

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 101 OF 2019

STATE

-v-

PENAIA DRIU NAWELULU

Counsel: Mr J. Nasa for Prosecution
Ms B. Muhammed with Ms D. Prasad for Defence

Date of Judgment : 23 February 2024

Date of Sentence: 29 February 2024

SENTENCE

1. Mr Penaia Driu Nawelulu, you were found guilty after trial and convicted of one count of Manslaughter on the following information filed by the Director of Public Prosecution:

Statement of Offence (a)

MANSLAUGHTER: Contrary to Section 239 of the Crimes Act 2009.

Particulars of Offence (b)

PENAIA DRIU NAWELULU on the 2nd day of May 2019, at Nadi in the Western Division, being reckless as to the risk that his conduct would cause serious harm, killed **PAULIASI ROKOWAQA**.

2. On 1 May 2019, you and your friends went to Nadi Town and drank four bottles of wine till midnight. Then you proceeded to a nightclub in Nadi at around 1 a.m. (2 May 2019) where you continued to drink till 4 a.m. When you went to the smoking lounge in the night club, the deceased bumped into you and he wanted to fight with you. You found the deceased heavily drunk so you warned him to behave himself although you wanted to punch him.
3. Despite the warning, the deceased was throwing himself around, mumbling and swearing at you. When the nightclub was about to close at 4 a.m., you came down where you could see the deceased. You felt you being followed by the deceased. You gave your bag to your cousin and kept on walking until the deceased came very close to each other. You saw the deceased swinging his hand in such a way that gave you the impression that he was trying to punch you. Being under that impression, you punched the deceased with your left hand in what you called self-defense. The punch landed on the deceased's chin which caused him to swing and fall sideways on the cement pavement. When the deceased was lying unconscious, you ducked down and punched the deceased again on his face. The deceased was bleeding from his nose. You boarded a taxi and fled the scene. On the same evening, the deceased succumbed to his brain damage. The pathologist at the postmortem found extensive hemorrhage in the brain of the deceased caused by a blunt force trauma which eventually caused the death.

Maximum Sentences and the Tariff

4. Manslaughter, the killing of a fellow human being by an unlawful act is recognized by the Legislature as a very serious matter. The offence of Manslaughter contrary to Section 239 of the Crimes Act No. 44 of 2009 carries a maximum sentence of 25 years imprisonment. The punishment under Section 198 of the Penal Code Cap.17 (now repealed) for the same offence was imprisonment for life. Life imprisonment is the maximum sentence prescribed for this offence in England even today. The maximum term prescribed by law indicates how serious this offence has been viewed by the Legislature.

5. The tariff for Manslaughter in general is settled in this jurisdiction. Despite the maximum sentence being reduced drastically under the Crimes Act, the Courts in Fiji thought it fit to maintain the tariff prescribed for Manslaughter under the Penal Code which was suspended sentence to 12 years imprisonment¹.
6. The current sentencing practice for this offence is reflected in the following paragraph in State v Milika Vadei² where Temo J (as he then was) referred to the Court of Appeal decision in Kim Nam Bae v The State³

Manslaughter is a serious offence. It carries a maximum sentence of life imprisonment. However, case laws in Fiji seemed to show that penalties for manslaughter range from a suspended sentence to 12 years imprisonment. Sentences in the upper range were reserved for cases where the degree of violence was high and the provocation given was minimal. Sentences at the lower end of the scale were reserved for cases where the violence used was minimal and the provocation given was in the extreme: see *Kim Nam Bae v The State*, Fiji Court of Appeal, Criminal Appeal No. 1998S; *The State –v- Frances Bulewa Kean*, Criminal CASE No HAC 037 of 2007; *State v Amali Rasalusalu* Criminal Case No. HAC 003 OF 2003, High Court, Suva. The actual sentence passed will depend on the presence or otherwise of strong mitigating and/or aggravating factors

7. In Bae v State (supra), the Judges of Court of Appeal observed as follows:

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.

8. The wide sentencing range prescribed for the offence recognizes the fact that the circumstances of manslaughter vary greatly so that the sentencer should be given wide discretion to tailor his/ her sentence having due regard to the facts and circumstances of each individual case.

¹ See *Vakaruru v State* [2018] FJCA 124; AAU94.2014 (17 August 2018) para 44

² [2010] FJHC 168; HAC 0068/2009s [May 2010]

³ [1999] FJCA 21; AAU0015u.98s (26 February 1999)

9. In determining the starting point, I must have regard to the culpability of the offence and the harm caused to the victim. The culpability level is not that high given the degree of provocation offered, albeit minimal, and that no weapon was used to commit the offence which appeared unplanned. The degree of violence is also not that high. However, the second punch on the face when the deceased was lying on the floor unconscious should be taken into consideration in measuring the culpability level. Although you did not intend to cause the death of the deceased, the risk you took of causing serious harm to the deceased is not justified in the circumstances known to you. For all cases of manslaughter, the loss of life will inevitably be of utmost importance in measuring the level of harm.
10. Having considered these facts, I start your sentence from the lower range of the tariff with 5 years' imprisonment.
11. I carefully considered the submissions filed by the counsel from either side to make necessary adjustments, based on the aggravating and mitigating factors, to arrive at a sentence that is best suited to you. It is aggravating that you committed this offence under the influence of alcohol. You showed no remorse or mercy when you fled the scene when the deceased was being helped with first aid by your cousin and the deceased's friends. You did not care about the crowd that had gathered around and the public abhorrence when you proceeded to the second punch in full view of the public.
12. In mitigation, I considered your personal circumstances. You are young (33) and married with three children. You work for a leading hotel in Nadi earning \$ 240 a week. The family depends on you for financial support. I accept that you were offered some provocation by the deceased when you were drinking in the night club. However, given the lapse of time between the provocative act and your reaction, the offence cannot be considered as one being committed in the heat of passion. Therefore, your reaction cannot be considered as a measure of self-defense because it was not proportionate and reasonable. You always had the ability to leave the scene but you did not do so. So, this could never have been a defence. You are

a first offender. Therefore, I accept that you have not shown any tendency to reoffend. You are of good character. You have cooperated with police during the investigations.

13. I increase your sentence by two years to arrive at an interim sentence of seven years to reflect the above-mentioned aggravating features and deduct four years for mitigation to arrive at a final sentence of three years imprisonment.
14. Section 26 of the Sentencing and Penalties Act gives the High Court the powers to suspend the sentence fully or partially if it does not exceed three years imprisonment. Your Counsel urged that you be handed down a suspended sentence. Since your imprisonment term has not exceeded three years, I must consider if you are a suitable candidate for a suspended sentence.
15. The Court of Appeal in Vakaruru v State⁴ observed as follows:

[46] The current sentencing trend for the offence of manslaughter under the Crimes Act appears to be between 5 years to 12 years imprisonment. The above sentencing range does take into account the objectives of section 4 of the Sentencing and Penalties Act. Section 26 (2) (a) of the Sentencing and Penalties Act gives the High Court the powers to suspend a final sentence if it does not exceed three (3) years imprisonment. Accordingly, there is no need to establish a new tariff for the offence of manslaughter. A sentencing court can impose a suspended sentence based on the circumstances of the offending, a tariff may be construed as a restriction or may even confuse a sentencer. In exceptional cases a sentencing court should consider suspending a sentence.

[48] I note that a sentence of 5 years to 12 years imprisonment for the offence of manslaughter is in line with the current sentencing regime adopted by the High Court with a suspended sentence to be considered in exceptional circumstances. It does not mean that a sentencing court cannot deviate from the above range. There may be reasons to go below or higher than the range of sentencing between 5 years to 12 years imprisonment depending upon the circumstances of the offending and the sentencing court should provide reasons why the sentence is outside the range.

16. In State v Amani Rasalusalu HAC 003 OF 2003, the Court observed as follows:

The tariff for manslaughter in Fiji ranges from a suspended sentence to 12 years imprisonment. Suspended sentences have been given in the most exceptional cases where there are extenuating circumstances in the accused's favour and where

⁴ [2018] FJCA 124; AAU94.2014 (17 August 2018)

there may have been minimal violence with a high degree of provocation. Into this category fall drunken brawls leading to a **single punch and a fatal fall**, and cases of prolonged abuse and violence on the accused by the deceased leading to the sudden loss of self-control. (emphasis added)

17. Winter J (as he then was) in **State v Kuliniasiasi**⁵ considered the previous cases to decide on what basis a suspended sentence would be appropriate in an assault and violence related manslaughter case. His Lordship identified the category of cases whose features are associated with suspended sentences and those, because of the lack of special circumstances, the only proper penalty is a full and immediate term of imprisonment.
18. Accordingly, the usual features associated with suspended sentences for manslaughter are:
 - extreme and/or long duration provocation
 - minimum violence used in the assault
 - sometimes a relationship between the accused and the victim
 - powerful reconciliation
 - gross negligence
 - with little appreciation of the risk of serious harm
 - no relevant previous convictions
19. Having emphasized that these preliminary considerations often cause the Court to go further and enquire whether or not there are **special circumstances that might justify the suspension of a term of imprisonment**, His Lordship explored the case law and found in the following cases the factual matrix for suspended sentences:
 1. **State v Samuela Neimila & Another**, Criminal Case No. HAC0011.1998L.
In this case the accused persons were the deceased's brothers. The assault on the deceased was a correctional measure taken by the brothers to stop him from becoming a nuisance after being intoxicated. The violence used was minimal. The death was considered an accident and unfortunate by the family. The accused persons had spent 3 months in remand. The State supported a suspended sentence. The sentence was 18 months imprisonment suspended for 2 years.
 2. **State v Mika Bula**, Criminal Case No. HAC0009.1999.

The accused was the deceased's brother. They argued, the accused punched the deceased who fell over a jetty and drowned. The accused was sentenced to 12 months imprisonment suspended for 2 years.

⁵ [2004] FJHC 124; HAC0008.2004 (26 July 2004)

3. **State v Shakuntala Devi**, Criminal Case No. HAC0001.2001S.

The accused was the deceased's sister. The deceased had provoked the accused over a period of time. The provocation was grave. The accused had spent 6 months in remand. The sentence was 2 years imprisonment suspended for 2 years.

4. **State v Mikaele Buliruarua**, Criminal Case No. HAC0001.2002.

The accused and the deceased were work mates. During an argument the accused slapped the deceased causing the deceased to fall backwards on to a tarsealed surface. The accused was remorseful for his actions. He was a first offender and pleaded guilty. The sentence was 2 years imprisonment suspended for 2 years.

20. His Lordship identified the usual features associated with full custodial sentences for Manslaughter as follows:

- The high degree of violence in the assault or a sustained degree of violence in a beating.
 - Minimal provocation.
 - Gang violence.
 - Associated criminal offending such as robbery.
 - An intention or premeditation for violence.
 - A wanton disregard as to the risk of serious harm as a result of violence.
 - Previous convictions.
 - The absence of meaningful reconciliation.
- Special categories of violent offending particularly domestic violence or child related abuse.

21. Examples for category of cases whose features are associated with a full and immediate custodial term of imprisonment are as follows.

1. **Shashi Kapoor v The State**, Criminal Appeal No. AAU0028.2000S

In this case the Fiji Court of Appeal upheld a sentence of 3 years imprisonment given by the High Court. The provocation was minimal. The victim died as a result of the injuries caused by the accused person punching and kicking the victim.

2. **State v Orisi Roko & Ors.**, Criminal Case No. HAC0013.2000

In this case, through the provocation was grave, the degree of violence was serious. It was a case of gang violence. All six accused persons were sentenced to 7 years imprisonment.

3. **Joeli Tikolevu & Another v The State**, Criminal Appeal No. AAU0021.

This was a case of killing resulting from a violent robbery. A sentence of 6 years imprisonment was upheld by the Fiji Court of Appeal.

Having considered the circumstances of the case, His Lordship found that an immediate custodial sentence of 2 ½ years was warranted.

22. If I were to apply the principles enunciated in State v Kuliniasiasi (supra), I would identify the following characteristics of your offence that justify a suspended sentence:
- Provocation, albeit minimal
 - minimum violence used in the assault
 - no relevant previous convictions
23. I would identify the following characteristics that are associated with a full and immediate custodial sentence:
- A high degree of violence in the assault in full view of the public.
 - Minimal provocation
 - A wanton disregard as to the risk of serious harm as a result of violence.
24. I considered the Sentence Ruling in The State v Asena Rakavono⁶ filed by your Counsel where Bull J had referred to four Manslaughter cases⁷ in which full suspended sentences have been handed down. Except for State v Koleta Rote⁸, all other cases involve spousal abuse in a domestic setting where the accused had tolerated high degree of provocation offered by the victim. This case is factually different to those cases and they do not represent the current sentencing practice in Fiji.
25. In this case, I would not consider there to be sufficient special circumstances⁹ that would allow me to impose anything other than an immediate custodial sentence of imprisonment. After careful consideration of all the facets, I am of the view that full suspended sentence is not warranted in this case. However, you deserve a partial suspended sentence so as to strike a correct balance between rehabilitation on one hand and deterrence, denunciation and protection of public on the other.

⁶ Criminal Case No. HAC 86 of 2019 (30 January 2023)

⁷ State v Wati[2001] 1FLR 336 (9October 2001); State v Lewatsevu (Cr. Case No. 1of 1990L); State v Koleta Rote HAC 005 of 2001 S; State v Lebbe Crim Case No.HAC 0021 of 2003S

⁸ HAC 005 of 2001 S;

⁹ See for exceptional circumstance: CF R v Petersen [1994] 2 NZLR 55)

26. We have seen a remarkable rise in violence associated with night life in Fiji in the recent past. The public must be concerned at this sort of wanton violence inspired by an over indulgence in alcohol. Fiji, already on the verge of being declared a risky tourist destination, must ensure a peaceful environment for the tourists and everyone engaged in the entertainment business. The people must feel free and secure in night clubs where alcohol is served. It is the responsibility of all parties concerned, including Courts to ensure that the night life in Fiji is safe to everyone. You and others must learn by deterrence that this sort of behaviour is totally unacceptable.

Conclusion

27. Mr Penaia Driu Nawelulu, you are sentenced to 3 years imprisonment. You are to serve only two years in the correction facility and the remainder of one year to be suspended for a period of three years. If you are found guilty of an offence during the period of three years which this sentence is in suspension, you are liable to be punished. The effect of suspended sentence is explained.
28. 30 days to appeal to the Court of Appeal.




Aruna Aluthge
JUDGE

At Lautoka
29 February 2024

Solicitors:

- Office of the Director of Public Prosecution for State
- Legal Aid Commission for Defence