

IN THE HIGH COURT OF FIJI  
AT LABASA  
CRIMINAL JURISDICTION

Criminal Case No. HAC 45 of 2013

BETWEEN: THE STATE

AND: TEVITA DUTABOTO

Counsel: Mr. Vodokisolomone S. for the State  
Mr. Lomaloma P. for the Accused

Date of Sentence : 12<sup>th</sup> September, 2014

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**SENTENCE**

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1. Mr. Tevita Dutaboto, you stand convicted for "Aiding and Abetting" the murder of Samuel Vikash Nand contrary to section 45 and 237 of the Crimes Decree No. 44 of 2009.
2. The Statement of Offence and the Particulars of Offence are as follows:

**First Count**  
*Statement of Offence*

**MURDER:** Contrary to Section 45 and 237 (a) (b) (c) of the Crimes Decree 44 of 2009.

*Particulars of Offence*

**TEVITA DUTABOTO** between the 5<sup>th</sup> of July and the 7<sup>th</sup> of July 2013 at Korosomo, Seaqaqa in the Northern Division, aided and abetted **NILESH CHAND** to cause the death of **SAMUEL VIKASH NAND**.

3. The admitted Summary of Facts reveals that you accompanied with Nilesh Chand, (the principal offender who is already convicted and serving a life imprisonment with a minimum term of 25 years imprisonment for committing the murders of Abishek Kumar and Samuel Vikash Nand) in his Hilux Twin Cab (Registration Number HB 608) to pick-up the two deceaseds above named from Wailevu. Then all four of you had gone to Korosomo Hill, Seaqaqa to drink beer. Whilst drinking beer, Nilesh Chand, the principal offender had hit Abishek Kumar with a bottle of beer on his forehead. He had fallen on the ground. Then Nilesh Chand had struck Samuel Vikash Nand with another beer bottle, which caused Samuel to spin around dazed. You had then grabbed Samuel and threw him down when Nilesh Chand told you to hold Samuel.
  
4. By that time you had seen Nilesh Chand kneeling beside Abishek Kumar and slicing his throat using a knife. You claimed that you got very scared of what you saw. You were on top of Samuel when Nilesh Chand came towards you after finishing with Abishek. He then had given the knife to you to cut Samuel. You had refused to do so saying "I cannot cut him" and given the knife back to Nilesh. When Samuel, the deceased was trying to cover his face, you had pulled his hands down as told by Nilesh. You had even used your legs to lock the legs of Samuel while Nilesh Chand cutting Samuel's neck from the back. After killing Abishek and Samuel, Nilesh Chand and you had fled from the scene and thrown the knife on the hill side. Two days later, the bodies of two deceased boys were found by a villager at Korosomo Hill. After the matter is been reported to the police the investigations had commenced. According to Doctor Ponusami Goundar, the Forensic Pathologist, the cause of death of Samuel is "Excessive loss of Blood, cut injuries to the neck, severed spinal cord, severed trachea, severed oesophagus due to multiple cuts to the body and assault cut injuries". At the caution

interview you had admitted that you aided and abetted Nilesh Chand for the murder of Samuel Vikash Nand.

5. Pursuant to Section 237 of the Crimes Decree No. 44 of 2009 the offence of 'Murder' carries a mandatory sentence of life imprisonment with a judicial discretion to set a minimum term to be served before a pardon been considered.
6. Section 45(1) of the Crimes Decree considers a person who aids, abets, counsels or procures the commission of an offence by another person is liable to the commission of the offence as if he had committed the said offence and is punishable accordingly, unless he had terminated his involvement to the crime or took all reasonable measures to prevent the commission of the crime.
7. The penal liability of Section 45 of the Crimes Decree attracts when a person aids or abets or counsels or procures the offence of the main perpetrator. This, sometimes calls as "accomplice liability" in some jurisdictions. It is essential that 'active participation' to the crime is needed to impose the liability to a person under this provision. What constitutes 'active participation' is a matter of fact. Mere presence at the scene of crime or mere knowledge of the crime would not suffice to convict a person for "aiding and abetting". The existence of a 'prior arrangement' or 'premeditation' to 'aid or abet' the principal offender is not a must. It can well be a spur of the moment or extemporaneous decision as crimes itself, sometimes take place instantaneously.
8. Mr. Tevita, as the Summary of Facts reflects, your conscious contribution to Mr. Nilesh Chand ended up with the murder of Samuel Vikash Nand, a 17 year old boy. Therefore, Mr. Tevita, the combine effect of section 45 and section 237 of the Crimes Decree warrants you to be sentenced for a mandatory sentence of life imprisonment.
9. Now this court has to decide the "minimum term" you are to be served before a pardon is been considered. When deciding the 'minimum term', this court is mindful that it should adequately reflect the nature and circumstances of the crime and the antecedents of the offender. Whilst expressing the abhorrence of

the law abiding society to the crime, the 'minimum term' should obviously contain a strong message of deterrence as well.

10. In **State v Lole Vulaca & two others** (Criminal Case No: HAC 120 of 2007, 23<sup>rd</sup> April 2008), Shameem J did not set a minimum term for two accused who were convicted of murder.

*"I would accede to the prosecution's request for a minimum term except for one factor. The evidence against you was that of secondary offenders, that is, that you were part of a joint enterprise to assault Malasebe. There was no evidence that either of you inflicted any of the assaults yourselves. It is impossible in these circumstances to apportion responsibility to either offender".*

11. Another instance where Shameem J decided on the 'minimum term' is **Mohammed Sahid Khan and Selina Vosavakatani** (Criminal Case No. 058 of 2005; 01<sup>st</sup> November 2007). Whilst ordering 13 years minimum term of imprisonment to the 2<sup>nd</sup> accused; Shameem J said that;

*"Selina, I put you in a different category. I accept that you did not stab Sarwan Kumar and that you have been found guilty because you got the second knife for Mohammed Sahid to use on the deceased, and tied up the deceased's legs during the incident. I also consider that you are very much under Mohammed Sahid's influence to the extent that you have allowed him to procure men for you to have sexual intercourse with, for money."*

12. Madigan J, in **State v Rokete** (Criminal Case No: HAC 084 of 2008; 04<sup>th</sup> March 2014) held that;

*"This court said in Nilesh Chand, HAC 45 of 2013 (Labasa) a minimum term is set so that the community can be assured that persons taking the lives of others may serve a meaningful period in custody."*

13. In *Deakin v R*. [1984] HCA 31; (1984) 58 ALJR 367 (16<sup>th</sup> May 1984), the Australian High Court held that,

*“The intention of the legislature in providing for the fixing of minimum terms is to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence. See Power v The Queen [1974] HCA 26; (1974) 131 CLR 623; at p.629.”*

14. In *R v Shrestha* [1991] HCA 26; Brennan and McHugh JJ of the High Court of Australia stated:

*“It is clear that, although a minimum term is a benefit for the offender may be allowed only for the purpose of his rehabilitation and it must not be shortened beyond the lower limit of what might be reasonably regarded as condign punishment.”*

15. Once again Mason and McHugh JJ of the High Court of Australia in *Bugmy v The Queen* [1990] HCA 18, stated that a judicial officer does not fix a minimum term solely or primarily in accordance with the offender’s prospects of rehabilitation. Thus, other purposes of sentencing – such as retribution, deterrence and incapacitation – are relevant to fixing the non-parole period as well as to fixing the head sentence.
16. It is in this back ground court wishes to see the mitigatory grounds urged by you. You were born on 26<sup>th</sup> October 1992 and was 20 years and 09 months old at the time of the offence. You are the oldest of a family of five (05) siblings. You studied till Form 6 at Dreketi Secondary School. Your father told court that comparing to other siblings you were very sensitive. If an animal is to be slaughtered for a feast, he said that you cannot stand even to see that. The learned defence counsel urged that you had to aid and abet Nilesh Chand, a person whom you trusted so much, after witnessing a sudden and unexpected

violent attack on Abishek and Samuel. He further argued that it was Nilesh Chand who planned the murder by his own and callously tricked to use you for that. He continued to argue that Nilesh Chand, being over 30 years, dominated you and you had to obey him without questioning.

17. The violent and surprise attack by the bottles on the two deceased, according to the learned defence counsel, would create a shock in any one in the position of the accused and limit their ability to think and act clearly with fear of their own safety. Counsel pointed out that this state of shock paralysed or certainly diminished your mental ability to react and think and thus reduces your culpability to a considerable extent.
18. On the other hand, your counsel stretched this situation to say that even though "duress" is not a defence to murder, what you witnessed made you feared for your own life and therefore actions committed under duress is a very important mitigating factor. The very short time, perhaps few minutes, that you had to take a decision about the ongoing crime, your counsel argued, reduces your culpability.
19. After a careful analysis of the factual background or in fact your actual contribution to the crime, I conclude that you carry a separate liability as opposed to the principal offender. When you continued to hold the deceased, Samuel, there is no doubt that you aided and abetted his murder, but your actions do fall within a lower culpability. The facts suggest that you are a secondary participant to the crime and this difference of the degree of culpability must reflect when the 'minimum term' is been decided. In fact, you are a first offender. It is important to identify the different roles played by the offenders in an offence of murder to assess their individual culpability as the sentences vary according to their respective culpabilities.
20. Nevertheless, Mr. Tevita, your offending back ground does not warrant for this court to impose you only the mandatory life imprisonment without a minimum term. Hence, I sentence you to life imprisonment with a minimum term of 11 years imprisonment.

21. It was brought to court's attention that you have been in remand custody for 14 months in relation to this case. Thus, in terms of section 24 of the Sentencing and Penalties Decree 2009, that period is ordered to be deducted from the minimum term of 11 years.



Janaka Bandara  
Judge

At Labasa  
12 September 2014

Office of the Director of Prosecution for State  
Office of P. R. Lomaloma Esq. for Accused

