

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC. 27 of 2014

STATE

V

SULIASI DUMUKURO

Counsel : Ms. P. Madanavosa for the State
Mr. T. Bukarau for the Accused

Dates of Hearing : 03rd March – 14th March 2016

Date of Summing Up: 16th March 2016

Date of Judgment : 18th March 2016

JUDGMENT

1. The accused is charged with the following offence;

Statement of offence

Murder: Contrary to Section 237 (a) and (b) and (c) of the Crimes Decree No: 44 of 2009.

Particulars of offence

SULIASI DUMUKURO on the 25th day of December 2013 at Waisomo village, Tavuki, Kadavu in the Central Division, murdered **SAVENACA TUINABULI**.

2. After trial, the assessors have returned with a unanimous opinion that the accused is not guilty of murder but guilty of manslaughter.

3. I direct myself in accordance with the summing up delivered to the assessors on 16th March 2016 and the evidence adduced at the trial.
4. To find the accused guilty of murder contrary to section 237 of the Crimes Decree 2009, the prosecution must prove the following elements beyond reasonable doubt;
 - a) the accused
 - b) engaged in a conduct
 - c) that conduct caused the death of Savenaca Tuinabuli
 - d) accused intended to cause the death of Savenaca Tuinabuli,
or
accused was reckless as to causing the death of Savenaca Tuinabuli by the
conduct
5. In addition, since the defence of provocation was raised, the prosecution is also required to disprove provocation beyond reasonable doubt.
6. The defence did not challenge the voluntariness of the cautioned interview or of the charged statement. However, the defence took up the position that the accused did not give the answers recorded in respect of the questions 101 and 140 of the cautioned interview.
7. In brief, the deceased and the accused are from the villages of Waisomo and Natumua respectively. The two villages are located next to each other. According to the accused, they were good friends. But the deceased and his brother were assaulting and threatening the accused since the month of August 2012. This was due to the accused having a relationship with the deceased's sister. Accused said, there were three main incidents of assault. Accused said that the deceased assaulted him in August 2012 and in August 2013; and deceased's brother Seci assaulted him in November 2013 as a result of which he became unconscious and hospitalized.
8. On 25/12/2013, the accused started drinking Rum from around 12.00am, first with one of his cousins and one Tevita at Natumua. The deceased also joined them subsequently. There they had consumed four 'half bottles' of Rum. Then they went to Vunisea and continued drinking. They bought two 40oz bottles of Rum from Vunisea. Again they came back to Natumua and were drinking at one Isoa's house. The deceased started to quarrel with the accused at Isoa's house and then the accused

- wanted to leave. Then the deceased hugged the accused and invited him to go to Waisomo.
9. According to the prosecution, while the accused was drinking with the deceased and few others at the deceased's house at Waisomo, after having an argument with the deceased, accused swore at the deceased and ran towards Natumua. However, the accused said that the deceased started chasing Masi who was drinking with them at the deceased's house and the accused followed the deceased with Apolosi. According to the accused, he swore at the deceased and started running towards Natumua when the deceased punched him near the church steward's house at Waisomo.
 10. The last encounter between the two, before the alleged incident of stabbing took place was at Natumua according to both the prosecution and the defence. Deceased's wife, the first Prosecution Witness Sokoveti Tuinabuli said that she followed the deceased when the deceased was chasing the accused who was running towards Natumua. She said the deceased could not catch the accused because the accused ran fast and she said that the accused came and punched the deceased while they were at Natumua.
 11. According to the accused, deceased came to the place he was lying down at Natumua and then they had a fist fight there. Accused said that the deceased swore at the accused at Natumua in front of his relatives including accused's cousin sisters using swear words concerning mother, father and low cast. At this point it is pertinent to note that when deceased's wife was cross examined she first said that the deceased did not swear at the accused. But when her statement made to the police was shown to her, she admitted that the deceased did swear at the accused using the same swear word used by accused concerning mother.
 12. Though the prosecution and the defence were at variance on how the two met at Natumua and as to the nature of the commotion, they seem to be in agreement on how this commotion ended. That is, both the prosecution and also the defence says that one uncle of the accused, Manueli Navono intervened and both the accused and the deceased left for their respective houses after that.
 13. Thereafter, according to the admitted fact No. 6, the accused was seen walking towards his house. According to Defence Witness Emi Logaivau, the mother of the accused, when the accused reached the house, he asked her about his younger brother

and then he came inside the house and picked the knife which was on the sink. After that, according to the admitted fact No.8, the accused was seen running towards Waisomo with the knife.

14. The final episode took place near Prosecution Witness Epeli Tabuarua's house. According to Witness Epeli, when he was talking with the deceased, the accused came towards his house and the accused was swearing. The, deceased then went towards the accused to challenge the accused for a fist fight. The accused tried to attack the deceased with the knife. Epeli told the accused to drop the knife but the accused did not listen. According to Witness Epeli and Prosecution Witness Kelera who is Epeli's wife, when the accused tried to strike the deceased with the knife, the deceased went backwards avoiding the knife and then the deceased tried to hide behind an Ivi tree. Near the Ivi tree the deceased threw a bamboo stick given by Epeli at the accused.
15. Then comes the point when the stabbing took place. According to the wife of the deceased, she saw the accused chasing the deceased and then accused stabbing the deceased besides one corner of Epeli's house. She witnessed this, when she came running from her house after she heard a noise. She did not witness the incident where the deceased threw a bamboo at the accused. So it can be concluded that she only witnessed the final moment.
16. Witness Kelera witnessed the incident from the point the accused was trying to attack the deceased with the knife after Epeli told the accused to drop the knife. With regard to the bamboo, her version was that the deceased just tried to poke the accused with the bamboo near the Ivi tree, but because the deceased was so drunk, the bamboo fell from the deceased's hands the first time he tried to poke. She said, the deceased ran towards the house from where the Ivi tree was and the accused ran after the deceased. She said, "*Just as Save turned to see Suli, Suli was right next to him. Then Suli stabbed Save*".
17. Witness Epeli did not see the actual stabbing though he witnessed the encounter between the deceased and the accused near his house from the beginning to the end. He said he gave the bamboo to the deceased to protect himself from the accused, but the deceased speared the bamboo towards the accused. He said the bamboo did not hit

the accused and thereafter the deceased ran towards his house. The accused ran after the deceased. He said *“Suli ran after Savenaca. Savenaca paused just beside our house and looked at Suli. What I could gather is that Save captured Suli”*. At this point when the deceased turned to face the accused, he then ran towards the accused to grab the accused from behind, to prevent the accused from using the knife on the deceased. But at the same time he heard deceased’s wife yelling that the deceased was stabbed and he saw the accused running away.

18. The accused’s version was that, after the deceased threw the bamboo at him, the deceased came running towards him and what he could remember is that he and the deceased bumped into each other. In evidence in chief he said after bumping into each other he became unconscious and the next thing he could remember is being assaulted by villagers. However, he admitted that he stabbed the deceased when he was being cross examined. He also said during re-examination that he stabbed the deceased because he was angry. In his own words he said, *“he had come to the village, spoke against me, spoke stuff about me in front of my cousins, he swore at me when my cousin sisters heard. I was angry”*.
19. According to Doctor Mate who conducted the post mortem examination, the cause of death of Savenaca Tuinabuli was excessive blood loss due to the injury caused to the lower chamber of the heart which could have been caused by a kitchen knife.
20. Now I turn to consider whether the elements of the offence of murder have been proved beyond reasonable doubt.
21. There was no dispute with regard to the identity of the accused.
22. Considering all the evidence including the admitted facts, the cautioned interview of the accused and the charge statement, I am satisfied beyond reasonable doubt that the accused did stab the deceased on 25/12/2013 near Witness Epli’s house. That act of the accused was a product of the accused’s will and it was not accidental. I am also satisfied beyond reasonable doubt that this deliberate act of the accused caused the death of the deceased. Therefore I find that the second and third elements of the offence of murder are proved by the prosecution.

23. Now the question is whether the prosecution has proved the fourth element which concerns the state of mind of the accused at the time of stabbing.

24. Considering the evidence of the prosecution witnesses and the accused, I find that, when the accused was chasing the deceased who ran from the Ivi tree towards Epeli's house, the deceased stopped and turned towards the accused and the accused was right next to the deceased at that moment when the accused stabbed the deceased. It is pertinent to note that that the accused did not stab the deceased from behind when he was chasing the deceased, though the accused seem to have had the opportunity to stab the deceased before the deceased turned towards him. Therefore, stabbing the deceased on the left side of the chest appears to me as more of a spontaneous act as the evidence does not suggest that the accused had time to take a specific aim when he stabbed. Therefore, I am unable to draw the inference that the accused intended to cause the death of the deceased from the mere act of stabbing the deceased on the left side of the chest.

25. The following questions and answers recorded in the cautioned interview are relevant with regard to the state of mind of the accused at the time of the incident;

Q.71: What caused you to run home?

A. I just ran away to our house.

Q.72: What did you do when you reached your house?

A. I entered the house, beside the door was the sink and on top the sink was a knife.

Q.73: That means when you ran away home, you went to bring the knife?

A: Yes.

Q.74: What did you do when you saw the knife on top of the sink?

A. I took it and ran back.

Q.75: Was there anyone at your house when you took the knife from on top the sink?

A. My mother.

Q.80: What caused you to bring the knife from your house?

A. I wanted to injure Savenaca with it.

Q.81: How are you going to injure Savenaca?

A. To cut him or stab him and to injure him.

Q.82: What caused you not to hear the villagers calling when you were holding the knife and trying to stop you?

A. I just tried to injure him so that I can be satisfied.

Q.85: *What can you say about the statement of Tevita who was calling you to wait when you were going to Waisomo and holding the knife?*

A. *I just went on to satisfy myself.*

Q.86: *How would you satisfy yourself?*

A. *I wanted to do something to Savenaca.*

Q.87: *How would you injure Savenaca?*

A. *To cut him or stab him.*

Q.99: *What did you do when Savenaca came towards you?*

A. *I took the knife and struck him with it.*

Q.100: *What can you say about Epeli Tabuarua's statement when he told you to leave the knife and not to stab Savenaca with it?*

A. *I did not want to hear anything, I just wanted to stab Savenaca never mind if something happen to him.*

Q.101: *What did you mean by saying "never mind if something happens to him"?*

A. *I just wanted to kill him.*

Q.104: *When you were striking Savenaca with the knife, what part of his body were you aiming to hit?*

A. *I just kept striking him anyhow.*

Q.113: *What was your intention when you were hitting Savenaca?*

A. *I was thinking of hurting him or something to happen to him.*

26. Apart from the answer recorded under question 101, all the other answers in the cautioned interview suggest that the accused had the intention to cause serious harm. Accused says that he did not give the answer at question 101 which is, "*I just wanted to kill him*". Considering the entire cautioned interview and especially the answers produced above and the evidence given by the accused in court, I have a reasonable doubt whether the admission recorded at question 101 is true. Therefore, I decide not to rely on that admission.

27. Considering all the evidence, I am not satisfied that the prosecution has proved beyond reasonable doubt that the accused intended to cause the death of the deceased. However, I am satisfied beyond reasonable doubt that the accused had the intention to cause serious harm to the deceased.

28. The next question is whether the prosecution has proved beyond reasonable doubt that the accused was reckless as to causing the death of the deceased.

29. In order to prove that the accused was reckless as to causing the death of the deceased, the prosecution should establish that the accused did foresee or realise that

death was a probable consequence or the likely result of his conduct and having foreseen or having realised that consequence, he decided to go ahead and engage in the conduct.

30. To prove recklessness as to causing the death of the deceased, the prosecution is required to establish the actual state of mind of the deceased. Overruling the decision in *R v Caldwell* [1982] AC 341 which gave an objective interpretation to 'recklessness', Lord Bingham observed in the case of *R v G and another* [2003] UKHL 50, that;

"It is neither moral nor just to convict a defendant (least of all a child) on the strength of what someone else would have apprehended if the defendant himself has no apprehension."

31. In the case of *R v Grant* [2002] NSWCCA 243, Wood CJ at CL said the following regarding the *mens rea* for the offence of *murder by reckless indifference to human life*;

"The mens rea for this form of offence, as was pointed out in Crabbe v The Queen at 470-471, is the knowledge of the offender that death is the probable consequence of his or her act (or omission), to which I would add the decision to go ahead regardless of that consequence.

... ..

In relation to reckless indifference there is a significant element of intent involved in a state of mind which requires first an awareness or foresight that the probable consequence of one's act is death, and secondly a conscious decision to proceed regardless."

32. I am of the view that the above approach taken in *R v Grant* (supra) is the correct approach to be applied in determining whether an accused was '*reckless as to causing the death*' in a murder charge which carries a mandatory life sentence.
33. Considering the available evidence with regard to the moment when the accused stabbed the deceased, I have a doubt whether the accused had sufficient time to realise that death of Savenaca Tuinabuli was a probable consequence or death was the likely result of what he is going to do next and having realised that, he consciously decided to stab Savenaca Tuinabuli on the left side of the chest. Accused should be given the benefit of this doubt. Therefore, I am not satisfied that the prosecution has proved

beyond reasonable doubt that the accused was reckless as to causing the death of the deceased.


34. In the light of the above, I find that the prosecution has not proved the charge of murder beyond reasonable doubt. However, I do find that the prosecution has proved the offence of manslaughter beyond reasonable doubt.

35. I am therefore convinced that the unanimous opinion of the assessors in finding the accused not guilty for murder, but guilty for manslaughter was not perverse and it was open for them to reach that conclusion. I concur with the opinion of the assessors.

36. I find the accused not guilty for murder and accordingly acquit him of the murder charge.

37. I find the accused guilty for manslaughter and convict him accordingly for the offence of manslaughter under section 239 of the Crimes Decree 2009.




Vinsent S. Perera
JUDGE

Solicitors for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Muskits Law, Suva.**