IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0093 OF 2010
[High Court Case No. HAC 017 of 2009L]

BETWEEN : **ISOA SAQANAIVALU**

Appellant

AND : **THE STATE**

Respondent

Coram : Calanchini P
Goundar JA
Temo JA

Counsel : Mr. S. Waqainabete for the Appellant
Mr. M. Korovou for the Respondent

Date of Hearing : 18 November 2015

Date of Judgment : 3 December 2015

JUDGMENT

Calanchini P:

I have had the advantage of reading in draft the judgment of Goundar JA and for the reasons stated by him I agree with his proposed orders.

Goundar JA:

[1] The appellant was charged with manslaughter of his wife contrary to section 198 of the Penal Code, Cap. 17. He pled guilty to the charge in the High Court at Lautoka and was sentenced to 7 years' imprisonment with a minimum term of 5½ years, effective from 13 October 2010.

[2] This is an appeal against sentence only. Initially, the appellant was granted leave to appeal both conviction and sentence, but at the hearing, he abandoned his appeal against conviction. The appeal against conviction being abandoned is dismissed.

[3] The grounds of appeal against sentence are:

> 1. ***THE*** *Learned Judge erred in law when he sentenced your Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending.*
>
> 2. ***THE*** *Learned Judge erred in law when he commenced his sentencing starting point with 10 years which was too high considering the facts of the offending.*
>
> 3. ***THE*** *Learned Judge erred in law when he did not take the early guilty plea as a separate mitigating factor and accordingly allow an appropriate discount.*

Facts

[4] The brief facts were summarized by the learned judge in his sentencing remarks at paragraph [3], which I reproduce here:

> *"The deceased in this case was the 43 year old wife of the accused. On the 27th December 2008 they were both resting at home when their 10 month old baby fell whilst playing. The accused became angry at this incident thinking his wife should be in control and kicked her on the left side of her head. On the admission of the accused he kicked her head once, but she lay unconscious on the living room floor. She was taken to Tavua Hospital for examination where she was found to have "haematoma on left brow temporal". Over the next month she experienced severe headaches, and on the 30th January 2009 she was transferred to Suva CWM Hospital, where she was operated on after a diagnosis of left subdural haematoma. Unfortunately she failed to recover and died on the 4th February 2009. The pathologist determined the cause of death to be left side subdural haemorrhage of the brain."*

Review of sentence

[5] It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (**Naisua v The State**, unreported Cr. App. No. CAV0010 of 2013; 20 November

2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

> i. *Whether the sentencing judge acted upon a wrong principle;*
>
> ii. *Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;*
>
> iii. *Whether the sentencing judge mistook the facts;*
>
> iv. *Whether the sentencing judge failed to take into account some relevant consideration.*

[6] Reasons for sentence form a crucial component of sentencing discretion. The error alleged may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself (**House v The King** (1936) 55 CLR 499). What is not permissible on an appeal is for the appellate court to substitute its own view of what might have been the proper sentence (**Rex v Ball** 35 Cr. App. R. 164 at 165).

[7] The appellant's first complaint is that his sentence is excessive when compared to sentences imposed in other more serious cases of manslaughter. This Court has said on my occasions that comparing sentences imposed in other cases does not involve any error of principle. Other cases have only limited relevance. The sentencing court may look at the other cases to determine a tariff, but ultimately every case must be considered on its own facts. This view was recently endorsed by the Supreme Court in **Eroni Nabainivalu v The State** unreported Cr. App. No. CAV027 of 2014; 22 October 2015 at [41]:

> *"As the single judge of the Court of Appeal quite rightly observed in paragraph 3 of his impugned Ruling, "an appealable error cannot arise by comparing sentences imposed in other cases". Comparative decisions are only relevant in identifying the range of sentence for a particular offence, but each case must be decided on its own facts."*

[8] In sentencing the appellant, the learned judge referred to the range of sentence for manslaughter as established in the case of **Kim Nam Bae v The State** unreported Cr. App. No. AAU0015 of 1998S; 26 February 1999. In that case, this Court said at pages 4-5:

> *"We have been referred to several cases of sentence on manslaughter in the High Court as well as in the Court of Appeal to enable us to determine the correct range of sentence for this type of offence. With respect, this is the correct approach that should be taken by the courts. The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly so with manslaughter where the circumstances and the offender's culbability can vary greatly from case to case. An appropriate sentence in any case is fixed by having regard to a variety of competing considerations. In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence.*
>
> *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. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts."*

[9] There is nothing in the sentencing remarks of the learned judge to indicate that his approach to sentencing was incorrect. The learned judge selected a term within the range of sentence for manslaughter and then adjusted the sentence to reflect the mitigating factors. The first complaint is not made out.

[10] The second complaint is that the starting point used by the learned judge was too high considering the facts of the offending. The reason 10 years was used as a starting point was explained by the judge at paragraph [10] of his sentencing remarks:

> *"To reflect the violent and unprovoked act of kicking his wife in the head (later causing her death) I take as a starting point a term of ten years."*

[11] The use of a starting point does not involve any error of principle. Starting point is used in practice to arrive an appropriate sentence that reflects the criminality involved. As the Supreme Court said in **Maciu Koroicakau v The State** unreported Cr. App. No. CAV0006 of 2005S; 4 May 2006 at [13]:

> *"When a sentence is reviewed on appeal, again it is the ultimate sentence rather than each step in the reasoning process that must be considered. Different judges may start from slightly different starting points and give somewhat different weight to particular facts of aggravation or mitigation, yet still arrive at or close to the same sentence. That is what has occurred here, and no error is disclosed in either the original sentencing or appeal process."*

[12] Of course, what is not permissible is the double counting of the same factors. For instance, if a factor is used to justify a high starting point, then the same factor should not be used as an aggravating factor to enhance the sentence. The use of the same factor twice to increase sentence amounts to double punishment (**Laisiasa Koroivuki v The State** unreported Cr. App. No AAU0018 of 2010; 5 March 2013 at [31]).

[13] There is nothing in the sentencing remarks to indicate double counting of the same factors to increase the appellant's sentence. The act of kicking in the head no doubt was a dangerous and violent act. It must have been a strong kick to cause brain injury. The attack was completely unprovoked. Death arose out of a domestic dispute. The appellant kicked the victim in the head when their 10 month old baby fell while playing. There was no suggestion that the victim who at the time was 43 years old and a mother of three other children was responsible for the baby's fall. Taking these factors into account, the starting point of 10 years imprisonment was justified.

[14] The third complaint relates to the guilty plea. Again, the appellant's contention that his guilty plea should have been discounted separately from his other mitigating factors does not involve any error of principle. The Sentencing Penalties Decree 2009 does not require separate quantification of mitigating factors. Instead, the Sentencing and Penalties Decree 2009 has left it to the discretion of the sentencing court as to what methodology should be adopted by the sentencing court in computing the sentence. In rejecting a similar complaint, the Supreme Court in **Solomone Qurai v The State** unreported Criminal Appeal No. CAV24 of 2014; 20 August 2015 said at [53]:

> *"Although section 4(2)(j) of the Sentencing and Penalties Decree requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to*

the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately. While therefore, the failure to separately deal with each of the mitigating circumstances would not nullify the sentence, it goes without saying that it is a good sentencing practice to specify clearly the value of each discount when allowing for such matters as pleas of guilty, clear record, time on remand and the like, without clamping together all the mitigating factors and specifying one discount, as it happened in this case. The victim, the convict, counsel, appellate courts as well as the public can then readily comprehend the various components of a sentence and sentence appeals and public criticism of the judicial process could be prevented."

[15] The appellant was given a total discount of three years for his late guilty plea, his claimed remorse, and remand period. We have been told that the remand period was two months. A total discount of three years for these factors is not unreasonable. But there are two matters which give us some concern. The first is that the appellant's good character was not taken into account pursuant to section 5 of the Sentencing and Penalties Decree 2009. The appellant was unrepresented in the High Court. He did not present any meaningful mitigation on his behalf. Nevertheless, counsel for the State advised the learned judge that the appellant's convictions were all spent, the last one being in 1992. The appellant deserved some credit for his good character and the failure to take this factor into account as a mitigating factor was an error in the sentencing discretion.

[16] The second matter of concern is that the learned judge took into account that the guilty plea was late. There is no suggestion that that the appellant was asked to take his plea in the Magistrates' Court. When the case was transferred to the High Court, no plea was taken. The matter was adjourned on numerous occasions because the legal aid was processing his application. After legal aid was refused, the appellant told the learned judge that he was indigent and was going to represent himself. The trial judge went ahead and fixed the trial date without taking the appellant's plea. On the pre-trial conference date, the appellant voluntarily informed the learned judge that he wanted to plead guilty. According to the court records, the following exchange took place between the learned judge and the appellant:

"*Court:* *Your trial will start next week. If you want to call witnesses tell them to be ready next Wednesday.*

Mr. Singh: *We have 20 witnesses, we will call at least 12 witnesses. Most of them doctors. Disclosures. We have post mortem report. Filing today. Copy served on the accused.*

Accused: *I want to plead guilty.*

Court: *Any pressure?*

Accused: *I committed offence. No pressure on me.*

Court: *You understand the effect of plead guilty? Sentenced.*

Accused: *Yes.*

Court: *Mention 12th October. Plea and sentence.*
You will get some discount for plead guilty. Not full discount.
Think about things that can be said in your favour re the offence or you personally.
Trial is vacated, 12th October 2010 for plea and sentence. 12th October for mitigation and facts to be agreed."

[17] It is clear that the appellant was not at fault for his late plea. From the beginning, the appellant admitted responsibility for his conduct. When he realised the victim was unwell following the assault, he took her to the hospital. She died two months later and after receiving medical treatment. When interviewed under caution, the appellant admitted the assault. Before the trial commenced, he voluntarily pled guilty to the charge without knowing that he could have done the same earlier if plea was taken from him. The appellant's guilty plea was a sign of genuine remorse. In these circumstances, the learned judge mistook the guilty plea to be late.

[18] The two errors in the sentencing discretion justify some reduction in the sentence. I would allow the appeal and set aside the sentence imposed on the appellant by the High Court. In lieu thereof, a sentence of 6 years' imprisonment effective from 13 October 2010 is imposed. Since the appellant has served a substantial term of his sentence, fixing of a non-parole period will not serve any useful purpose. I decline to fix a non-parole period.

Temo JA:

I agree the appeal should be allowed for the reasons given by Goundar JA.

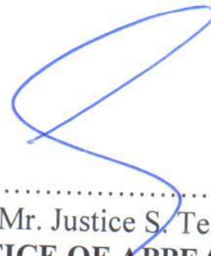
Orders of the Court are:

Appeal against sentence allowed.

Sentence imposed by the High Court is quashed and substituted with a sentence of 6 years' imprisonment, effective from 13 October 2010.

....
Hon. Mr. Justice W. Calanchini
PRESIDENT COURT OF APPEAL

....
Hon. Mr. Justice D. Goundar
JUSTICE OF APPEAL



....
Hon. Mr. Justice S. Temo
JUSTICE OF APPEAL

Solicitors:
Office of the Legal Aid Commission for the Appellant
Office of the Director of Public Prosecutions for the Respondent