

**IN THE FIJI COURT OF APPEAL**  
**[On Appeal from the High Court of Fiji]**

**Criminal Appeal No. AAU0032 of 2014**  
**[High Court Case No. HAC 34/11 Labasa]**

**BETWEEN** : ELIA NIUBALAVU  
*Appellant*

**AND** : THE STATE  
*Respondent*

**Coram** : The Hon. Mr. Justice Daniel Goundar

**Counsel** : Mr. J. Savou for Appellant  
Mr. L.J. Burney for Respondent

**Date of Hearing** : 11 May 2016

**Date of Ruling** : 18 May 2016

**RULING**

[1] The appellant was charged with murder. Following a trial in the High Court at Labasa, he was convicted of manslaughter. On 25 November 2011, the appellant was sentenced to 11 years' imprisonment with a non-parole period of 8 1/2 years for manslaughter. This in an untimely application for leave to appeal against sentence.

[2] The facts were that on the night in question the appellant met the deceased outside a nightclub and accompanied him in his vehicle for a drink. The deceased was a well known businessman in Labasa. The appellant was an unemployed young man. Both men drove to an isolated location and started to drink beer. According to the appellant, a scuffle ensued when the deceased made sexual advances to him. In the scuffle, the

appellant punched the deceased, and when the deceased retaliated by grabbing the appellant's throat, the appellant got angry and punched and kicked the deceased several times. The deceased died of brain injury.

- [3] According to the appellant he filed a timely appeal in person through the Corrections Department on 25 November 2011. Subsequently, upon making an enquiry, he learnt that his appeal papers had never reached the Court of Appeal Registry. As a result, he filed the current application, which is 2 1/2 years late. The State has not rebutted the appellant's reason for the late appeal.
- [4] The initial grounds of appeal filed in person by the appellant lack clarity. It seems the gist of the complaint is that the sentence is manifestly excessive. The appellant is now represented by counsel. The sole ground of appeal filed by the appellant's counsel is:

*THE learned sentencing Judge erred in law and fact when he used Balekivuya and anor HAC 95/2010 as the basis of establishing a starting point when the facts in Balekivuya (supra) were distinctively different from the Appellants matter.*

- [5] In Balekivuya, the offender was convicted of manslaughter following a trial on a murder charge. The facts of that case were that the victim died of injuries sustained in the course of an armed robbery. The offender was sentenced to 12 years' imprisonment by the High Court.
- [6] In the present case, the trial judge used Balekivuya's sentence to identify the range for manslaughter and the starting point. Counsel for the State fairly concedes that the use of Balekivuya's sentence in this manner by the trial judge raises an arguable error in the sentencing discretion especially when on appeal Balekivuya's sentence was reduced by the Court of Appeal. In my judgment, the appeal is arguable.

**Result**

Enlargement of time granted.

Leave granted.



A handwritten signature in black ink, appearing to read "Daniel Goundar", written over a horizontal line.

.....  
Hon. Mr. Justice Daniel Goundar  
**JUSTICE OF APPEAL**

**Solicitors:**

Office of the Legal Aid Commission for Appellant

Office of the Director of Public Prosecutions for Respondent