IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court of Fiji

CRIMINAL APPEAL NO: AAU 109 OF 2015
High Court Case No. HAC247 of 2013S

BETWEEN	:	**JESSICA HILL**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Calanchini P** **Chandra JA** **Aluthge JA**
Counsel	:	**Mr. G. O'Driscoll for the Appellant** **Mr. L. J. Burney with Ms. S Tivao for the State**
Date of Hearing	:	**2 July 2018**
Date of Judgment	:	**10 August 2018**

JUDGMENT

Calanchini P

[1] I have read in draft the judgment of Aluthge JA and agree that leave to appeal should be refused.

Chandra JA

[2] I agree with the reasoning and conclusion of Aluthge JA.

Aluthge JA

[3] This is a renewed application for leave to appeal against sentence.

[4] Following a trial in the High Court at Suva the Appellant was found guilty on one count each of Manslaughter, contrary to section 239 of the Crimes Act of 2009, Dangerous Driving Occasioning Grievous Bodily Harm contrary to section 97 (4)(c) and section 114 of the Land Transport Act 1998 and failure to undergo breath analysis upon direction of a police officer contrary to section 103(1)(b) and section 114 of the Land Transport Act 1998.

[5] On 12 August 2015, the High Court sentenced the Appellant to 7 years' imprisonment on the head count of Manslaughter to be served concurrently with sentences on the other two counts with a non-parole period of 5 years. She was also disqualified from driving for 3 years.

[6] Being aggrieved by the conviction and sentence, the Appellant, on 8 September 2015, filed a timely application in this Court for leave to appeal against conviction and sentence. By his Ruling dated 11 November 2016, the learned single judge refused leave to appeal against conviction and sentence. On 22 May 2017, the Appellant's new counsel filed a renewed application for leave to appeal against sentence only.

[7] The facts are succinctly summarized in the sentencing remarks and the previous Ruling of this Court. I reproduce them verbatim in this ruling:

> *"On 24 May 2013, Sereana Lesi Pratap (deceased) was returning from a school concert and dinner at Laucala Bay at about 11pm. She was driving a motor vehicle registration no. VM 385 and inside the car in the front passenger seat was her daughter, Natasha and in the back seat were Natalia, Jokapeci Bale and Safaira Tiko.*
>
> *The deceased was driving from Nokonoko Road, round the roundabout towards the Nadera side. Suddenly, the sound of a speeding vehicle coming from Nokonoko Road was heard. A car came speeding from Nokonoko Road, on the wrong side of the road, which 'flew' towards the roundabout approaching it on the wrong side. The car landed and bounced up again and landed again on the side of the concrete middle of the roundabout. The deceased's car was positioned travelling towards Nadera side, in front of this black car, registration number FB 073.*

The black car then sped towards VM 385, and smashed into the driver's door of VM 385 and part of its right rear door. The force of the impact pushed VM 385 off the roundabout, over the footpath, over the drain and onto the right side of VM 385's driver's door, and part of the right rear door. The black car was driven by the Appellant. The deceased suffered massive, brain, liver and other injuries, and died at the scene. Jokapeci Bale was knocked unconscious and suffered a fractured jaw, a fractured cheek bone and other injuries.

The Appellant smelt heavily of liquor at the scene. She was taken by police to Nabua Police Station to be tested for drunk driving. On 25 May 2013, at Nabua Police Station, Corporal 3472 Seniloli requested the appellant to provide a sample of her breath for analysis of the Dragger (Alco test 7110) machine but the Appellant failed to provide a sample."

[8] At trial, the Appellant was represented by a counsel of her choice. She elected not to give evidence or call witnesses.

[9] The only ground of appeal filed by the Appellant in her renewed appeal is that *"the learned Judge erred in law when he sentenced the Petitioner to a term of imprisonment which is harsh and excessive considering the facts of the offending and in view of other decided cases involving a manslaughter charge under a motor vehicle accident".*

[10] The appeal is governed by section 21 (1) of the Court of Appeal Act 1949. Leave is required to appeal against sentence. The question this Court has to determine is whether there is an error in the sentencing discretion.

[11] 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 a wrong principle, 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 (***Bae v State*** [1999] FJCA 21; AAU0015u.98s (26 February 1999; ***House v The King*** [1936] HCA 40; (1936) 55 CLR 499).

[12] The Appellant complains that her sentence is manifestly excessive in the circumstances. In the written submission filed by her Counsel, a number of points of contention have been advanced. At the hearing, an oral submission in support thereof was made.

[13] In response, Mr. Burney with his co-counsel has filed a helpful written submission for the Respondent and made oral submissions. The Respondent maintains that it is not arguable that the sentencing discretion miscarried in this case. Having conceded the fact that there is paucity of any guideline case in Fiji on sentencing for '*motor manslaughter*', Counsel invite this Court to consider formulating a guideline judgment for future guidance. With that in view, Counsel for the Respondent in his written submission has included helpful foreign authorities drawn from various jurisdictions in the British Commonwealth to address the relevant guiding principles in sentencing for manslaughter arising from reckless driving.

[14] The Court however takes the view that without a proper notice pursuant to Section 8 of the Sentencing and Penalties Act 2009 being given and considering the fact that the matter is still at the leave stage, it is not appropriate to exercise the power conferred on this Court to set a guideline judgment. The Court however intends to draw some light from the authorities cited to address the issues raised in the matter at hand.

[15] Counsel for the Appellant submits that this is a manslaughter matter that involves somewhat more than simple dangerous driving and not what might be termed a usual manslaughter whereby the tariff has been set dependent on the degree of provocation.

[16] Prescribed maximum sentence for Manslaughter is 25 years imprisonment. In the repealed Penal Code, the maximum was life imprisonment. In identifying the applicable tariff, the learned sentencing Judge at paragraph 5 of the sentencing Ruling observed:

> *"Despite the above change in the legislation, the law and tariff on manslaughter is still the same, as when I said in* ***State v Milika Videi****, Criminal Case No. HAC 068 of 2009S, High Court, Suva, the following, "...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 often 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. AAU0015 of 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..." ".*

[17] Counsel for the Appellant does not dispute that the tariff for Manslaughter ranges from suspended sentence to 12 years' imprisonment. The learned sentencing Judge correctly referred the judgment and the tariff for Manslaughter in his Ruling.

[18] The learned sentencing Judge picked a starting of 6 years at the middle range of the tariff. The Appellant contends that the starting point is too high for a gross negligence motor manslaughter case. It should be noted that His Lordship has not specifically mentioned why he picked 6 years as the starting point.

[19] As a matter of good practice the starting point should be picked from the lower or middle range of the tariff. ***Koroivuki v State*** [2013] FJCA 15; AAU0018.2010 (5 March 2013).In terms of the said practice, the selection of the starting point of 6 years does not offend the good practice recommended by this Court.

[20] In picking the starting point the sentencer should take into account the objective seriousness of the offence. In gauging the objective seriousness, the sentencing court is supposed to look at culpability of the offending and harm caused to the victim.

[21] Gounder J in ***Koroivuki*** (supra) observed at paragraph [27]

> *"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this stage."*

[22] It has to be accepted that the tariff range for Manslaughter is one of the widest in the criminal justice system. The reason for the width of the tariff is that cases of Manslaughter vary widely. Both Counsel agree that the tariff range is broad and provides little guidance to a sentencing judge.

[23] Types of Manslaughter can encompass involuntary manslaughter, by an unlawful act which requires proof that the accused caused the death of another by an unlawful act (unlawful act manslaughter) or Manslaughter by gross negligence (criminal negligent manslaughter). In the former category there must be proof of an unlawful act carrying with it a risk of causing

death to others. In the latter category there must be proof that the accused did an act, albeit lawful, in a way which was grossly negligent which caused the death of the deceased, and which involved a high degree of negligence requiring criminal sanction [***State v Toka*** [2003] FJ Law Rp. 45; [2003] FLR 345 (19 September 2003)]. The motor manslaughter cases generally fall into the latter category.

[24] In the sentencing scheme proposed in ***Bae*** (supra), no distinction has been drawn between the two types of manslaughter and in formulating the said tariff the Court appears to have been in contemplation of the former category of manslaughter when it reserved upper range for cases where the '*degree of violence was high*' and the '*provocation given was minimal*'.

[25] The learned sentencing Judge in selecting the starting point on the basis of the said 'Bae formulation' appears to have considered the manner of driving of the Appellant as an act of high degree of violence unleashed on road users when they offered no provocation at all. The trial Judge observed:

> *"A person driving a motor vehicle on any Fiji road is in charge of an instrument capable of unleashing extreme violence on other road users, if he or she is not careful. It is equivalent to a person walking down the street, with a loaded pistol in his or her hand. One wrong or careless move will result in an innocent bystander being seriously wounded or killed.. The degree of violence you unleashed on other road users, at the time, was in the high, and there was no provocation at all"*

[26] Generally speaking, the learned Judge's thinking may not be incorrect. However, it should be accepted that, in motor manslaughter cases, measuring the seriousness on the basis of the degree of violence used or provocation offered in my opinion may not be technically correct. Instead, the seriousness of the offence should be measured on the basis of the outcome (harm caused) and the culpability of the offender.

[27] Although no explicit reasons were given, the learned sentencing Judge's selection of 6 years as the starting point is quite justified when considering the outcome of the offence and the culpability of the Appellant. From aggravating factors recorded in the sentence Ruling which I reproduce below, one can easily gauge the high culpability of the Appellant. It appears that all of the features he did say were aggravating were reasons that he used to take the starting point he did.

"In this case, you drove your motor vehicle, at the material time, with extreme recklessness and with no regard whatsoever for the safety of other road users. You sped along Nokonoko Road, obviously at a very high speed, went onto the wrong side of the road, and collided with the deceased's vehicle. The deceased, who was driving her car, at the time, was correctly and legally navigating the Nokonoko Road/Ratu Dovi Road roundabout....

.....As had been mentioned above, you smelt heavily of liquor when apprehended. You refused to co-operate with police in carrying out a breath analysis test, hence the charge in count no.3. Obviously, you were drunk when you were driving at the material time. This appeared to be an important factor in causing you to drive recklessly at the material time"

[28] In describing the outcome or harm caused by the offence, His Lordship observed:

"The deceased suffered massive brain, liver and other injuries, as a result of your reckless act. She died at the scene. All the four girls travelling with the deceased in her car were knocked unconscious, as a result of your reckless act. One of them, Jokapeci Bale, suffered a fractured jaw and cheek bone. .....

.... Through your offending, you had deprived the deceased's husband of a wife, their two daughters a mother, and you have caused this family a lot of heartache and sadness. They are paying for your reckless driving on 24 May 2013 with the loss of a wife and mother. You must therefore not complain when your liberty is taken away to pay for your crime. In addition to the above, Jokapeci Bale, also suffered with a fractured jaw and cheek bone.

..... Your offending cost the deceased's family $80,000 worth of property damage, when their Toyota Camry V6 model appeared written off. The deceased's daughter's medical bills came to about $2,000. So your offending had not only caused emotional sufferings to the deceased's family, it had also caused them financial loss".

[29] In any reckless driving case, the number of people being put at the risk of being killed or injured is often a matter of chance. However, there are cases where the offender has knowingly put more than one person at risk, or where the occurrence of multiple deaths was reasonably foreseeable. A person who takes the control of the steering wheel under the influence of alcohol or drugs knowingly puts more than one person at risk of being killed and this is one of such cases although only one person succumbed to injuries.

[30] Manslaughter is involuntary when there is no intention to kill another human being. A condition for involuntary manslaughter is when, despite not intending to kill anyone, the person charged knows that their behaviour is dangerous or reckless, and may endanger lives. A good example of this is a drunk driver who kills a pedestrian. Even though the drunk driver did not set out with the intention to kill another human being, the driver ought to have known that operating a motor vehicle could cause danger to others, and that alcohol would make this activity more reckless. The drunk driver is therefore committing *'unlawful act manslaughter'* as opposed to 'criminal negligence manslaughter' because he is driving under the influence of alcohol.

[31] In the absence of availability of the defence of intoxication, the culpability of a driver who kills a person under the influence of alcohol should attract a sentence in the upper region of the tariff.

[32] Therefore, the Appellant's Counsel's assertion that this is a simple manslaughter matter that involves somewhat more than simple dangerous driving and not what might be termed a usual manslaughter would not hold water.

[33] In the present case, there is evidence that the Appellant drove the vehicle at night at an excessive speed, on the wrong side of the road, under the influence of alcohol, causing death to a mother and serious injuries to a daughter. Appellant's act is highly culpable and should attract a higher starting point.

[34] The learned Counsel for Respondent have cited a similar manslaughter case, ***State v Gounder*** HAC 194 of 2016, where a sentence of 8 years' imprisonment with a non-parole period of seven years' had been imposed. Although that case was decided after the sentence of the present matter was passed, it indicates the current sentencing practice in Fiji in cases involving driving under influence of alcohol. Therefore, the learned sentencing Judge has not fallen into an error in selecting the starting point.

[35] The Court agrees that there is little guidance on the sentencing for manslaughter by a vehicle driver in Fiji. The only case cited by the Appellant ***State v Kaminieli Tuimavana*** (Suva High Court Criminal Case No. HAC 92 of 2009 – Sentence date 16th May 2013) is of little help or relevance to the present case in that it presents a different factual matrix as far as

culpability of the driver is concerned. In that case a sentence of 3 years imprisonment with a non-parole period of 2 years was imposed. This matter involved 12 deceased. The engine of the bus had caught fire due to a mechanical defect and the accused was convicted based on his omissions. The reason given for the starting point is stated in the judgment as reflecting the gross negligence and insouciance of the accused on the journey as far as Sigatoka.

[36] The Counsel for Appellant making a point for consideration claims that *'no consideration appears to have been given by the learned trial Judge either before or during the course of the trial or in the summing up as to whether the offence charged was correct or whether the charge should have been Causing Death by Dangerous Driving (under the land transport Act), a charge that would have lead, because of the set tariff, to a lesser sentence than that imposed'*. While conceding that this may not be a relevant consideration for the purposes of this appeal, it is submitted that 'it may be worth in considering whether the sentence imposed was correct as compared to sentences for the lesser offence'.

[37] I accept that a person who unlawfully kills another in the course of driving a vehicle may be convicted either of the crime of manslaughter, or of the crime defined as Causing Death by Dangerous Driving under the Transport Act. Section 162 (1) (e) of the Criminal Procedure Act specifically states that upon an information charging a person with the crime of manslaughter he may be convicted of a lesser offence of dangerous driving.

[38] However to address this issue in a proper perspective, it is apposite to appreciate the marked distinguishable features between the two offences. The maximum sentence for manslaughter is imprisonment of 25 years (earlier imprisonment for life), whereas the maximum for Aggravated Dangerous Driving Occasioning Death under Section 97(1) (read with Section 114) of the Land Transport Act is 14 years' imprisonment with or without a fine of up to $20,000 and disqualification for any period up to life.

[39] The statutory offence- Dangerous Driving Occasioning Death has been introduced in other jurisdictions on account of the reluctance of juries to convict a negligent driver of manslaughter. The high degree of negligence that has to be proved and the maximum punishment for that offence being life imprisonment are two reasons for their reluctance.

[40] The attempt to produce an *"intermediate offence"* was unsuccessful, because some courts took the view that the degree of negligence required to establish guilt of either offence was the same (***Calloghen v. The Queen*** (1952) 87 C.L.R. 115) or judges found it hard to differentiate between the two degrees of negligence. The classic statement is that of Lord Hewart C.J. in ***R. v Bateman*** (1925) 19 Cr. App. R8; [1925] All E.R. 45.

> *'The judges then explain that the only difference between the two offences is that a conviction under the one carries a lesser maximum penalty than a conviction under the other and that this is [possibly] "the only case in the law in which the jury is given an express right to indicate by its verdict that the case is not as bad as it might otherwise be and in effect to put a ceiling on the possible penalty."*

[41] In ***Regina v Seymour*** HL [1983] 2 AC 493, 1983] 2 All ER 1058, the House of Lords considered the relationship between the offences of manslaughter and causing death by reckless driving. The applicant in that case argued that recklessness in a manslaughter case bore a different meaning from that which applied in respect of the statutory offence. Though rejecting that proposition, the House of Lords held that the degree of recklessness required for conviction of the statutory offence was less than that required for conviction of the common law crime of manslaughter. Lord Roskill observed that the jury was to perform the duty of assessing the degree of wickedness exhibited by the accused in order to decide which offence (if any) he has committed: 'If any modification of the 'Lawrence direction' is appropriate in a case where manslaughter alone is charged, **it would be to add a warning to the jury that before convicting of manslaughter they must be satisfied that the risk of death being caused by the manner of the accused's driving was very high**. Such a direction will, of course, always be necessary where the common law crime and the statutory offence are charged alternatively, but where, as in this case, the common law crime is charged alone, it may be unnecessary and inappropriate.' (emphasis added)

[42] Lord Roskill contrasted the culpability underlying the two offences:

> *"Parliament must however be taken to have intended that 'motor manslaughter' should be a more grave offence than the statutory offence. While the former still carries a maximum penalty of imprisonment for life, Parliament has thought fit to limit the maximum penalty for the statutory offence to five years' imprisonment, the sentence in fact passed by the learned trial judge upon the appellant upon his conviction for manslaughter.* ***This difference recognises that there are degrees of turpitude which will vary according to the gravity of the risk created by the manner of a defendant's***

> ***driving.*** *In these circumstances your Lordships may think that in future it will only be very rarely that it will be appropriate to charge 'motor manslaughter': that is where, as in the instant case, the risk of death from a defendant's driving was very high.' And went on to answer the question certified for the House: 'Where manslaughter is charged and the circumstances are that the victim was killed as a result of the reckless driving of the defendant on a public highway, the trial judge should give the jury the direction suggested in Reg. v Lawrence (1981) 73 CrAppR 1; [1982] AC 510 [[1981] 1 AllER 974; [1981] 2 WLR 524; [1981] RTR 217; [1981] CrimLR 409] but it is appropriate also to point out that in order to constitute the offence of manslaughter the risk of death being caused by the manner of the defendant's driving must be very high." (emphasis added)*

[43] In those jurisdictions, as a matter of policy, the Crown Prosecutor's office or the State agency prosecutes for manslaughter and not under the statutory offence leaving it to the jury to decide, having regard to the seriousness of the offence, under which of these sections they would convict.

[44] In Fiji also, framing the information is the prerogative of the Director of Public Prosecution (DPP). However the statistics in Fiji show and Counsel for the Appellant appears to have conceded that the DPP has rarely opted to indict a person who unlawfully kills another in the course of driving a vehicle for manslaughter. In this context it can be assumed that the DPP has drawn his wisdom from ***Seymour*** (supra) where Lord Roskill stated that *it will only be very rarely that it will be appropriate to charge 'motor manslaughter': that is where, as in the instant case, the risk of death from a defendant's driving was very high.'* and had taken a cautious approach in picking the offence that is best suited to the presented circumstances in terms of driving and harm caused thereby.

[45] Therefore, when an accused is charged for manslaughter alone, the trial judge is not required to give the assessors or himself any additional direction other than that suggested in ***Lawrence*** (supra) and point out that in order to constitute the offence of manslaughter the risk of death being caused by the manner of the accused's driving must be very high unless the trial judge, having considered the evidence led before him, decides to direct the assessors in terms of Section 162 (1) (e) of the Criminal Procedure Act.

[46] In the present case, the Appellant was charged only with manslaughter. The trial judge having considered the evidence led before him, and in the absence of any application for redirection by the defence and having been satisfied that the risk of death from Appellant's

driving was very high, had decided not to invite the assessors to consider the lesser offence of Causing Death by Dangerous Driving. Therefore, in an appeal where the conviction is not impugned, it is futile to question the legality of the sentencing discretion of judge in terms of his failure to consider the maximum sentence or the tariff prescribed for the lesser offence of Causing Death by Dangerous Driving.

[47] In the sentencing Ruling, the learned trial judge noted 4 aggravating factors including the high degree of 'violence' unleashed on other road users and increased the sentence by three years.

[48] Collins dictionary defines *'violence'* as a behavior which is intended to hurt, injure, or kill people. Oxford dictionary gives a similar meaning and defines *'violence'* as behavior involving physical force intended to hurt, damage or kill someone or something. There can be no doubt that the risk of death the Appellant took in her driving was very high. However it cannot be said that she intended to cause the death or injuries to the victims. Therefore, the consideration of violence to aggravate the offence is not technically correct.

[49] The learned trial Judge also took financial loss caused to the victims as an aggravating factor. It is imperative in Fiji that all vehicles driven on public roads must have at least a third party insurance policy and there is no evidence that Appellant's vehicle did not have one. Therefore, any financial loss caused to the victims may be recovered from the relevant insurance company and should not lead to any increase in sentence. In ***R v Cooksley*** [2003] EWCA Crim. 996 [2003] 3 All ER the English Court of Appeal set out relevant aggravating and mitigating factors and have not considered financial loss caused to the victims as an aggravating factor.

[50] The Appellant contends that non-cooperation with police is rather based on speculation rather than any factual matrix and goes to the count of refusal to give a breath test for which sentence was also imposed.

[51] It appears from the Record that learned trial Judge's finding that the Appellant was not cooperative with police is not based on mere speculation. PW 7 Seniloli in his evidence stated (paragraph 3 of page 225)

"When she took the first chance, she did not provide enough sample to give a clear reading. I gave her a second chance to blow into the dragger machine. The result said insufficient. She did not blow into the machine. I told her this is her last chance. I told her if she did not provide enough sample of breath, she will be locked at the station and charged for failure to undergo a breath test. She did not blow the third time. There was no reading in the machine. I then handed her over to an arresting officer, with a copy of the test result"

[52] Since the Appellant was charged and sentenced in a separate charge for refusal to give a breath test, the learned trial Judge having considered the totality principle has imposed a concurrent sentence and not a consecutive sentence. However, in reaching the final sentence for the head count which is manslaughter the learned trial judge was not justified when he considered an offence committed at the same time for which a sentence was imposed as an aggravating factor.

[53] I take the view however that the learned trial Judge although he had taken into account some irrelevant factors into consideration to increase the sentence by three years, he had not fallen into error because the final sentence is within the tariff prescribed for Manslaughter.

[54] In ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) the Court discussed the proper approach to be taken by an appellate court when called upon to review the sentencing discretion of a court below:

"In determining whether the sentencing discretion has miscarried this Court does not rely upon the same methodology used by the sentencing judge. The approach taken by this Court is to assess whether in all the circumstances of the case the sentence is one that could reasonably be imposed by a sentencing judge or, in other words, that the sentence imposed lies within the permissible range. ***It follows that even if there has been an error in the exercise of the sentencing discretion, this Court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.*** *However it must be recalled that the test is not whether the Judges of this Court if they had been in the position of the sentencing judge would have imposed a different sentence. It must be established that the sentencing discretion has miscarried either by reviewing the reasoning for the sentence or by determining from the facts that it is unreasonable or unjust." (emphasis added)*

[55] The learned trial Judge in his sentencing Ruling recorded following mitigating factors:

(i) At the age of 28 years, this was your first offending;

(ii) This case had been hanging over your head since 27 May 2013, that is, in the last 2 years 3 months, and that in itself, was a punishment in itself;

(iii) You are an accountant by profession, and were married in December 2014.

[56] It is submitted that remorse was put forward in the mitigation submissions but was not considered by the learned judge or mentioned in his sentence. The Counsel for Appellant asserts that even if it is accepted that the selected starting point was correct a more substantial discount should have been given in the circumstance that the Appellant expressed genuine remorse in her submissions in mitigation that was not mentioned in the sentence nor was any reason given for disregarding that mitigating factor.

[57] I agree that it can be expected that anyone who has caused death by driving would be expected to feel remorseful. Remorse is generally recognised as personal mitigation. Therefore it is for the court to determine whether there is remorse and an expression of remorse is genuine; where it is, this should be taken into account as personal mitigation.

[58] Having considered the previous application of the Appellant, [***Hill v The State*** [2016] FJCA 185; AAU0109.2015 (11 November 2016)] Gounder J held:

> *"A human life was lost as a result of the appellant's conduct. She expressed no remorse for her conduct. Apart from her previous good character, she did not have any compelling mitigating factors to justify a lenient sentence. The primary purpose of the sentence was deterrence, both special and general. In my judgment, the sentence reflects these factors. For these reasons, I am satisfied that there is no arguable error in the sentencing discretion".*

[59] It appears that there was nothing or precious little to support that the Appellant was truly and genuinely remorseful for her actions. In the caution interview she was putting the blame on the deceased (answer to Q. 16). At the trial PW 1 who was a bystander said (2nd 3rd and 4th paragraphs of page 278 of the Court Record)

> *"She woke up. I asked her whether or not she was drunk. She swore at me, saying "who the fuck are you?" you bustard! You are the policeman? Who the hell are you? ... Later the driver came out of the vehicle. When she came out of the car, she behaved like a drunk. She was not worried with what happened. She was talkative. She was moving around when she came out of*

the car. She later got back into her car. She then said she is taking her car. ....I explained to her there was a car accident involving her. She wanted to run away by driving her car away. ....."

[60] Appellant's lack of remorse is further borne out by the fact that she initially appealed against conviction and has belatedly come to accept, apparently on legal instructions, that she was properly convicted. Therefore, the learned trial Judge had not fallen into error when he disregarded her professed remorse.

[61] Other mitigating factors professed in the mitigation submission filed before the Court below but had not been considered by the learned trial Judge had little or no mitigating value at all.

Conclusion

[62] Road accidents cause immense human suffering. Every year, a considerable number of people are killed and seriously injured. This represents a serious economic burden. It is understandable that cases of serious driving offences causing death are referred to courts by the DPP in the form of Manslaughter because he considers that the prescribed sentence and tariff for Causing Death by Dangerous Driving is unduly lenient.

[63] Motor manslaughter cases cause particular difficulty for sentencers. By definition, it is one which always gives rise to extremely serious harm. Understandably this often leads to calls from victims' families, and from the wider community, for tough sentencing. On the other hand, an offender sentenced for causing death by reckless driving did not intend to cause death or serious injury, even in the extreme case where he or she deliberately drove for a prolonged period with no regard for the safety of others. Therefore, the sentencing should strike an appropriate balance between the level of culpability of the offender and the magnitude of the harm resulting from the offence.

[64] A factor that courts should bear in mind in determining the sentence which is appropriate is the fact that it is important for the courts to drive home the message as to the dangers that can result from dangerous driving on the road. It has to be appreciated by drivers the gravity of the consequences which can flow from their not maintaining proper standards of driving. Motor vehicles can be lethal if they are not driven properly and this being so, drivers must know that if as a result of their driving dangerously a person is killed, no matter what the

mitigating circumstances, normally only a custodial sentence will be imposed. This is because of the need to deter other drivers from driving in a dangerous manner and because of the gravity of the offence. [***R v Cooksley*** (supra)].

[65] For all of the above reasons, I consider that a sentence of 7 years' imprisonment is neither harsh nor excessive. Therefore, the sentence imposed by the learned trial Judge should not be interfered with.

Orders

i. Leave refused.

ii. The appeal is dismissed.

iii. The sentence passed in the High Court is affirmed.

Hon Mr. Justice W. D. Calanchini
PRESIDENT, COURT OF APPEAL

COURT OF APPEAL FIJI

Hon Mr. Justice S Chandra
JUSTICE OF APPEAL

Hon Mr. Justice Aruna Aluthge
JUSTICE OF APPEAL