~~237~~
98

IN THE FIJI COURT OF APPEAL

CRIMINAL APPEAL NO. 4 OF 1988

Between:

AJIPOTE KOROI

Appellant

- and -

THE STATE

Respondent

Mr. D.S. Naidu for the Appellant
Mr. I. Mataitoga (Acting D.P.P.) for the Respondent

Date of Hearing: 15/11/88
Delivery of Judgment: 2/11/88

JUDGMENT OF THE COURT

The appellant (1st accused) was one of the 3 persons jointly charged with the offence of murder. All 3 pleaded not guilty and were tried before the High Court in Lautoka. All 3 assessors were of the opinion that the appellant was guilty of murder. They were also unanimous that accused 2 and 3 were not guilty of either murder or manslaughter. The trial judge accepted the opinion of the assessors in respect of accused 2 and 3 and acquitted them. However as regards the appellant, he found that he was not guilty of murder but guilty of manslaughter and convicted him of that offence.

After hearing evidence on the appellant's antecedents and having taken into account the plea in mitigation made by the appellant's counsel, the learned trial judge sentenced the appellant to 10 years imprisonment. Any person convicted of manslaughter is liable to be imprisoned for life under Section 201 of the Penal Code.

The appellant lodged an appeal against conviction as well as against sentence. However at the hearing of this appeal counsel for the appellant abandoned the appeal against conviction.

This judgment is therefore concerned only with the appeal against sentence on the grounds that the sentence was "manifestly harsh and wrong in principle".

The brief facts of this case are as follows:

On Saturday 6/6/87 the deceased went to the appellant's house with a knife and forced himself into the house. However the appellant and the deceased later had drinks together. But on Sunday 7/6/87 the deceased again went to the appellant's house in the morning and used bad language. He was drunk and challenged the appellant and others to a fight. The same afternoon the appellant met the deceased at a shop at Waiyavi in Lautoka. The deceased swore at the appellant and warned him to watch out. That evening the appellant and the 2nd and the 3rd accused went to the deceased's house. According to the appellant the purpose of his visit was to enquire why he (the deceased) hated him. The appellant accompanied by the 2nd accused entered the complainant's bedroom whilst the 3rd accused waited in the sitting-room. The appellant then woke up the deceased whereupon the deceased started punching the

239
100

appellant. There was a struggle and the 2nd accused assisted the appellant in the struggle. The appellant claims that he saw the deceased holding a knife. The appellant then stabbed the deceased twice presumably with that knife. The medical evidence shows that the deceased died from stab wounds in his stomach. The appellant and the 2nd accused then ran away. The appellant hid the knife but it was not discovered when he accompanied the police later on to look for it. When interviewed by the police on Monday 8/6/87, the appellant told the police:-

> "I did this thing because he had threatened me several times saying that he would kill me and also because he condemned the Government and the Army."

Learned counsel for the appellant did not advance any reasons why the sentence of imprisonment for the offence of manslaughter committed with a lethal weapon like a knife by a person with the appellant's background should be considered wrong in principle. In any case we can see no reason why a custodial sentence in the particular circumstances of this case should be regarded as wrong in principle. In our view it correctly reflects the court's duty to protect the public and to punish and deter the culprit.

As to the sentence being harsh merely by reason of its length, an appellate court would normally not interfere with the trial judge's discretion unless it can be shown the sentence was manifestly excessive per se or unjustifiably disparate from the normal run of sentences imposed in similar cases.

In his well known book "Principles of Sentencing" (2nd Edition) D.A. Thomas dealing with 'manslaughter by reason of provocation' points out at pages 76 - 77 that the scale of sentences in England appears to extend from 3 years to 7 years imprisonment. He suggests that a much longer sentence of 7 years is unlikely to be upheld even where the provocation is not grave.

The following observations appearing at page 77 are also apposite:-

> "Sentences at the lower end of the scale, within the bracket of three to five years, are likely to be considered appropriate where the provocation is grave and its effect on the offender immediate. Given a high degree of provocation, sentences vary within this bracket in accordance with the nature of violence used. A sentence of about five years may be upheld where after grave provocation death is caused by a sustained course of violent conduct."

Sentences in Fiji for manslaughter have generally ranged from 9 months to 6 years and in a number of cases where the provocation was grave the sentences have been suspended. Only in exceptionally serious cases where provocation was minimal have sentences been higher than 6 years imprisonment.

We only have the appellant's version as to what happened at the deceased's house but the appellant apparently had not gone to the deceased's house with any weapon. Nor is there any evidence to show that he had gone there with the intention of assaulting the deceased. But it cannot be overlooked that he went to the deceased's house accompanied by 2 others and woke him up in circumstances where a violent reaction could have been anticipated. On the other hand there is no doubt that the deceased is a big man of strong build who had been threatening and abusing the appellant.

~~247~~ 102

He had also made indecent references to the appellant's mother.

Whilst we are satisfied that the learned trial judge was justified in taking a serious view of this case we are of the opinion that the sentence of 10 years was appreciably higher than that normally imposed in similar cases of manslaughter. This is particularly so when we take into account the fact that the appellant had already spent over 10 months in gaol awaiting trial. We appreciate that the learned trial judge did take into account the custody period when assessing sentence. But this suggests to us that he might have imposed a longer sentence had the appellant not been in prison for that length of time.

Taking into account all the circumstances of the case we are satisfied that the appeal against sentence must be allowed. The sentence of 10 years imprisonment is reduced to eight years.

.....
President, Fiji Court of Appeal

.....
Justice of Appeal

.....
Justice of Appeal