IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU 0032 of 2014
(High Court HAC 34 of 2011 Lab)

BETWEEN : **ELIA NIUBALAVU**

Appellant

AND : **THE STATE**

Respondent

Coram : **Calanchini P**
Gamalath JA
Goundar JA

Counsel : **Mr. S. Waqainabete for the Appellant**
Ms. P. Madanavosa for the Respondent

Date of Hearing : **20 February 2018**

Date of Judgment : **8 March 2018**

JUDGMENT

Calanchini P

[1] I have read the draft judgment of Gamalath JA and agree that the appeal against sentence should be dismissed.

Gamalath JA

[2] Elia Niubalavu, the appellant was charged in the High Court of Labasa with Murder, contrary to section 237 of the Crimes Act 44 of 2009, and according to the particulars of crime, it had been alleged that on 25 June 2011 at Labasa, he murdered one Hakim Begg. At the conclusion of the trial the assessors returned divided opinions in which the majority opinion was for manslaughter while one assessor returned an opinion of guilty for murder. The learned trial Judge agreed with the majority opinion and convicted the appellant. The appellant was sentenced to a total period of eleven years imprisonment, with a non-parole period of eight years and six months.

[3] In arriving at the decision on the sentence the learned Judge had taken into account *inter-alia* the following factors;

(a) that the degree of violence used in the commission of the crime was disproportionate to the alleged provocation;

(b) that the evidence of the pathologist is unequivocal that there had been a severe battering to the head of the deceased causing extravasation; according to the evidence in this case the appellant had punched and kicked the deceased violently and that had occasioned multiple injuries particularly to the deceased's brain;

(c) that according to the appellant's evidence at the trial (this was in answering the cross examination) he admitted to have used excessive force in battering the deceased despite the ample opportunity available for him to have walked away from the scene of crime.

(d) that according to the learned Judge the appellant was not remorseful over the incident.

(e) that further, the learned trial Judge had made reference to the High Court decision of **Balekivuya and Another** HAC 95 of 2010, a decision by Temo J, who imposed a sentence of 12 years imprisonment on a convict for manslaughter; according to the grounds of appeal the appellant is specifically taking umbrage at the approach of the Learned Judge who seemed to have been influenced by the said decision.

The Ground of Appeal

[4] In this appeal the appellant is seeking to challenge the quantum of the sentence of imprisonment on the basis of excessiveness.

The Leave to Proceed

[5] The learned Single Judge ruled in the leave to appeal decision that the learned Sentencing Judge had arguably erred when he relied on the High Court decision in **Balekivuya's** case to determine the starting point of 12 years.

It is noteworthy, that the State also has conceded this as an error. In the circumstances, presently the only contentious issue involved in this appeal is about the justification of the sentence of imprisonment to which reference has already been made.

The Facts

[6] As transpired at the trial, on 26 June 2011, the deceased's decomposed body was found on a sugarcane field, which is some distance away from Labasa town. Beside him was found the vehicle that he drove in the night of the fatal day, 24 June 2011. At the High Court trial in the absence of the independent evidence coming from any witnesses who could testify to the facts relating the crime directly, the prosecution relied solely on the caution statement of the appellant, a confession. However, since there had been many items of evidence that were capable of confirming the contents in the confession, the Court had not found any difficulty in relying on the contents of the confession; (**Hassan and 2 Others -v- Regina** [1978] FJCA 18, Cr. App. R. 57 of 1977; **R -v- Sykes** (1913) 8 Cr. App. R. 233; **McKay -v- The King** (1935) 54 CLR 1; **Khan -v- The State** Cr. App. R. No. AAU0069 of 2007).

[7] In addition, the appellant has testified at the trial and his evidence had been compatible with the main features of his confession. In the circumstances, what has been left to be relied on primarily and mainly as evidence in the case against the appellant is his own version of the incident. Accordingly, the following are the salient features that emerged out of the appellant's version of the incident;

(a) that he was 22 years old at the time of the commission of the alleged crime on 24 June 2016, the sole bread-winner of the family without a father, employed at a metal company.

(b) that on Friday 24 June 2011, in the evening at around 6:00pm he and his friends, Manoa Lasarusa, Tex and Panapasa (Manoa and Panapasa are witnesses for the prosecution) arrived at Labasa, for shopping and to spend the weekend leisurely. They booked into a room at Melrose and a drinking spree started thenceforth.

(c) that at around 9.00 pm they visited a night club called Pontoon, where they continued with their dinking. Later on the appellant seemed to have turned somewhat boisterous, compelling the security guards to evict him from Pontoon.

(d) that having been evicted he started to walk down the road with the idea of going to another nightclub, Bounty, a place to which his friends were planning to visit later in the night. He tried to catch a taxi to get to Bounty but not a single taxi had stopped for him. As a result he started to walk towards Melrose, the place where they had already made arrangements to spend the weekend. Along the way, while passing Rups Big Bear, he noticed the white vehicle driven by the deceased pulling over to the side of the road where he was walking. The deceased offered to take him to Bounty. The appellant got onto the rear seat of the vehicle as there was another person, whom the appellant described as an Indian boy, sitting on the front seat. After travelling to a certain distance the Indian boy had got out of the vehicle and the appellant moved on to the front seat.

(e) On the way the deceased had proposed to the appellant to spend some time together with him. According to the appellant's exact words what the deceased had suggested was to *"go to his place to have more drinks."* According to the appellant he had shown no reservation about the suggestion.

(f) Whilst passing through the town area the deceased had bought five bottles of beer. Along the way the deceased turned the vehicle towards the desolated area of the sugarcane farm in which the alleged crime took place later.

(g) Having parked the car at a certain place and while enjoying the beer the deceased wanted to make it comfortable for the appellant by reclining his seat.

(h) Thereafter, obviously with the idea of breaking the ice and to feel the pulse of the appellant, the deceased had shared with him the personal story of how he was enjoying drinks with a "gay" on a previous day. According to the appellant he had treated it with a mere laughter. Then the deceased had lowered his pants down to the knee and made a request of the appellant to show him his penis.

(i) The appellant had refused to accede to the proposition and had told the appellant he is not a homosexual. The undeterred deceased seemed to have been persistent in his sexual approach. Despite the appellant's resistance the deceased kept on trying to remove his pair of trousers.

(j) According to the appellant, triggering a scuffle between the two of them, at one stage the deceased had turned somewhat aggressive by holding the appellant by his shirt collar. With that a scuffle had ensued between them. The appellant had repeatedly punched the deceased in his face causing the deceased to fall out of the car. The deceased also had thrown the punches at the appellant which have missed him. Having fallen out of the vehicle the deceased had tried to strangle the appellant with his hands. Being provoked by this act the appellant had punched the deceased in his face repeatedly.

(k) Having over powered the deceased completely the appellant continued to punch and to kick the deceased in the face and in the chest.

(l) After a while the deceased became motionless; having left the deceased at the place where he was lying with injuries the appellant had made attempts to start the vehicle by turning on the key; since the vehicle couldn't be started, the

appellant had tried to open the bonnet to find out if there was any mechanical defect with the engine. He failed to open the bonnet and in his frustration may well be, wrenched a part of the bonnet and having dropped it on the ground he walked the long journey back to Melrose.

At Melrose

[8] Having returned to Melrose, the appellant had met his two friends Manoa Leca and Panapasa, with whom he had stated that he had a fight with an Indian man with whom he went out to have a drink. However, significantly he had not told either of them about the unwelcome sexual advances that the deceased was supposed to have made. Both Manoa Leca and Panapasa testified for the prosecution at the trial and according to their evidence the appellant had returned in the morning around 7.00 am, the t-shirt he was wearing was torn and there were bruises on his back and on the hands.

The Medial Evidence

[9] The medical evidence of the Pathologist, who conducted the post-mortem examination, one Dr. Ponnu Swamy Gounder, reveals "subarachnoid hemorrhage", bleeding into the subarachnoid space, and according to his evidence the causation of the injuries could be due blunt trauma and compatible with injuries caused by several "kicks" to the head. He opined that there may have been heavy punches to the facial area, causing rupture of blood vessels. Based on these findings one can infer safely that the deceased must have been lying on the ground when the appellant directed the several kicks at his head.

The medical evidence relating to the Appellant

[10] One Dr. Nadeem Farooq from Labasa Hospital had examined the appellant on 28 June 2011. Although the appellant maintained in his evidence as well as in his caution statement that the deceased "throttled him" whilst he and the deceased were embroiled in the scuffle, the Doctor had not found any material that is supportive of the version of the appellant. There had been multiple lacerations found on the back of the deceased and on both arms. Doctor expressed the opinion they were two to three days old. According to the history given by the appellant the lacerations to the hands were as a result of punching the deceased. The appellant's claim he was provoked by

the deceased's attempt to throttle him does not find any support through the testimony of Dr Farooq who had observed no injuries on the appellant's neck.

Other peripheral evidence and the arrest of the appellant

[11] The evidence of the deceased's wife shows that the deceased was last seen alive on 24 June 2011. Accordingly, he had been drinking grog in the night with some visitors and left home driving around 12.30 midnight to drop one Mohammed Ifran Khan; Ifran Khan's evidence shows how the deceased drove him home that night and at one point they stopped the vehicle for him to buy some coca-cola and on his return he found the appellant sitting on the back seat.

[12] Reverting to the deceased's wife's evidence would show that she was alarmed by the fact that the deceased had gone missing for two days. There was no response from his mobile phone. It was on 26th morning she was informed about the discovery of her husband's dead body at a desolated cane farm.

[13] Sergeant 1978 Lanyon gave evidence about the discovery of the deceased at the sugar field. At the time of the discovery the body was in an advanced state of decomposition; the pair of trousers he was wearing was lowered down to the ankle and the body was about 10 meters away from the vehicle; the doors of which were widely opened.

[14] With having reference to the facts discussed so far there are certain matters that become noteworthy at this juncture; going by the description of the events as provided by the appellant both in his caution statement and in his testimony at the trial, it is not clear as to what may have caused the 10 meter distance between the dead body and the vehicle; further, what may have caused the pair of trousers of the deceased to be lowered down to his ankles and most significantly as to what may have prevented the appellant from telling his friends, who he met at Melrose in the morning, about the alleged unwelcome sexual advances made by the deceased, which in fact provided the very foundation to the incident relating to the death of the deceased.

[15] In the light of these inconclusive matters of importance, I am of opinion that although the deceased died many moons ago, the complete truth surrounding his death still remains a mystery.

The evidence directly referable to the defence of provocation

[16] According to the contents of the caution interview of the appellant, it was the unwelcome sexual advances of the deceased that triggered the initial discordance between the two of them. The crucial part was the deceased's alleged aggression in which he was supposed to have throttled the appellant. As a reaction the appellant had launched the attack. Even whilst the deceased was lying on the ground, completely over powered by the appellant, the severe attack had continued. What is inferential from the available material is that despite the availability of the opportunity for the appellant to "cool off" and to act with restrain, he had continued to carry on the battering. The learned Judge concluded correctly that this was disproportionate to the alleged provocation.

The Summing Up, the Verdict

[17] It is common ground that the summing up poses no contentious issue in the appeal. The opinion of the assessors was a divided one in which one member was of opinion that the appellant was guilty of murder. Based on the defense of provocation, the majority opined that the conviction should be for manslaughter.

The Impugned Sentence

[18] In this appeal, as had been stated earlier, the main contention revolves around the quantum of the sentence.

[19] The learned sentencing judge was of opinion that the aggression of the appellant was disproportionate. In addition the learned Judge had referred to the fact that the appellant had shown no remorse over the incident. In that regard it is important to recall that according to the evidence the appellant had left the deceased at the scene where he had breathed his last. The appellant had admitted that when he was walking away from the scene of the incident, he could still hear the continuing painful groaning of the deceased .The evidence does not provide any factual basis to conclude

that there was any empathy or remorse on the part of the appellant after the infliction of the fatal injuries to the deceased. Unfortunately, the medical evidence does not render support to decide on the issue whether the death of the deceased was instantaneous or after a prolonged suffering with injuries.

[20] The matters referred to above can be seen reflecting in the reasons given by the learned Judge on 25 November 2011. Placing the sentence at the high level of the tariff for manslaughter, the learned Judge picked 12 years as the starting point. According to the learned Judge 12 years imprisonment encompasses all the aggravating factors such as continued and unnecessary assault. In my view there is no rational basis to take umbrage at the reasons adduced by the learned Judge in arriving at the sentence.

[21] In arriving at the quantum of the sentence the learned Judge was guided by the dicta in **Kim Nam Bae -v- The State**, [1999] FJCA21 ;AAU 0015u.98s (26 February 1999), HAC 0002 of 1997 L, where it states that:

> *"The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly 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.*
> *The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts."*

[22] The case of **State -v- Anand Dinesh Mani and Anand Avinesh Mani**, HAC 005/005, 11 October 2001, states thus;

> *"The maximum sentence for Manslaughter is life imprisonment. This maximum in statute is a reflection of how seriously our society takes human life. In cases of gross provocation, sometimes over a period of time the Courts have imposed suspended sentences. However this should be regarded as an exception rather than the rule. Where a*

weapon is used, where an attack is brutal and where the provocation has not been overwhelming, a custodial sentence is clearly called for, thus 6 years and 4 years imprisonment imposed where case not one of gross violence, nor grave provocation with minimal violence."

The issue relating to Balekivuya and Another HAC 95 of 2010

[23] In advancing the main argument against the sentence of imprisonment in this appeal, the learned Counsel for the appellant was emphatic that the reference to the above in the sentencing order by the learned High Court Judge a clear indication that he was influenced by the sentence imposed in **Balekivuya** in the High Court and that is an error that is tantamount to a miscarriage of justice.

[24] In relation to that, it is necessary to point out that following the *dicta* in **Kim Nam Bae -v- The State**, sentencing judges are free to examine the general approach adopted in other cases of similar nature, in deciding on the quantum of the sentence with regard to a case in hand.

> *"In order to arrive at the appropriate penalty for any case, the courts must have regard to sentences imposed by the High Court and the Court of Appeal for offences of the type in question to determine the appropriate range of sentence."*

[25] In the case of **Balekivuya** , (**State -v- Balekivuya** [2001] FJHC 834; at AC 095, 2010 (5 August 2011), in the High Court at Suva, there were several accused who stood trial on different charges including murder, theft, damage to property and attempted robbery. After trial, the assessors returned a mixed verdict.

The appellant Balekivuya, who faced the trial on the charge of murder was convicted as charged, whereas the accused Tukana, who was also jointly charged with Balekivuya was convicted of the lesser offence of manslaughter. The conviction and the sentence in the High Court was challenged in appeal.

[26] The decision in that appeal is reported in the case of **Salesi Balekivuya and Saimoni Tukana -v- The State**, Criminal Appeal AAU81 of 2011. In that appeal, Tukana appealed only against the sentence for manslaughter, on the basis that *"the sentence is harsh and excessive in all the circumstances of the case."*

[27] In the Judgment of the Court of Appeal in the case of **Tukana**, the learned President of the Court of Appeal had stated that;

> *"An Appeal Court will only interfere with the sentence imposed if an appellant establishes an error in the exercise of the sentencing direction."*

Unlike in the present appeal, in the case of **Tukana**, the learned High Court Judge had not explained how he arrived at the starting point of 9 years.

This is reflected through the following pronouncement found in the appeal against the sentence of **Tukana's** case.

> *"In my judgment the trial Judge has erred by sentencing a high starting point within the tariff applicable for manslaughter (**Bae –v- The State**; AAU15 of 1998). 26 January 1999) and then adding a further six years for aggravating factors some of which must have been considered in selecting the high starting point. I say must have been considered since the trial Judge has not explained how he arrived at a starting point of 9 years which is certainly at the higher end of what was accepted tariff for manslaughter at the time."*
>
> Per Calanchini P.

[28] However, in the instant appeal the learned trial Judge had clearly set out the reason for selecting the higher level of the tariff in quantifying the sentence. Referring to his decision the following reasons are clear;

> *"[6] The degree of violence occasioned to the deceased was extremely forceful and despite the assessor's opinions it was unnecessary and horrifying. The pathologist found multiple injuries particularly to the head which he said could only have been made with very strong punches or kicks.*
>
> *[7] The accused if he were angry could have walked away from the unpleasant situation. Admittedly he had no idea where he was but he did in fact later leave the scene and walk to town. There is no reason why he could not have done that earlier before he became an unrestrained savage. He is a young man of 22 years of age, seemingly healthy and fit and it is hard to believe that he was in immediate danger. He even admitted in his evidence in Court that his actions were excessive.*
>
> *[8] The life of a well known Labasa businessman and family man has been lost. The fact that he had made the inappropriate suggestions to the accused should not lead to him being*

assaulted in such a violent manner. The crime is abhorrent and there can be very little sympathy for the accused.

[9] I take as a starting point a term of twelve years imprisonment. This subsumes all aggravating features such as continued and unnecessary assault. For his hitherto clear record and in recognition of his time spent in remand (4 months), I deduct one year from that, meaning he will serve a term of imprisonment for this crime of eleven years."

[29] In the circumstances, a clear distinction can be made between the approach of the High Court Judge in **Balekeivuya** and the approach of the learned High Court Judge in the case relating to this appeal. I am of opinion the reference to **Balekeivuya** in the sentencing judgment under consideration in this appeal had been in passing and therefore there had been no serious miscarriage of justice occasioned. In this appeal what is needed to be determined is whether the Court should have imposed a different sentence. (s 23(3) of the Court of Appeal Act (Cap 12).

As stated in **Bae -v- State**;

*"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 (**House v. The King** [1936] HCA 40; (1936) 55 CLR 499."*

[30] In the circumstances the appeal against the sentence cannot be supported and the appeal should be dismissed. Having regard to all these matters the sentence imposed in the present case falls well within the range and cannot be described as an excessive one.

Goundar JA

[31] I agree that the appeal against sentence should be dismissed for the reasons given by Gamalath JA.

Orders of the Court:

The appeal is dismissed and the sentence is affirmed.

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

Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

Hon. Mr. Justice D. Goundar
JUSTICE OF APPEAL