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

CRIMINAL APPEAL No: AAU 82 OF 2016
(High Court No. HAC 298 of 2013)

BETWEEN : **KAMELI BOLA KOROITAMANA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Basnayake JA**
Jameel JA
Nawana JA

Counsel : **Mr. A. Naco for the Appellant**
Mr. A. Jack for the Respondent

Date of Hearing : **17 September, 2019**

Date of Judgment : **3 October, 2019**

JUDGMENT

Basnayake JA

[1] This is an appeal against the sentence. The appellant was originally charged under section 237 of the Crimes Act for the offence of Murder. On 16 April 2015, amended

information was filed, amending the charge to Manslaughter under section 239 of the Crimes Act. The appellant having pleaded guilty was sentenced to 7 years imprisonment with a non-parole period of 6 years.

[2] The appellant appealed against the sentence. In an amended notice of appeal (pgs. 80-83 of the Record of the High Court (RHC)) the appellant urged 3 grounds.

The grounds of appeal

1. *That the learned Judge erred in law and in fact when he took into account irrelevant factors to aggravate the offence.*
2. *The learned Judge erred in law and in fact, when he did not consider the Appellant's remorse as a mitigating factor.*
3. *That the sentence of 7 years imprisonment with a non-parole period of 6 years imprisonment was manifestly harsh and excessive considering the entire circumstances of the case.*

[3] A Justice of Appeal of the Court of Appeal on 31 July 2018 granted leave encompassing grounds 2 and 3 above, that is whether the sentence was harsh and excessive and whether the learned Judge considered the conduct of remorse. The learned Justice of the Court of Appeal had taken into account the submission made by the learned counsel for the appellant that there was an attempt made by the appellant to revive the deceased after the fall due to the blow given by the appellant to the deceased.

[4] The Court of Appeal has the power to quash a sentence passed and to replace it with a different sentence or dismiss the appeal. Sub section 3 of section 23 of the Court of Appeal Act is as follows:

> 23 (3) "*On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted by law by the verdict (whether more or less severe) in substitution therefore as they think ought to have passed, or may dismiss the appeal or make such order as they think just*".

[5] In an appeal against the sentence the principles that are followed have been set out in **Kim Nam Bae v The State** [1999] FJCA 21 (26 February 1999) where a sentence of 6 years was imposed by the trial court after accepting a plea of guilt for manslaughter. The appellant in that case was originally charged for murder for causing the death of his partner over an argument. The injuries caused were extensive due to several blows.

[6] The Court of Appeal stated that, "*it is well established law that before this court can disturb the sentence, the appellant must demonstrate that the court below fell into error in exercising its sentencing discretion. If the trial Judge* ***acts upon wrong principles, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some relevant consideration****, then the appellate court may impose a different sentence. This error may be apparent from the reasons for sentence or it may be inferred from the length of the sentence itself* (**House v King** [1936] HCA 40; (1936) 55 CLR 499)" (emphasis added).

[7] The Court further held that, "*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 culpability 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*" (**Simeli Beli Naisaua v State** CAV 10 of 2013 (20 November 2013).

[8] In **Rauve v State** [1990] FJCA 10; (19 October 1990) the Court of Appeal held in a case of manslaughter that, *"The punishment for manslaughter of a serious kind has normally ranged from 7 years to 10 years imprisonment depending on the degree of gravity...The sentence must reflect not only the gravity of the offence but also the nature of conviction actually entered against the appellant"*.

[9] In **Viliame Ratoa v The State** (AAU 14 of 2012; 23 February 2017) an imprisonment of 7 years with a non-parole period of 6 years had been reduced to 6 years with a non-parole period of 5 years (by the Court of Appeal). In this case the appellant was convicted of manslaughter for giving the deceased one blow, due to which the deceased died three days later of a brain injury. The incident in this case was sparked due to an altercation between the deceased and the wife of the appellant. Due to the altercation the deceased is said to have ransacked the stall in the market belonging to the appellant. At the trial the learned Judge having started the sentence with 5 years, added 4 years as aggravating factors after considering the manner in which the altercation occurred. The Court of Appeal found the addition of 4 years as aggravating factors was excessive and reduced it to 3 years. The Court of Appeal found that a sentence of 7 years imprisonment for one punch of manslaughter was excessive.

The sentence

[10] The learned Judge started the sentence with 6 years. 3 years had been given for aggravating factors. As aggravating factors the learned Judge has considered two factors, namely; that the appellant as a 'bouncer' had a duty towards the patrons of the club and secondly the loss caused to the bereaved family. In mitigation, the 2 month period spent in remand and for a clean record in the last 10 year period, another 2 months were discounted. 1 year and 8 months were discounted for pleading guilty, bringing the sentence to 7 years with a non- parole period of 6 years imprisonment.

The submissions of the learned counsel for the appellant

[11] The deceased was a 27 year old student of the University of South Pacific and originally from Solomon Islands. He was found drinking with his friends at Liquids Night Club between 9.30 pm and 11pm. The appellant was the head of security and acting as a '*bouncer*,' and was on duty. The learned counsel submitted that the appellant had been employed at the night club for over 7 years and was not involved in a single incident during this period.

[12] At about 11 pm the deceased walked away from his group of friends through a door which leads to the toilet at the top of the stairs. The deceased was followed by the appellant. Outside the toilet, the deceased and the appellant had had a verbal exchange. The appellant claimed that this was a homosexual taunt from the deceased. The appellant punched the deceased one blow as a result of which the deceased fell down unconscious. The appellant attempted to revive the deceased to no avail and despatched him to hospital where he was pronounced dead.

[13] At the post-mortem the doctor has observed multiple fractures to the skull and injuries to the lips indicative of a severe force, consistent with a punch and subsequently the head hitting a hard surface.

[14] The learned counsel had drawn our attention to the clean record of the appellant for at least 10 years. The appellant was 44 years at the time of the trial in August 2015. He also drew attention to the unblemished record of 7 years whilst performing a tough job providing security in a night club. On this occasion one punch caused the death of a patron of the club. The learned counsel accepted that a punch was not necessary. A warning would have been sufficient. Losing his temper on the spur of the moment is what brought about this unfortunate death. The appellant made an attempt to revive the deceased to no avail. Thereafter he got the deceased despatched to hospital. This shows that there was no intention to cause the death of the deceased. The punch was too hard. A

punch could be given so that the victim may not be able to give a return. Would one think how hard a punch should be in a moment like this?

[15] The learned counsel had submitted before the learned Judge several cases where suspended sentences were imposed. **State v Mikaele Buliruarua** (HAC 001/2002) one blow was used. Also cited the cases of **State v Leba** [2004] FJCA 61; HAC 21J.20035, **State v Wati** [2001] FJHC, [2001] FLR 336, **State v Darshani** [2006] FJHC 24; HAC 7S 2005. The learned counsel submitted that in assessing the culpability the court has to consider the degree of violence used, number of blows delivered. This will indicate one's intention either to cause minimum or maximum harm, the duration the violation lasted, whether the assailant used any weapons, whether there was any forethought involved and cases involving gang violence could be considered as aggravating factors. None were found in this case and therefore he urged this court to consider the case in favour of the appellant.

[16] The learned counsel for the respondent admitted that no discount was given on account of remorse. However the learned counsel submitted that there is no evidence of remorseful conduct on the part of the appellant.

[17] I have carefully considered the reasons given by the learned Judge in imposing the sentence of 7 years with a non-parole term of 6 years. However there are other matters the learned Judge could have considered in a situation like this. It was a night club. The deceased was drinking for more than two hours. The appellant was an employee of the night club. He had been employed to do security work. There was evidence of a homosexual taunt. However the learned Judge has not given much consideration to it. If well considered, that fact could have been decided in favour of the appellant. If the deceased was responsible in provoking the appellant that fact would have been relevant.

[18] He was said to be the '*bouncer*'. A bouncer is after trouble makers. The appellant had been working in this place for 7 years when this offence was committed. For a period of 7 years the appellant appears to have performed his job well. After this incident the

appellant having left the club found employment as a security officer at Fiji National University, Nasinu. There is not much detail with regard to the incident. The reason for the appellant to follow the deceased to the toilet is not disclosed. There is no evidence of any opposition to the appellant after the incident. There is no information as to how much liquor the deceased consumed. Friends of the deceased continued with their drinking session. Considering the fact that there was no planning in committing this offence, the legitimate presence of the appellant where the offence was committed, having no intention to cause death, his clean record, the attempt made to revive the deceased and thereafter despatching him to hospital can be considered as matters that could be considered in favour of the appellant. I am of the view that the learned Judge should have considered more than 2 months for the clean record of 10 years. I am of the view that justice could be met by imposing a sentence of 5 years with a non-parole period of 4 years effective from the date of sentence.

Jameel JA

[19] I have read the draft judgment and proposed orders of Basnayake JA, and in agreement with his Lordship's judgment.

Nawana JA

[20] I agree with the reasoning and the conclusions of Basnayake JA.

Orders of the Court :

1. *Appeal allowed.*
2. *Sentence reduced to 5 years with a non-parole period of 4 years effective from 16.8 2015.*

Hon. Justice E Basnayake
JUSTICE OF APPEAL

Hon. Justice F Jameel
JUSTICE OF APPEAL

Hon. Justice P Nawana
JUSTICE OF APPEAL