IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 5 OF 1992
(High Court Criminal Case No. 13 of 1992)

BETWEEN:

RAJEND KUMAR — APPELLANT

-and-

S T A T E — RESPONDENT

Mr. John Semisi for the Appellant
Mr. Ian Wikramanayake for the Respondent

Date of Hearing : 26th April, 1993
Date of Delivery of Judgment : 5th May, 1993

JUDGMENT OF THE COURT

This is an appeal against a sentence of 7 years imprisonment imposed on the appellant on 17 June 1992. The appellant had been charged with murder but, at the request of the Director of Public Prosecutions, that charge was reduced to one of manslaughter to which the appellant then pleaded guilty.

The principal facts as they appear from the record are these. The appellant was a young bank officer with a previously unblemished record. He is now 27. For about 3 years he and the deceased, Samshun Yasin had a steady relationship which both apparently accepted would lead ultimately to marriage. During that period, however, they had not engaged in sexual intercourse. They seem to have agreed that they should wait until they were married. It was submitted on behalf of the appellant that it was a matter of considerable importance to him that Samshun Yasin should remain a virgin until the consummation of their marriage.

This may well have been what would have happened but for the intervention of a period during which the appellant was required in the course of his duties as a bank officer to go to Western Samoa. This requirement was itself a matter of emotional concern to the appellant as he came to believe that, after 7 1/2 years' service, a transfer such as this may indicate a lack of confidence in him by his employer. One might have thought the converse was true, but the effect on the appellant was such that he became depressed and sought medical treatment.

During the two months that the appellant was away his health suffered and he had trouble sleeping. He telephoned the deceased as often as he was allowed and in this way learned from her that she was seeing other men. He feared that she may no longer be a virgin and became deeply suspicious of whether she was telling him the truth about this.

On his return to Fiji the appellant arranged to meet the deceased the following day and when they met they agreed to go to a hotel where the appellant took a room under an assumed name. They then had intercourse and the appellant realised the deceased was no longer a virgin and had been deceiving him. He then lost all control. He repeatedly stabbed her as a result of which she died.

The appellant then attempted to commit suicide by taking a poisonous substance. He was taken to hospital and eventually recovered. It was acknowledged by the Director of Public

Prosecutions at the time of sentencing that a suicide note left by the appellant made it plain the deceased used the appellant to get most of the things she wanted.

In his remarks on sentencing the Judge observed that the appellant was fortunate in the charge having been reduced from murder to manslaughter. He referred then to the relationship between the appellant and the deceased and accepted that the appellant had killed her while "blinded by jealousy and passion". The Judge evidently attached considerable importance to what he described as the brutality of the act. He then observed, "when his attempt to strangle her failed he inflicted on her no less than eight stab injuries some of which fatally pierced her liver and kidneys".

On the hearing of the appeal Mr Semisi on behalf of the appellant submitted that the Judge had erred in taking into account matters which were not contained in the statement of facts presented by the prosecution. In particular, the reference to attempted strangling had not been referred to by either counsel in their submissions on sentencing. It seemed obvious that the Judge had drawn upon material available to him on the Court file, namely the depositions. Mr Semisi contended that the Judge was bound by the facts as presented to him by the prosecution and was not permitted to take into account other matters appearing from the depositions.

This submission raised some most important matters of principle and has prompted us to look closely at the practice

followed in sentencing on an indictable offence. Although some of that practice may seem elementary we think it helpful to set it out in detail.

Where a person is charged with an indictable offence the Criminal Procedure Code Cap. 21 provides for a preliminary hearing before a Magistrate (s.224). The evidence given at that enquiry may be presented in one of two forms. First, it may be taken as sworn evidence with a right of cross-examination on behalf of the accused. The evidence is taken down in writing and signed by the witness (s.226). All the statements taken in this way comprise the depositions, a copy of which is available to the accused (s.238). If the Court considers the evidence sufficient to put the accused on trial then he is committed to the High Court for trial (s.233).

Alternatively, the evidence at the preliminary enquiry may take the form of written statements (s.255) so long as those statements comply with the requirements of s.256, namely:

1. They purport to be signed by the person making them.
2. They contain a declaration as to the truth of the statement and as to an understanding of the consequences of the statement being false.
3. A copy of each statement being given to each of the parties.
4. There being no objection to the statements being tendered in this way.

Statements taken in compliance with these requirements become, in effect, the depositions and may be the basis upon which an accused is committed for trial. This is the procedure which was followed in the case of the appellant's committal for trial.

That was a committal for trial on a charge of murder, but when the appellant appeared in the High Court the Director of Public Prosecutions informed the Judge that he had reviewed the matter and applied for reduction of the charge to manslaughter. The record does not show upon what basis that application was made but it must be assumed that the Judge had read the depositions and accepted that the charge of murder was unlikely to succeed. From the remarks made by the Director at the time of sentencing the most likely explanation is that he considered a defence of provocation could be made out resulting in a sudden loss of control, and that the Judge took a similar view.

Once there was a committal to the High Court the depositions (in either form) would become part of the Court file and therefore available to the Judge. There is no express requirement that the Judge should read those depositions in advance of the appearance of the accused, but it would be a normal practice for him to do so, and our understanding is that most Judges follow that practice. Various situations could arise in which he would have no option than to read them. Certainly that occurred in the present case, because the Judge could not

have agreed to the Director's application for reduction of the charge unless he was aware of the nature of the case to be presented by the prosecution. As we have said earlier, the Judge's comment on sentencing about attempted strangling seems to make it clear he had read the depositions.

Once the appellant had pleaded guilty to the reduced charge the Judge proceeded to hear both counsel on sentencing. The Director presented and read a statement of facts. This was in summarised form and gave a brief outline of what was said to have occurred. Counsel for the appellant then addressed the Court in mitigation, and, after a short ajournment, the Judge gave his Judgment and imposed sentence.

The record before this Court on the appeal against sentence, apart from formal documents, sets out the submissions of counsel and the remarks on sentencing. As we have said, it was Mr. Semisi's submission that neither the Judge nor this Court could look beyond what is contained in the record. If by that Mr. Semisi meant that neither Court could seek further information then we are unable to agree.

The author of Thomas on Principles of Sentencing 2nd Ed. observes at p.37:

> *"On a plea of guilty it is the responsibility of counsel for the prosecution to give a full account of the circumstances of the offence, on the basis of the evidence that would have been called"*

It is a matter of concern that in the present case that was not done.

It is often said by Judges sitting in criminal cases that sentencing is the hardest task which they have to perform. From our experience we agree, and add that it is the duty of the prosecution, on a plea of guilty, to inform the Court of all matters not in dispute that will assist a Judge to fix a proper penalty - one that will, as far as possible, fit the crime. In this we adopt what is said by Thomas in the passage set out above.

It is plain from the record that a number of matters which ought to have been regarded as material to sentencing were not placed before the Judge. He has sought to fill one of the gaps by his reference to the attempted strangling, but there must have been a number of other matters which were not disclosed, namely:

1. Was there in fact an attempted strangling, and, if so, in what manner was it carried out?
2. What was the nature of the knife used by the appellant?
3. Where was the knife obtained from, and when?
4. What were the contents of the suicide note, and when and in what circumstances was it written?
5. How and when did the appellant acquire the substance he took in his attempted suicide?

There may well be other matters but these at least stand out from the record as demanding an answer.

In view of the fact that the Judge and both counsel had copies of the depositions it was always open to the Judge to inform counsel that he was aware from the depositions that the matters we have just referred to appeared to be material and to seek the submissions of counsel on them. Thomas (op.cit.) at p.370, refers to a case where this occurred and observes:

> *"The Court held that while that inference might have been consistent with the evidence, the sentencer should have mentioned the matter and given counsel the opportunity to mitigate directly on the question; `The appropriate course ..... would have been to indicate to counsel ..... what was provisionally in his mind, to point out the basis of the suggested inference, and ..... to offer counsel the opportunity .... to call his client to give evidence about this matter.'"*

We accept this as a correct statement of the procedure which should be followed in such a case.

As we have stated, and subject to what we have just said, we do not accept that this Court (or the High Court) is bound to pay regard only to the statement of facts presented by the prosecution. It is the function of a sentencing Judge to ensure that he is informed of all the facts which would be material to a proper consideration of the sentence to be passed. In the present case that has not been done. If the Judge had indicated

to counsel his provisional intention to attach importance to matters of the kind we have mentioned, and objection had been taken on behalf of the appellant as to the accuracy of that evidence or the inferences to be drawn from it, then the Judge would have been able to resolve the matter by requiring that evidence be given before sentencing (s.306 Criminal Procedure Code).

The question then remains as to what course this Court should now take. We are not prepared to complete our consideration of the appeal against sentence until we are more fully informed on those matters which appear to be material.

Section 23 of the Court of Appeal Act Cap. 12, as amended by the Court of Appeal Act (Amendment) Decree 1990, provides in subs.(3):

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

In the present case, and pursuant to that provision, we propose to order that the matter be remitted to the High Court to enable the Judge to make express findings of fact upon those matters which in our view may be material to a review of the sentence. We should make it clear that we do not challenge the Judge's right to have accepted a reduction in the charge. That

reduction was made and a plea entered and this Court will not now seek to interefere with that.

Nor do we invite the Judge to offer any comment on the sentence or the reasons on which it was based. So far as the imposition of the sentence is concerned the Judge is now functus officio. We require only his findings of fact as to the matters we have specified. It may well be that, if the depositions do not provide the answers, or if the accuracy of the depositions in that regard is challenged, then the Judge will be required to take evidence and make his findings of fact. He has power to do so under s.306. There is power for this Court to take evidence itself in such circumstances (s.28 (b) of the Court of Appeal Act), but this Court is not well equipped for the taking of evidence and in any event the trial Judge is the more appropriate person to do it.

Accordingly, the case is remitted to the High Court with a direction that the trial Judge make and convey to this Court his findings of fact on the following matters:

1. Was there in fact an attempted strangling, and if so, in what manner it carried out?
2. What was the nature of the knife used by the appellant to inflict wounds on the deceased?
3. Where was the knife obtained from, and when?

4. What were the contents of the suicide note, and when and in what circumstances was it written?

5. How and when did the appellant acquire the substance he took in his attempted suicide?

Upon receipt of the Judge's findings of fact on these matters the hearing of the appeal will be re-opened and counsel will be invited to address the Court again on the basis of those findings.

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Mr. Justice Michael M. Helsham
President Fiji Court of Appeal

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Sir Moti Tikaram
Resident Judge of Appeal

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Sir Peter Quilliam
Judge of Appeal