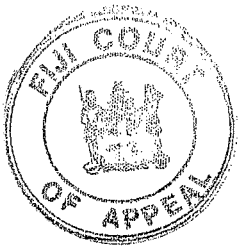
[21] Sentencing judges have the primary responsibility to ensure their sentences are correct. By the time an appeal is heard, it will often be unduly harsh to increase it. This is a case where the Court has considered its power to increase the sentence. However, we bear in mind the fact that the appellant was clearly acting out of character and had committed no previous offences.

[22] The appeal against sentence is dismissed and the sentence confirmed.

Ward, President

Penlington, JA

McPherson, JA



Solicitors:

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