

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 86 of 2019

BETWEEN : **THE STATE**

AND : **ASENA RAKAVONO**

Counsel : Ms. Tamanikaiyaroi, U for the State
: Ms. Prakash, A for the Accused

Judgment : 19 January 2023

Sentence : 30 January 2023

SENTENCE

1. Asena Rakavono, following a trial on a charge of murder, you were found not guilty of murder but guilty of manslaughter by reason of provocation.
2. The facts at trial are that you were in a de facto relationship with the deceased from 2014 until his death in 2019. The relationship was fraught with violence and abuse, verbal, emotional, and physical. All civilian witnesses for both the Prosecution and Defence who were neighbours, close family and friends of you and the deceased testified that the two of you fought everyday. You were assaulted on a regular basis. Numerous reports were made to the Police. Often you would ask the Police to just warn the deceased. Many of the assaults were not reported, in your words, because you loved the deceased so much. During the assaults, neighbours and the deceased's brother would sometimes take your two young

children out of the home into their own care so as to keep the children away from the violence at home.

3. Between the 2nd and 3rd of March 2019, the deceased returned home drunk, swearing at you after asking for food at a neighbour's home. You heated up his food but he refused the food you prepared. He said he might throw it away. He then tried to assault you. He grabbed and pulled you and you pulled away in resistance as he tried to assault you. In this struggle at the door of the home, you reached down under the house, got hold of a 4 x 2 piece of timber and struck him on the knee, head and shoulders. The blows to the head felled him unconscious. He did not regain consciousness and died a few weeks later.
4. I found that you had hit the deceased in the heat of passion caused by sudden provocation, the last one in what was ongoing, cumulative acts of provocation. There was evidence of anger and frustration at the time and also of a sudden loss of control which was not disproved beyond reasonable doubt.
5. The maximum penalty for manslaughter is 25 years imprisonment. In *Kim Nam Bae v The State* Criminal Appeal No. AAU0015 of 1998S, the Court of Appeal stated:

We have been referred to several cases of sentence on manslaughter in the High Court as well as in the Court of Appeal to enable us to determine the correct range of sentence for this type of offence. With respect, this is the correct approach that should be taken by the courts. The task of sentencing is not an exact science which is capable of mathematical calculation. This is particularly so with manslaughter 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. 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.

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.

6. In *State v Kean* [2007] FJHC 69; HAC 037.2007 (26 October 2007), Winter J set out the relevant factors in sentencing for manslaughter cases as follows:

The English Court of Appeal in *R v Byrne Field and Cuthbert* [2009] EWCA Crim 1096; [2002] 1 Cr. App. R(s) 33 in relation to sentencing in cases of manslaughter said that the following factors were relevant:

1. The conduct causing death;
2. The public concern and the need for deterrence;
3. Whether there was an intent to do violence; and
4. Any risk, apparent to those involved, of serious harm being caused.

7. Considerations relevant to sentencing were stated at [27] – [28] and [30] as follows:

[27] It is only in exceptional cases that the Court will suspend a prison term for manslaughter. The general features to be considered when a judicial officer is deciding upon a suspended sentence were described by the Court of appeal in *The State v Chand*, FCA 0027 of 2000S and include:

- Previous good record
- The offender's likely response to a suspended sentence.
- The impact of a suspended sentence as a strong deterrent to the offender. This is often underscored by genuine remorse and appropriate acts of contrition.
- Diminished culpability arising through lack of pre-meditation or the presence of provocation.
- Suspending a sentence is also indicated where there has been complete co-operation with the authorities and an early guilty plea.
- Time spent on remand (*R v Petersen* [1994] 2 NZLR 533).

[28] The usual features associated with suspended sentences for manslaughter are:

- extreme and/or long duration provocation
- minimum violence used in the assault
- sometimes a relationship between the accused and the victim
- powerful reconciliation

- gross negligence with little appreciation of the risk of serious harm
- no relevant previous convictions

[30] In contrast the features that tend to indicate an immediate custodial term are:

- A high degree of violence in the assault or a sustained degree of violence in a beating.
- Minimal provocation.
- Gang violence.
- Associated criminal offending such as robbery.
- An intention or premeditation for violence.
- A wanton disregard as to the risk of serious harm as a result of violence.
- Previous convictions.
- The absence of meaningful reconciliation.
- Special categories of violent offending particularly domestic violence or child related abuse.

8. In *Vakaruru v State* Criminal Appeal No. AAU 94 of 2014 (Decision of 17 August 2018), the Court of Appeal stated at [46] that:

The current sentencing trend for the offence of manslaughter under the Crimes Act appears to be between 5 years to 12 years imprisonment. The above sentencing range does take into account the objectives of section 4 of the Sentencing and Penalties Act. Section 26 (2) (a) of the Sentencing and Penalties Act gives the High Court the powers to suspend a final sentence if it does not exceed three (3) years imprisonment. Accordingly, there is no need to establish a new tariff for the offence of manslaughter. A sentencing court can impose a suspended sentence based on the circumstances of the offending, a tariff may be construed as a restriction or may even confuse a sentencer. In exceptional cases a sentencing court should consider suspending a sentence.

9. At 37 years old, this is your first offending. You have two daughters ages 17 and 8 from a previous relationship; two sons aged 7 and 6 with the deceased, and a two year old child from your current relationship. You are a stay at home wife.
10. Your conduct following the incident supports your counsel's plea of remorse. You asked neighbours to come look at the deceased and told them what you did; you called the

deceased's brother the next morning and helped him take the deceased to the hospital. You attended until the doctors told you to keep your distance. When interviewed by the Police in the course of investigations, you admitted hitting the deceased with a piece of timber.

11. I take particular note that though you pleaded not guilty to murder, you admitted substantial facts most of which were essential elements of the offence. You disputed the charge only on the ground of provocation which was eventually found in your favour. The Prosecution did not therefore need to lead evidence of the facts you admitted though they did choose to do so. Your admissions are a sign of remorse and are a strong mitigating factor.
12. You were distraught throughout the trial. I accept as sincere your plea of remorse and contrition.
13. Your relationship with the deceased was marked by years of verbal, emotional and physical abuse against you. The violence was perpetrated in the presence of your young children who had to be removed by neighbours and the deceased's brother. The deceased constantly threatened to kill you. You were assaulted with a piece of timber and thrown in the face with a bottle of beer. You reported some assaults and asked the Police to only warn the deceased. Other assaults, including the serious ones with the use of a weapon, were not reported out of love for the deceased. You did not retaliate until the night of this incident.
14. You have undergone counseling with an independent counselor and also with Empower Pacific in an effort to deal with your emotions following this offending.

Aggravating factors

15. The use of a weapon to inflict harm on another person is always a serious aggravating factor. The deceased was struck twice in the head with sufficient force to immediately render him unconscious. He was unconscious from immediately after the blows until he died a few weeks later.
16. In *State v Wati* [2001] FJLawRp 88; [2001] 1 FLR 336 (9 October 2001), the Accused was subjected to 35 years of emotional, verbal and physical abuse and suddenly retaliated as a

result of continued spousal abuse. She was sentenced to 2 years imprisonment, suspended for 2 years.

17. The Court in *Wati* (supra) cited *State v Lewatsevu* (Cr Case 1 of 1990L) where the accused, a victim of domestic violence, had been beaten for roughly 3 hours before the deceased threatened to kill her with a cane knife when he woke up. She had fled the house and, returning about 30 minutes later, found her husband in a drunken slumber with the cane knife beside his bed. No longer able to stand the deceased's ill treatment of her, she took the knife and chopped her husband's neck 3 times. She was sentenced to 2 years imprisonment suspended for 3 years.
18. In *State v Koleta Rote* HAC 005 of 2001S (also referred to in *Wati*, supra), the accused who had been armed with a knife was also sentenced to 2 years imprisonment, suspended for 3 years.
19. In *State v Leba* Criminal Case No. HAC0021 of 2003S, the accused had poured hot water over her husband. He sustained 40-50% burns and died 6 days later of septicaemia as a result of infected burn wounds. The couple's marriage was unstable with frequent assaults and ongoing infidelities on the part of the deceased. The Court considered that the act of violence was committed after years of emotional and physical abuse at the hands of the deceased. She was sentenced to 18 months imprisonment suspended for 2 years.
20. For your offending, I take a starting point of 5 years imprisonment, add 2 years for the aggravating factors and deduct 4 ½ years for the compelling mitigating factors, leaving now a sentence of 2 ½ years imprisonment.
21. Section 26 of the Sentencing and Penalties Act gives the High Court a discretion to suspend an imprisonment sentence that does not exceed 3 years.
22. I consider whether your sentence ought to be suspended, bearing in mind the guidelines in the authorities above.

23. Your remorse and contrition was evident in your conduct immediately following the incident and throughout these proceedings. There was no evidence of planning and on all the evidence before the Court, your actions were the result of years of continuous abuse, what the neighbours said were daily assaults, insults, swearing and threatening which they were all accustomed to. No one came to your aid though they knew of the violence you were being subjected to. Your offending happened on another night of verbal and emotional abuse and while the deceased was trying to assault you. You knew that a beating was inevitable. You struck the deceased twice on the head while struggling to get away from his attempts to assault you. The piece of timber was just within your reach and in the heat of the moment, you grabbed it and hit the deceased with it. You stopped immediately after he lay down on the floor.
24. The provocation was serious and prolonged. While the loss of a human life cannot be condoned, the mitigating circumstances are compelling. In my opinion, a custodial sentence would not be consistent with sentences in domestic violence cases against women where there has been provocation over prolonged periods of time and with similar compelling mitigating factors.
25. I sentence you to 2 ½ years imprisonment, suspended for 3 years.
26. Suspended sentence explained.



S. Bull
Siainiu F. Bull

ACTING PUISNE JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused