

IN THE COURT OF APPEAL
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 0062 OF 2006
[High Court Case No. HAC 47 of 2005]

BETWEEN : **APAKUKI SOWANE**

Appellant

AND : **THE STATE**

Respondent

Coram : Anthony Fernando, JA
Prematilaka, JA
Priyantha Fernando, JA

Counsel : Appellant in Person
Mr. M. D. Korovou for the Respondent

Date of Hearing : 11 September 2015

Date of Judgment : 2 October 2015

JUDGMENT

Anthony Fernando JA

- [1] The Appellant has appealed against his conviction for the offence of murder in October 2006 after having been granted leave to appeal against the conviction, under section 35 (1) (a) of the Court of Appeal Rules.
- [2] The Appellant along with his co-accused Josaia Valebiu, had been charged in the High Court of Suva for Murder of Nirmala Devi d/o Kampta Prasad and Robbery of articles belonging to the said Nirmala Devi as specified in the Amended Information.
- [3] The Appellant has appealed only against his conviction for the offence of Murder. This is an admission by itself that the Appellant has accepted his conviction for robbery and

has thus placed himself at the scene of the crime. I wish to point out that the Statement of Offence in respect of the charge of murder had been incorrectly worded and this was pointed out to Counsel for the Respondent at the hearing. The Statement of Offence reads as follows: "Murder: Contrary to sections 199 and 200 of the Penal Code." Section 200 is the punishable section and thus one cannot act contrary to it. I am however of the view that this has not caused any prejudice to the Appellant and he has not complained about it.

- [4] The facts in brief as per the cautioned interview of the Appellant, that was relied upon by the prosecution, and admitted in evidence is to the effect that on the 7th day of June 2005, the deceased Nirmala Devi, referred to as Bhaini by the Appellant, was alone at home when the Appellant entered her house along with his co-accused. On entering the house he had seen the deceased who was making roti with her back turned towards him. She had then turned around and on seeing the Appellant had yelled. The Appellant had gone towards her closed her mouth with his hand and pulled her towards him. He had asked her where the money was and the deceased had pointed to the bedroom and yelled again. The Appellant had closed her mouth again with his hand and kicked her legs. The deceased had then fallen on the floor face upwards. He asked his co-accused to look for a piece of cloth to tie her and when it was brought, he had tied her mouth and legs, and asked his co-accused to guard her so that he could ransack the house. His statement thereafter is to the effect: "Josaia (co-accused) was guarding her while I was ransacking the house and when I returned to them I saw bhaini (deceased) was not moving. So I asked Josaia what happened to bhaini? He stated that she had unconscious....I told Josaia to move away, then I took the cushion out and removed the cloth that was tied around her mouth and I saw her mouth opened and her eyes also open too.....I tried to feel her pulse under her jaws likewise her right wrist and I found out that her pulse was not moving. I then applied mouth to mouth to bhaini but there was no change to her. I then closed her mouth and her eyes....." (verbatim). Thereafter he had gone back to the deceased, sat beside her and asked for forgiveness before they left the house. He had identified the pillow with which he had tied the deceased.

- [5] His co-accused in his cautioned interview, which was relied on by the prosecution and admitted in evidence, had stated that after entering the house of the deceased, the Appellant had got hold of the deceased, pressed her mouth and called him to assist the Appellant. The Appellant had asked the co-accused to get a cloth and tie the mouth of the deceased, as she was yelling. The Appellant had then made her fall on the floor, pressed a pillow on the deceased's mouth and with the cloth brought by the co-accused tied the pillow around her head. In so doing he had covered her mouth, nose and the face with the pillow. The Appellant had also tied her legs. After having tied her up the Appellant had searched the house while he kept watch over the deceased. At a certain stage the co-accused had noticed that the deceased's voice had lowered and she had stopped moving. The co-accused had thereafter realized that the deceased was dead and informed the Appellant about it. Then the Appellant had tried to resuscitate her and "pumped her three times on the chest"(verbatim). When the Appellant had realized that the deceased was dead, he had held her hand and said "Forgive us that we have taken your life but our intention was to look for money".
- [6] Although this statement cannot be used against the Appellant it is consistent with what the Appellant had said in his statement. The co-accused in his statement does not say that the neck of the deceased was also covered with the pillow. What is to be noted from the statement of the co-accused is, if the deceased was throttled and killed before the Appellant started to ransack the house there would have been no need to ask the co-accused to keep watch over her. The Appellant's attempts to resuscitate the deceased had also been after he had ransacked the house and after he was told by the co-accused that the deceased was not moving.
- [7] The evidence of Dr. Prashant who conducted the post-mortem examination on the 58 year old body of the deceased is to the effect that the deceased had died of: "Asphyxiation by manual strangulation. Strangulation, food in air passage and smothering. Exclude and conclude as to what appropriate cause of death. Indicates struggle at time of smothering and marks on neck. More....strangulation" (verbatim from the record).The doctor's testimony, according to the record of proceedings, pertaining to the cause of death is confusing to a certain extent as he seems to suggest

that asphyxiation could have been the result of strangulation and smothering but when apparently pressed for an answer had said “more...strangulation.” This view finds support in the Summing Up where the learned Trial Judge, who heard the testimony of the doctor, advertent to the doctor’s evidence states: “Dr. Prashant then came to talk to us about his autopsy findings. Remember he explained the external injuries around the deceased’s throat.....He said on internal examination the right cartilage of the thyroid bone was fractured.....He concluded death by asphyxiation by strangulation, which is the most probable cause bearing in mind the injuries he observed. He described that finding as the best one in the circumstances.” It has also been recorded that the injuries on the neck are indicative of a struggle at the time of smothering. Photograph No.24, clearly shows bruising on the neck. As regards the corresponding internal injuries the doctor’s evidence is: “right wing was fractured soft core-cartilage”. He had also referred to bruises on forearms, stomach, blunt tissue trauma behind right ear, and bleeding from the lungs and right pelvic and stated “pattern of injury indicates a struggle”.

[8] At the conclusion of the trial the assessors had returned with a unanimous opinion that both the Appellant and his co-accused were guilty of murder. The learned Trial Judge had disagreed with the opinion of the assessors in relation to their verdict on the co-accused and found the co-accused not guilty of murder but guilty of the lesser offence of manslaughter. His reasoning is to be found in his Ruling of 27th October 2006 as follows:

- i. That the co-accused simply did what he was told to do by the Appellant, and therefore was not the principal offender.
- ii. It was the Appellant who held the deceased, pushed her to the ground and pressed a pillow over her face to prevent her from yelling.
- iii. It was the Appellant who tied the pillow so that it covered the deceased’s whole face and tied her legs.
- iv. That the co-accused “was not an active or encouraging participant in the murder and thus lacked the necessary intention to kill or do grievous bodily harm to the deceased.
- v. “He was not in that third sense aware of the harm that was being caused but reckless to the outcome.”

I do not intend in this appeal to consider the correctness of that decision or to be influenced by that decision in any way in considering this appeal. However it is clear from the Ruling dated 27th October 2006 that the learned Trial Judge had failed to address his mind to asphyxiation by manual strangulation which he referred to in his summing up to the assessors as the cause of death and as to who was responsible for it.

[9] The following grounds of appeal can be deciphered from the Appellant's Written Submissions filed from prison and as correctly summarised by Counsel for the Respondent in his Written Submissions.

- i. "That the learned trial Judge erred in law when he allowed the confession of the appellant that was taken or obtained in breach of section 27 of the Constitution to be put to the assessors.
- ii. That the learned trial Judge erred in law when he failed to allow the appellant to have counsel to conduct the trial.
- iii. That the learned trial Judge erred in law in regard to joint enterprise.
- iv. That the learned trial Judge erred in law when he failed to reduce the charge to Manslaughter against the appellant as he had done against the co-accused.
- v. That the learned trial judge erred in law when he failed to direct the assessors on the intention of the appellant.
- vi. That the learned trial judge erred in law and in fact when he failed to direct the assessors and take into consideration that the appellant has tried to save the victim (deceased)."

[10] The crux of the Appellant's complaint is that his conviction should be for Manslaughter instead of Murder. This is borne out by the Appellant's following written submissions:

"There is no clear and succinct direction to the assessors during the trial as he did not sum up to the assessors the important direction of the intention as I went there for intent to steal not to kill. In view of this irreconcilable situation where seem to be serious prejudice occasion against interest of the appellant. I

humbly pray for the fairness of justice against my conviction of murder is reduced to manslaughter.”

“That I am seeking to persuade this honourable court of law and justice that the Assessors had returned a repugnant or an inconsistent verdict of murder rather than manslaughter due to the implign ruling on my Voir Dire.”

“The learned trial Judge erred in agreeing with the majority of the assessors’ opinion in convicting me with murder as I was supposed to be convicted of manslaughter when the principle of joint enterprise was available in evidence.”

“That the learned trial judge erred in law when he failed to reduce the charge to manslaughter against me as he has done to my co-accused.”

(All four passages cited are Verbatim from Appellant’s written Submissions).

The Appellant re-iterated the position taken up in his written submissions, at the hearing before us.

- [11] In his Written Submissions the Appellant had stated that he had been assaulted, that the confession had been induced by promises, that it had not been given voluntarily and that it had been given in oppressive and unfair circumstances. In view of the position taken up by the Appellant as referred to at paragraph 10 above, the challenge of the Appellant to the voluntariness of the confession at ground 1 of appeal, should be viewed not as a denial of the causing of death of Nirmala Devi by an unlawful act but merely to prove that the Appellant did not have malice aforethought and therefore should have been convicted of Manslaughter and not Murder. This becomes clear when one examines the second passage referred to at paragraph 10 above. There has been no challenge as regards the causing of death of Nirmala Devi. In his unsworn statement at the Voire Dire the Appellant had said: “....they interviewed me on this murder. Before then interrogated me. They assaulted me. They gave me promises that if I didn’t admit I would be locked up without food taken to Colo-i-Suva and assaulted. When I admit to offence they ask me the questions and they answer them...” (verbatim). It is not clear

from his evidence as to what the Appellant meant “When I admit to offence they ask me the questions and they answer them”. The Appellant had not clearly said as to what he admitted to and who gave the details pertaining to the incident as set out in paragraph 4 above. It is difficult to conceive that the confession is a fabrication by the police in view that the Appellant had not challenged the causing of death of the deceased. An examination of the evidence led at the Voire Dire shows that no credence could be placed on the Appellant’s version of assault and the confession having been obtained under oppressive and unfair circumstances and that it was not made voluntarily. The Appellant had not at the Voire Dire challenged the testimony of Savenca Tuivaga, Commissioner for Oaths, who visited him after the recording of the confession to see whether he had been assaulted or mistreated while in police custody. Savenca had asked the Appellant to take off his shirt and pull up his long pants and had testified to the effect that there were no visible injuries on the body.

- [12] The Learned Trial Judge in a detailed Ruling had admitted the confession of the Appellant after satisfying himself that it had been made voluntarily. He had given his reasons as to why he believes the prosecution witnesses and disbelieves the Appellant’s testimony. According to the Learned Trial Judge: “The allegation of assault was vague, general and lacked any specific detail as to time, place, circumstance, nature of assault and identification of assailant for there to be any reliance placed on it all.” This is a finding of fact by the Learned Trial Judge who had the opportunity to see the demeanour of the witnesses who testified before him at the Voire Dire. I am reluctant to disturb such a finding without cogent reasons. In **Jai Ram v The State**, Criminal Appeal AAU 0017 of 2004 this Court observed:

“As usual the voire dire turned entirely on questions of credibility which were for the Judge to assess. He made appropriate findings of fact, in essence accepting the evidence of the prosecution witnesses and rejecting the evidence of the appellants. The conclusions he reached were open on the evidence. As the Court said in Ajendra Kumar Singh v The Queen Cr. App 46/79 (30.6.1980), an appellate court should not disturb a Judge’s finding of fact unless satisfied that a completely wrong assessment of the evidence has been made or the correct principles have not been applied.”

I therefore dismiss this ground of appeal.

[13] In relation to ground ii of appeal it must be stated that the Appellant had been represented up to the close of the prosecution case and that necessarily includes the Voire Dire. It was the Appellant himself who had said "I want my counsel to withdraw". Thereafter he had been given a week's time to find a lawyer. Further in view of the stance taken up by the Appellant that his conviction should have been for Manslaughter and not Murder, the absence of Counsel after the close of the prosecution case had not prejudiced him in any way. This was essentially a question of law to be dealt with by the Learned Trial Judge in his Summing Up to the Assessors and one this Court will necessarily look into. The Appellant himself did not pursue this ground of appeal at the hearing before us. I therefore dismiss this ground of appeal as it is devoid of merit.

[14] I intend to deal with grounds iii, iv, v, and vi together. The Appellant undoubtedly had been indicted for murder along with his co-accused on the basis of section 22 of the Penal Code, although not specifically referred to in the charge. Section 22 deals with offences committed by joint offenders in prosecution of common purpose. Section 22 reads as follows:

"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."

The case for the prosecution had been to the effect that the Appellant had with his co-accused formed a common intention to prosecute an unlawful purpose, namely to commit theft in conjunction with one another and in the prosecution of such purpose an offence was committed, namely, murder. The theft that was jointly intended by the two accused, came to be termed robbery by a legal nomenclature, since it came to be committed by two persons and since violence was used. It has been the position of the prosecution that the commission of murder was a probable consequence of the prosecution of robbery. Thus there should have been evidence to establish that the murder of the 58 year old Nirmala Devi, was of such a nature that its commission was a

probable consequence in committing robbery in the contemplation of both the co-accused and the Appellant.

- [15] This necessarily calls for an examination of the offence of murder which has been defined in section 199 and 202 of the Penal Code. Section 199(1) states:

“Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder.”

Section 202 defines malice aforethought as follows:

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances:-

- a) An intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not;*
- b) Knowledge that the act or omission causing death will probably cause the death or grievous harm to some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.”*

“Grievous harm” according to the Penal Code means “any harm which amounts to a maim or dangerous harm, or seriously or permanently injures health or which is likely so to injure health, or which extends to permanent disfigurement or to any permanent or serious injury to any external or internal organ, membrane or sense”

- [16] Thus in order to establish malice aforethought and seek a conviction for murder the intention or knowledge as specified in section 199 must necessarily be proved. The requisite intention could be formed and the knowledge gathered on the spur of the moment. In the absence of malice aforethought a person may be convicted of the offence of manslaughter, provided there is proof of an unlawful and willful act that resulted in death. Thus every case of murder is also manslaughter but not vice versa.

- [17] With that brief introduction to the offence of murder it becomes necessary to examine how a person shall be held liable for the offence of murder on the basis of section 22. What is to be noted is that section 22 referred to at paragraph 14 above sets out a general principle of criminal liability and does not create a substantive offence.
- [18] Thus in view of the provisions in section 22 a person can be made jointly and severally liable not only for the offence the parties set out to commit but also for any other offence that is committed in the prosecution of the offence; provided that its commission was a probable consequence of the prosecution of the offence they set out to commit. This brings in the element of knowledge i.e. knowledge on the part of the perpetrators as to the probable consequences of the prosecution of the offence they set out to commit.
- [19] If a person is to be convicted of having committed murder, while prosecuting the offence of robbery; the words ‘and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose,’ found in section 22 suggests, that the accused should have knowledge of both the actus reus and mens rea of the offence of murder, namely the probability of death ensuing by an unlawful act or omission, with malice aforethought. The word ‘possible’ simply means that something could have happened, while the word ‘probable’ means that something was more possible than not, thus placing the burden much higher on the prosecution when seeking to prove ‘probable consequence’. In **Hui Chi-Ming v The Queen** (1992) 1 AC 34 Lord Lowry, giving advice of the Board in regard to the test to be applied in ‘Joint Enterprise’ said: “*Mere foresight is not enough: the accessory, in order to be guilty, must have foreseen the relevant offence which the principal may commit as a possible incident of the common unlawful enterprise and must, with such foresight, still have participated in the enterprise.*” In Fiji this statement goes further for the relevant second offence should have been foreseen not merely as a ‘possible’ incident but as a ‘probable’ incident.

- [20] There is no evidence that any one of the accused was armed when they entered the house of Kamala Devi. There is no evidence that the co-accused was a man of violent disposition and if that was so, it was known to the Appellant. Although an intention can be formed and knowledge acquired on the spur of the moment there is no evidence in this case that the Appellant and his co-accused went into the house with the intention of causing harm to Nirmala Devi or with the knowledge that she was in the house and may be harmed. There is no evidence that there was an understanding between the Appellant and the co-accused expressly or tacitly that if necessary one of them would kill or do serious harm to the deceased as part of their common enterprise. The confession of the Appellant does not indicate that they wanted to murder Nirmala Devi no sooner they saw her. The Appellant's confession is to the effect that on entering the house they had seen the deceased who was making roti with her back turned towards them. She had then turned around and on seeing the Appellant had yelled. The Appellant had gone towards her closed her mouth with his hand and pulled her towards him. He had asked her where the money was and the deceased had pointed to the bedroom and yelled again. What the confession indicates is that the deceased's face was tied up merely to prevent her from yelling.
- [21] In this case although the Appellant has admitted from a layman's point of view that he along with his co-accused caused the death of Nirmala Devi it becomes necessary to examine the medical evidence led in this case to ascertain the cause of death. Dr. Prashant's evidence as summarized by the learned Trial Judge and referred to at paragraph 7 above is, that the deceased had died of asphyxiation by manual strangulation. Photograph No.24 which clearly shows' bruising on the neck is indicative of manual strangulation. The Appellant in his confession does not state that he manually strangled the deceased nor is there any other evidence to this effect implicating the Appellant. To determine the intention or knowledge of an accused who manually strangles the neck of a person is different from determining the intention or knowledge of an accused who presses and ties a pillow covering the face of a person to prevent such person from shouting. This essentially is a question of fact to be determined by the Assessors on being directed by the Trial Judge. However the issue in this case is, who strangled the neck of the deceased, which is the cause of death? Was it the Appellant or the co-accused? There is nothing to indicate that it was the Appellant.

If it was the co-accused there is no evidence to indicate that the Appellant was a party to it or knew that this was a probable consequence of the prosecution of their unlawful purpose, namely robbery. It was the submission of the Appellant at the hearing before us that it was the co-accused who was responsible for the death of the deceased. There is no independent evidence to contradict this submission save the confession of the co-accused, even in which there is no reference to the strangulation. I note from the Appellant's confession referred to at paragraph 4 above that he had left the deceased in charge of his co-accused while he ransacked the house, and it was only on his return that he saw that the deceased was not moving. The co-accused in his confession has admitted that he was keeping watch over the deceased while the Appellant was searching the house.

- [22] The House of Lords decision in **Powell** (1997) 3 WLR 959 is to the effect that to found a conviction for murder for a secondary party to a killing, he should have realised that the primary party might kill with intent to do so. In **Rahman** (2009) 1 AC 129 Lord Brown in the House of Lords stated: *"If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B."*
- [23] In the case before us there is no evidence that the Appellant foresaw that the co-accused may strangle the neck of the deceased and kill or intentionally inflict grievous harm to her as he had only requested the co-accused to keep watch over the deceased to prevent her from shouting and as he had already tied her up with a pillow placed on her face to prevent her from shouting. Thus the act of strangling the neck of the deceased, which has to be attributed to the co-accused in view of the nature of the evidence available in this case, is to be regarded as fundamentally different from anything foreseen by the Appellant.

[24] I have scrutinized the Summing up meticulously and note that there has been no proper direction on liability under sections 22, 199 and 202 of the Penal Code and in regard to the issues raised above in this judgment. There was no specific direction to the assessors to consider that the Appellant was aware that there was a probability of a murder being committed when he and his co-accused formed a common intention to steal at the house of the deceased; especially in view of the fact that they went to the house of the deceased unarmed and tied up the deceased only to prevent her from shouting. There was no specific direction to the assessors to consider whether the Appellant who tied a pillow covering the face of the deceased to prevent her from shouting had the knowledge that as a result death or grievous harm will be caused to the deceased, although this was not the cause of death as per the medical evidence. There was no specific direction to the assessors to consider whether the Appellant had the knowledge that his co-accused would strangle the neck of the deceased when he asked his co-accused to keep watch over the deceased while he ransacked the house. The failure of the learned Trial Judge to sum up on these fundamental issues, was a non-direction on the part of the Trial Judge, leading to a miscarriage of justice. I therefore quash and set aside the conviction of the Appellant for murder as it is unreasonable and cannot be supported having regard to the evidence.

[25] I am however of the view that having regard to the evidence, had the Assessors been properly directed they are likely to have returned with an opinion that the Appellant was guilty of manslaughter.

[26] This necessitates us to examine the definition of the manslaughter, contained in section 198 of the Penal Code in conjunction with section 22 of the Penal Code referred to at paragraph 14 above. Section 198 states:

“Any person who by an unlawful act or omission causes the death of another person is guilty of the felony termed manslaughter. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.”

- [27] I am of the view that when the Appellant in conjunction with his co-accused started to tie up the 58 year old deceased, by placing a pillow to cover her face in order to stop her from shouting, and asked his co-accused to keep watch over her, so that he could ransack the house; he did commit an unlawful act which in conjunction with the act of the co-accused in strangling the deceased, led to her death. Section 206 (e) of the Penal Code states that “A person is deemed to have caused the death of another person although his act is not the immediate or the sole cause of death if his act or omission would not have caused death unless it had been accompanied by an act or omission of the person killed or of other persons”. Thus if the strangulation was done by the co-accused, who was asked by the Appellant to merely keep watch over the deceased, the Appellant would be deemed to have caused her death. But causing death by an unlawful act or omission is different from causing death by an unlawful act or omission with malice aforethought. The first is manslaughter and the other murder. In my view there is no evidence from which it could be inferred that the Appellant was aware that the co-accused would cause the death of the deceased with malice aforethought.
- [28] The case of Roberts and Day (2011) EWCA Crim. 1594, Anderson (1966) 2 QB 110 and Howe (1987) 1 AC 417 are examples of cases where the accessory was convicted of manslaughter even though the principal did the act with sufficient *mens rea* to be convicted for murder. In the case of Anderson the principal (Anderson) armed himself with a knife unknown to the accessory (Morris) and was convicted of murder while his accessory (Morris) was convicted of manslaughter. Blackstone’s Criminal Practice (2011 edition) commenting on the case of Anderson at A5.5 states: “*Thus Morris would have been responsible for the sort of attack he had contemplated (i.e. one without a knife) and if death had happened to result he would be liable for manslaughter.*”
- [29] I therefore substitute a conviction for manslaughter **under section 24(2) of the Court of Appeal Act**.
- [30] In the case of Vilimoni Navamocea v The State, Criminal Appeal No. AAU 0002 of 2006; 25 June 2007 this Court stated “*We suggest that, in all cases of manslaughter where the death is the result of a deliberate infliction of violence in the course of*

committing another offence such as robbery in which grave violence was anticipated and any form of weapons used, the Court should use a starting point between ten and fourteen years.” This was a case where a 58 year old lady going about her daily chores of preparing meals inside her house was suddenly set upon by the Appellant and the co-accused, who used violence on her to prevent her from shouting so that they could go about stealing articles from the house unnoticed by others. The Appellant as stated earlier in this judgment, closed her mouth, made her fall onto the floor by kicking her and then tied her up by placing a pillow on her face. This unlawful act in conjunction with the act of the co-accused in strangling the deceased, led to her death.

[31] I have considered the sentence of 5 ½ years imprisonment imposed on the co-accused Josaia Valebiu by the Learned Trial Judge and I am not in agreement with his assessment of facts in relation to the sentence. The learned Trial Judge had failed to consider that the cause of death was asphyxiation as a result of manual strangulation and that the evidence does not show that it was the Appellant who strangled the deceased. Had he done so he would not have made the statements that the co-accused was merely “a reluctant and frightened bystander” who did nothing to disassociate himself from the violent actions of the Appellant and “sat and watched over the victim as she lost consciousness and died”; and that the co-accused was merely a participant in this crime and not a principal actor.” Even the confession of the co-accused referred to at paragraph 5 above does not support the statements of the learned Trial Judge referred to above. I am of the view that the learned Trial Judge had been unduly lenient in sentencing the co-accused and therefore will not consider the sentence imposed on the co-accused, in passing sentence on the Appellant.

[32] In passing sentence there must be a strong message that the Court and the community denounces the commission of offences involving violence by home invasion, not only to deter offenders from committing offences of this nature but to protect the community from such offenders. I have taken into consideration the Appellant’s position that it was not his intention to cause the death of the deceased and that no sooner he realized that the deceased may have been mortally injured he tried to resuscitate her. The Appellant’s position that he did not intend to cause the death of the deceased finds

support from the fact that both he and his co-accused went into the house unarmed and that the Appellant had not used any weapon when he attacked the deceased. I have also taken into consideration that the Appellant had been 23 years old at the time of the commission of the offence. Taking the above aggravating and mitigating factors into consideration I substitute for the sentence passed by the Learned Trial Judge, a sentence of 12 years imprisonment with a non-parole period of 10 years which I believe will meet the ends of justice. The period the Appellant has spent in incarceration shall be counted against the sentence.

Prematilaka JA

- [33] I have read in draft form the judgment of Anthony Fernando JA and agree with the orders of the court.

Priyantha Fernando JA

- [34] I have had the benefit of reading the draft judgment of my brother Justices and I have the misfortune of disagreeing with them on one particular ground of appeal. This is the one on which they propose to reduce the conviction for murder to manslaughter on the basis that the appellant did not have the intention to kill or harm the deceased.

- [35] I need not go through the facts of the case except the evidence in synopsis which led to the conviction for murder.

- [36] The appellant, Apakuki Sowane, on 7 June 2005, entered the house of the deceased Nirmala Devi. She was alone at home. He entered the house with the co-accused who was convicted for manslaughter. I need not refer to the evidence and conviction regarding the co-accused since he has not appealed.

- [37] When the two entered the house, the deceased was making roti with her back facing the intruders. She turned round and saw the intruders, one of them being the appellant. She

then yelled. The appellant went to her, closed her mouth with one hand, and pulled her towards him. He asked her where the money was and the deceased pointed to the bedroom. She yelled again.

[38] The appellant closed her mouth and kicked her legs causing her to fall on to the ground with face upwards. He tied a cushion to cover her entire face, and with a towel tied her legs.

[39] He asked the co-accused to guard her whilst he ransacked the house. After gathering the loot, whatever he could get, he came to the deceased and saw that she was not moving. He asked the co-accused what had happened to her, and the co-accused told him that she was unconscious. He then removed the cushion and saw that the mouth and eyes of the deceased were open. He tried to check her pulse and upon not finding any, gave a CPR. The deceased's condition did not improve. He realized she was dead. He put the cushion back on her face. He tied around it a piece of cloth. He sat beside her and asked for forgiveness for killing her when he had only intended to steal the money. He then wiped the evidence of his foot prints he left the scene.

[40] Before leaving the scene the appellant decided to burn the house of the deceased so that the whole episode would look like an accident but he was discouraged from doing so by the co-accused. This is the account he gave to the police in his caution interview statement which was admitted into evidence.

[41] The learned Justices of appeal are of the view that there was no evidence that any one of the accused went into the house knowing that the deceased was inside the same or with the intention to cause her harm or death. The Majority of the Court is of the view that the accused persons went inside the house unarmed and that the appellant's confession does not indicate that he tried to kill Nirmala Devi as soon as he saw her. The deceased was only having tied up to prevent her from making loud noises.

[42] The Majority Court therefore found that since there was no intention to cause grievous harm or death of the deceased, the necessary element of malice aforethought had not been established in evidence for the conviction of murder to stand, and thus the conviction should be reduced to manslaughter.

[43] The medical evidence which stated that the deceased died of asphyxiation by manual strangulation was substantiated by photograph number 24 showing bruising on the neck indicating manual strangulation. The Majority Court found that there was no evidence that it was the appellant himself who strangled the deceased. The Court therefore held that since strangulation caused the death of the deceased, the prosecution has not proved that the appellant was responsible for the strangulation and the death of the deceased.

[44] I do not share the same legal view as the Justices of Appeal on the question of malice aforethought and their assessment of the medical evidence.

[45] I will deal first with the issue of malice aforethought. The necessary evidence that may prove malice aforethought as per s.202 of the Penal Code Cap. 17 (the relevant legislation at the time of the offence) is either:

- (i) *an intention to cause the death of or to do grievous harm to any person, whether such person is the person actually killed or not; or*
- (ii) *knowledge that the act or omission causing death will probably cause the death or grievous harm to some person,...although such knowledge is accompanied by indifference whether death or grievous harm is caused or not, or by a wish that it may not be caused.*

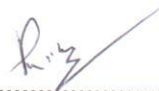
- [46] Indeed there is no evidence beyond reasonable doubt that the appellant entered the house with an intention to kill the deceased or to cause her any grievous harm but the element of malice aforethought is not limited to, or does not rest on, such intention alone. The statute refers to the knowledge that the act or omission causing death will probably cause the death or grievous harm.
- [47] The appellant used a cushion to cover the entire face of the deceased. The cushion was not loose enough to allow any breathing to continue and breathing was restricted by the tying of the face with the same.
- [48] The appellant, or anyone for that matter, would know that if a person's entire face is tightly covered to stop oxygen being inhaled, the probable result and the most likely outcome will be the death of the victim. One does not have to be in the medical profession to have knowledge of a simple matter of this nature. Breathing is essential for the functioning of the organs and for the continuance of life.
- [49] The appellant also kicked the deceased causing her to fall to the ground and when he committed that kicking, his intention was to cause her at least grievous harm. If he only wanted to prevent her from yelling, there was no need either to kick her causing her to fall to the ground or to tie her face with a cushion to stop her from breathing. In addition he asked the co-accused to maintain guard to ensure that she did not become free from the trap imposed on her face. By tying of the cushion he would have known that there was a real risk that she might not be able to breathe.
- [50] The medical evidence stated at page 22 of the Court Records indicates the cause of the death to be:
- “Asphyxiation by manual strangulation. Strangulation, food in air passage and smothering.
Exclude and conclude as to what appropriate cause of death. Indicates struggle at time of smothering and marks on neck. More strangulation”*

- [51] The tenor of the majority verdict is that since the medical evidence stated that there was manual strangulation and as there was no evidence that the appellant himself had manually strangled the deceased, his conviction for murder could not stand.
- [52] The medical evidence must be analyzed accurately. The term ‘manual’ used by the medical witness meant that it was caused through someone’s hands and the term strangulation means the constriction of the air passage by compressing the neck. The doctor went on to clarify how the asphyxiation had been caused. It was not only by strangulation, but also due to food in the air passage and from smothering. The evidence is that the smothering was caused by the appellant. The doctor also said in his findings that it ‘indicates struggle at the time of smothering and marks on neck’. Therefore it is clear that the strangulation was caused by the appellant when the victim struggled at the time she was smothered by the appellant. It is impossible to assume or conclude that strangulation may have been caused by the co-accused when there is no evidence to that effect.
- [53] In law it is enough that the accused’s act contributed significantly to the death; it need not be the principal cause thereof: Archibald Criminal Pleading and Practice 2011 at page 1831 in Paragraph 19-6, after considering the cases *R. v. Pitts (1842) C: & Mar. 248*; *R. v. Curley, 2 Cr. App. R. 96, 109, CCA*, summarizes the applicable legal principle as follows.
- ‘In homicide cases, it is rarely necessary to give the jury any direction on causation as such. When such direction is needed, they should be told that in law it is enough that the accused’s act contributed significantly to the death; it need not be the sole or principle cause thereof’* (emphasis added)
- [54] On the appellant’s own evidence he had smothered the deceased, so there need not be any further evidence on knowledge to form the necessary element of malice aforethought.

- [55] I then come to the neck injuries which were caused and gave room for the medical opinion that there was strangulation.
- [56] When the appellant entered the house, the deceased was alive and before he left she died. There are marks on the deceased person's neck which are not explained in the caution interview as to how it happened. The doctor stated that the injuries happened as a result of the struggle at the time of smothering and that is how the marks appeared on the neck. Doctor also said that the pattern of injuries in photograph 24 simply indicates a struggle.
- [57] Even if the injuries in the neck led to the asphyxiation, it was nothing but the struggle due to smothering that caused it, and the appellant is responsible for that act. He ought to have known that such smothering may lead to death.
- [58] The Majority Court found that since the co-accused was left to look after the deceased, the appellant could not be responsible for the death. I regret to disagree with their Lordships. The appellant did not put the co-accused to guard the deceased in order to ensure that she was alive. He left the co-accused to guard the deceased so that she would not make a noise and raise the alarm. That again indicates knowledge that smothering and keeping her under close contact with the pillow might risk her death.
- [59] The Court cannot assume that the co-accused did himself or alone the strangulation as there is no evidence to that effect. The appellant was in control of the entire episode leading to the macabre situation. The appellant may have repented after the death of the victim as he said in his caution interview statement. However his actions do not suggest he did, for when he realized that the victim had died, again he tied her up and decided to set fire to the house. He curbed any chances of her being revived. Even if he regrets now or professes that he did repent, it is insufficient to negate criminal liability from the risk he appreciated and yet perceived with.

[60] If the deceased was untouched by the appellant and had been left to be guarded by the co-accused, the assessors may have arrived at a different conclusion. But on the evidence before the assessors, it was open for them to find that the appellant had the necessary knowledge that his actions would cause the death of the deceased. One cannot expect a person to live without breathing and the consequence of not breathing is well known to any person.

[61] I therefore find that the appellant's conviction for murder is well supported by the evidence and should not be reduced to manslaughter. The appeal ought to be dismissed in its entirety.




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Hon. Justice P. Fernando
JUSTICE OF APPEAL

The Orders of the Court are:

1. *Appeal against conviction for murder allowed.*
2. *Conviction for manslaughter substituted.*
3. *Sentence of 12 years imprisonment with a non-parole period of 10 years substituted.*



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Hon. Justice A. Fernando
JUSTICE OF APPEAL



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Hon. Justice C. Prematilaka
JUSTICE OF APPEAL