

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 290 OF 2015S

STATE

vs

KELEVI TOKALAU

Counsels : **Mr. S. Vodokisolomone and Mr. S. Seruvatu for State**
Mr. N. Shivam and Ms. J. Lal for Accused

Hearings : **13 to 16 March, 2017**

Summing Up : **17 March, 2017**

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this

trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.

5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.

6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

“... [read from the information]...”

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 26 April 2015, at Suva in the Central Division, engage in a conduct, namely punching Saula Sucu thereby causing his death, and at the time, was reckless as to a risk that his conduct will cause serious harm to Saula Sucu?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with manslaughter, contrary to section 239 (a), (b) and (c)(ii) of the Crimes Decree 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (a) the accused engages in conduct; and
 - (b) the conduct causes the death of the deceased; and
 - (c) the accused was reckless as to a risk that the conduct will cause serious harm to the deceased.
10. The phrase “engages in conduct” in paragraph 9(a) above means “to do an act or omit to perform an act”. For example, if you hit someone with a stick, or punches someone with your hand, that is, to “engage in conduct” because you have “performed an act”. Similarly, if you hit someone with a stick and the victim is seriously injured, and you fail or omit to take him to hospital, that is, to “engage in conduct” by “omitting to take him to hospital” for medical treatment. The above is the first element of manslaughter.
11. “The conduct must cause the death of the deceased” in paragraph 9(b) above, means “the conduct must be a substantial cause of the deceased’s death”. For example, you hit someone with a baseball bat (engages in conduct), and the person falls on the ground hitting his head on a stone, which fractured his skull. The fractured skull lead to serious brain injuries, which later caused the deceased’s death (conduct causes death of deceased). The assault set in motion a chain of events that lead to the deceased’s death. Without the assault, the deceased would not have died. So the assault was a major and/or substantial cause of the deceased’s death. That is the second element of manslaughter.
12. The third element of manslaughter, as described in paragraph 9(c) above, involved its fault element. The accused must be shown beyond reasonable doubt “to be reckless as to a risk that his conduct will cause serious harm to the deceased”. A person is reckless with respect to a result if – (a) he is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him, it is unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact for you. You must consider the parties’ conduct, and the surrounding circumstances, to decide whether or not the accused was reckless. Was he reckless to the risk that his conduct will cause serious harm to the deceased? Was he aware

of a substantial risk that the deceased would suffer serious harm, as a result of his conduct? If so, was it justifiable for him to take the risk? If it was not justifiable for him to take the risk, and the deceased suffered serious harm as a result of his conduct, he would be reckless. If it was otherwise, he would not be reckless. If you find him reckless, then the third element of manslaughter is satisfied. If its otherwise, then the third element of manslaughter is not satisfied.

13. If you find that all the three elements of manslaughter were satisfied by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged. If you find that some of the element of manslaughter were not satisfied by the prosecution beyond a reasonable doubt, then you must find the accused not guilty as charged. It is a matter entirely for you.

F. THE PROSECUTION'S CASE

14. The prosecution's case were as follows. On 26 April 2015, the accused was 30 years old and single. He was a University of the South Pacific student and also working as a waiter and bouncer at the O'Reilly's Nightclub in Suva. He resided at Cunningham, Stage 1, Suva. The deceased, on the other hand, was aged 20 years, and he resided with his mother at 22 Berkley Crescent, Suva. He was unemployed at the time.
15. The 25 April 2015 was a Saturday, and the secondary school coco cola games had just ended. Suva city was full of people. According to the prosecution, the accused started work at the O'Reilly's Nightclub at 6 pm. He was the head waiter. As such, he takes orders from customers and serves them with drinks and food. He also dealt with customers' complaints and does general cleaning when required. He also acts as a bouncer at times to safeguard the security of customers. It was his duty to remove trouble makers and over intoxicated customers from the nightclub.
16. On 26 April 2015, at about 2am, the nightclub was full of people drinking and enjoying themselves. It was now Sunday early morning. In the nightclub was a separate smoke room for smokers. It had 4 windows that open out to the street. The windows were open at the time and the room was full of smokers sitting down and standing up. According to the prosecution, the accused was bringing out through the front door an intoxicated lady. While doing so, he saw an i-taukei youth (deceased) jumped through the window into the smoke room.

17. According to the prosecution, the accused ran towards the youth and delivered two right-hand punches to the youth's mouth. The two punches were said to be hard and strong. According to the prosecution, the accused was standing outside the window, and the youth was near the window inside the smoke room. The accused later entered the nightclub through the front door, went into the smoke room, and with the assistance of another staff, carried the i-taukei youth out of the nightclub. They put the youth on the pavement under the window of the smoke room. He was unconscious at the time, but appeared to be alive.
18. The matter was reported to police. A police team arrived in a police vehicle a short while later. They took the i-taukei youth to the Central Police Station. It was after 2.30am. The police found that the youth was not breathing and his pulse appeared to have stopped. They then took the youth to CWM Hospital. Doctors attended to him. The youth passed away a while later. A post-mortem examination was carried out on the youth on 27 April 2015. It was found that he died as a result of serious head and brain injuries resulting from assaults to the head.
19. A police investigation was carried out. The accused was interviewed by police. He was later charged for the manslaughter of the youth. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

20. On 13 March 2017, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called two witnesses in his defence. That was his right.
21. The defence's case was simple. On oath, the accused said, he did not punch the deceased twice on the mouth, as alleged by the prosecution. He said, he did not throw two right hand straight punches at the deceased from outside the window of the smoke room to inside the same, at the deceased. He said, he did not throw any right upper cuts at the deceased. He said, he did not punch the deceased at all on the mouth. He admitted slapping the deceased's ear from outside the window of the smoke room. He said, he only gave the deceased a right hand punch in the stomach, when he resisted being taken out of the smoke room and nightclub

for having entered illegally. He said, the deceased threw punches at him and DW3 when they went in to remove him.

22. William Pawa Tuiono (DW2) said, he was present in the nightclub's smoke room at the material time. DW2 said, he saw an i-taukei man, wearing a check shirt, delivered two right hand straight punches at the deceased, in the smoke room. DW2, he did not see anyone throw punches from outside the window of the smoke room at the deceased. So, in a sense, given the accused's and DW2's evidence, the defence totally deny the prosecution's case.
23. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the accused's case.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

24. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts" and its significance. Then we will discuss the State's case against the accused. In doing so, we will look at all the elements of the offence of "manslaughter", as described in paragraphs 9, 10, 11 and 12 hereof, and examine the question of whether or not the prosecution had proven those elements beyond a reasonable doubt, by providing the necessary evidence. Then we will consider the defence's case and the need to look at all the evidence.

(b) The Agreed Facts:

25. During the hearing, the parties agreed on certain evidence, being tendered as "Agreed Facts". There were two. The first was the Booklet of Photos, which contained Photos No. 1 to 6. It was tendered as Prosecution Exhibit No. 1, but it was really an "Agreed Fact No. 1" between the parties. The second was Keresi Turaganivalu's police statement, dated 27 April 2015. This is "Agreed Facts No. 2". The significance of the Booklet of Photos, was that it showed the crime scene. The crime scene was the outside of the O'Reilly's Nightclub's smoke room and the inside of this room. Keresi Turaganivalu's police statement showed that she was called by police to the CWM Hospital mortuary on 26 April 2015 at about 2 pm to identify the deceased

as her eldest son. The above facts were not disputed by the parties, and you may treat them as established facts, and that the prosecution had proven those facts beyond a reasonable doubt.

(c) The State's Case Against the Accused:

26. To find the accused guilty as charged, the State will have to prove beyond a reasonable doubt all the elements of "manslaughter", as described in paragraphs 9(a), 9(b), 9(c) hereof. In other words, you will have to consider all the evidence provided by the eight prosecution's witnesses.

(i) The First Element: The Accused Engages in Conduct [Paragraph 9(a) and 10 hereof]:

27. In their closing submission, on this issue, the State's position was that "the accused delivered two hard right-hand straight punches at the deceased" from outside the smoke room window to insider the room, where the deceased was standing next to the window. According to the State, the two punches landed on the deceased's mouth. You have heard the evidence, and it was not disputed by the parties, and you saw on the video evidence, how the deceased unlawfully got into the O'Reilly Nightclub smoke room, by climbing through its open window. To prove the above, the State relied primarily on the evidence of Misaele Draunibaka (PW1). PW1 identified the accused at a properly held police identification parade held at Totogo Police Station on 31 August 2015, and also identified the accused in the court room on the day of the trial. Note that Isei Wasabalavu (PW2) and Mataiasi Bose (PW3), never identified the accused at any properly held police identification parade, nor pointed out the accused in the courtroom.
28. So, it would appear that, the State's case on the first element of manslaughter against the accused, rested solely on PW1's identification evidence against the accused, at the material time. Despite the defect mentioned above, we will also consider PW2 and PW3's identification evidence against the accused, at the material time.
29. Before analysing PW1, PW2 and PW3's identification evidence against the accused, at the material time, I must direct you as follows, as a matter of law. First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, there is a special need for caution before convicting the accused in reliance on the correctness of the identifications, because an honest and convincing witness could be mistaken. Second, you must carefully

examine the circumstances in which the identification were made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? If so, how often? Are there any special reason for remembering the accused's face? Was there any police identification parade? Thirdly, are there any specific weaknesses in the identification evidence? Your answers to the above questions will determine the quality of the identification evidence. If it's of a high quality, you may rely on it. If it's otherwise, you should reject it.

30. PW1 said, on 25 April 2015, he was at the Friends Nightclub opposite MHCC from 10 pm to 12 midnight. He was drinking rum and cola with friends. He said, they drank 6 jugs of rum and cola. PW1 said, after midnight, he and his friends came to another nightclub ie. Temptation. He said, it was full and they came to O'Reilly's Nightclub. They arrived at 2am. PW1 could not remember what he did between 12 midnight and 2 am. PW1 said, he wanted to go into the Nightclub, but was not allowed in as he had short pants. He said, he then stood next to the railing opposite the main entrance. As you can see from the video evidence, it was crowded outside and inside the O'Reilly Nightclub. In the video evidence, you also saw how the deceased quickly climbed through the open window of the smoke room, as the accused was bringing out an intoxicated lady. In the video evidence, you saw how the accused left the intoxicated lady, and went to see what the deceased had done, that is, unlawfully jumping into the smoke room through its open window.

31. In the video evidence, you saw that the scene was crowded by people going into and out of the nightclub. The prosecution did not point out in the video evidence where PW1 was standing. Another bouncer watching the commotion was blocking the view from people standing near the entrance door. PW1 said, he was standing near the railings next to the main entrance. PW1 said, he saw the accused throw 2 hard straight right punches at the deceased's mouth. PW1 said, the accused was standing outside the smoke room window and threw the punches into the same, and he saw the same hit the deceased's mouth. He said, he was 10 footsteps away. PW1 said, there were lights in the area. He said, he could see clearly. PW1 said, he observed the accused for 2 minutes. PW1 said, there was no obstruction in the way to block his view. However, consider the video evidence carefully. PW1 said, he had seen the bouncer before working outside and inside the nightclub, as he had visited the club 3 or 4 times before. PW1 said, he identified the accused in a police identification parade at Totogo Police Station on 31 August 2015, about 4 months after the event.

32. Are there any specific weakness in PW1's identification evidence? Remember, the warning I had previously given you that an honest witness could be mistaken. Remember, PW1 was drinking rum and cola for 2 hours at Friends Nightclub between 10 pm and 12 midnight on 25 April 2015. He arrived at O'Reilly Nightclub at about 2 am on 26 April 2015. He could not tell us where he was between 12 midnight to 2 am on 26 April 2015. If he couldn't remember that, how could he remember what he's telling us now. Is this a case of recognising the bouncer as he had been to the O'Reilly Nightclub 3 to 4 times previously, or is it a case of a fleeting glance? In cases of recognition, it is often prejudicial to the accused to hold a police identification parade because the witness is coming to point out a person he does remember and recognize. In cases of recognition, an honest witness could also be mistaken. You will have to consider also the video evidence, which is very revealing. The crime scene was crowded with people and it would be difficult to observe something clearly for 2 to 3 minutes, as people were always in the way. It was the end of the coco cola games. Furthermore, PW1 was not allowed into the nightclub that night. It is possible that he had a grudge against the bouncers that morning that his views of the matter would be tainted? You will have to consider the above matters to decide whether or not PW1's identification was of a high quality or was it otherwise. Whatever you decide, is a matter entirely for you.
33. Then we consider PW2's identification evidence. PW2 said, he went to Sand Dunes Nightclub on 26 April 2015 and left the same a while later. PW2 said he came to O'Reilly Nightclub and was standing at the railings. PW2 said, he saw an i-taukei boy climbed through an open window into the club's smoking room. He said, he saw a bouncer throw a punch at the boy. He said, the boy fell backwards. As you saw in the video evidence, there were numerous bouncers standing at the crime scene. PW2 never identified the particular bouncer in a police identification parade or in the courtroom. Therein lies the quality of PW2's identification evidence.
34. As for PW3's identification evidence, he said on 25 April 2015, between 10 pm and midnight, he was drinking rum and cola at Friends Nightclub. He said, he drank 3 to 4 jugs of rum and cola, but not more than 6 jugs. PW3 said, he later went to Temptation Nightclub and later came to O'Reilly's Nightclub. He arrived at O'Reilly's between 1 am and 1.30 am. He said, he was standing near the railings. PW3 said, he saw a bouncer holding a boy in the smoking room and giving him two strong right uppercuts. However, PW3 did not point out the bouncer in a police identification parade or in the courtroom. You must carefully analyse PW2 and

PW3's identification evidence in the light of the video evidence shown. The prosecution did not point to where PW1, PW2 or PW3 were standing. Whether or not you accept PW1, PW2 or PW3's identification evidence is entirely a matter for you.

(ii) The Second Element: The Conduct Causes the Death of the Deceased
[Paragraphs 9(b) and 11 hereof]:

35. Doctor James Kalougivaki (PW6) did the post mortem on Saula Sucu on 27 April 2015 at CWM Hospital mortuary. He prepared a post mortem report and submitted the same as evidence, that is, as Prosecution Exhibit No. 3. In the post mortem report, PW6 described the external and internal injuries that Saula Sucu suffered.

36. In his evidence, Doctor Kalougivaki said the following, *"...On the right eye, there was a straight line bruise and upper and lower lips showed bruising, noted at the left side end of the mouth. The above injuries were caused by blunt force trauma. There was more bruising at the left end of the mouth. There were bruising all over his mouth. Blunt force trauma means trauma resulting from a rounded solid object or semi-solid, examples of which are a punch to the use of a baseball bat.*

The skin of the top of the head was examined and it showed bruising of the layers under the head skin towards the back i.e. 50 x 60 mm. Another bruise under the layers of his facial skin i.e. under the left jaw line. Blunt force trauma would cause the above injuries e.g. falling backwards and hitting a wall or something not sharp. Injuries to the jaw would be caused by blunt force trauma.

There was bleeding under the first covering of the brain, at the top of the head, and there was bleeding under the second covering of the brain on the left front and side of the head. There was swelling of the brain throughout. The above injuries are caused by high energy blunt force trauma to the head.

The cause of death is basically due to the bleeding within the layers or covering of the brain and severe traumatic head injuries. These injuries could be caused by an assault on the head which is a sudden acceleration of the head and can also include sudden deceleration of the head (e.g. a fall). The injuries were highly likely to come from an assault. All the assault to the head contributed to the injuries to the head."

37. It would appear that the parties do not dispute the doctor's evidence. The doctor said, "...**All the assaults to the head contributed to the injuries to the head...**". The prosecution is required to prove the above assaults to you to connect the same to the second element of manslaughter.

(iii) **The Third Element: The Accused was Reckless As to A Risk that the Conduct will cause Serious Harm to the Deceased {Paragraphs 9(c) and 12 hereof}:**

38. Your answers to the above issue, will depend on how you answer the first element of manslaughter, as discussed in paragraphs 27 to 34 hereof. If you do not accept PW1, PW2 or PW3's identification evidence of what the accused allegedly did to the deceased at the material time, then you do not need to consider the above issue, as there is no need to do so. You will have to find the accused not guilty as charged, as they had failed to prove beyond reasonable doubt the first element of manslaughter.

39. If, however, you accept PW1, PW2 or PW3's identification evidence of what the accused allegedly did to the deceased at the material time, then you will have to consider whether or not he was reckless as to a risk that his punch or punches will cause serious harm to the deceased. You will have to take on board the direction I gave you in paragraph 12 hereof. Was he aware of a substantial risk that the deceased would suffer serious harm if he delivered punches to his mouth? He knew the person unlawfully entered the Night Club and appeared to be drunk or high on other matters. Was it justifiable for the accused to punch him on the mouth? These are questions of fact for you to answer. If it was unjustifiable for the accused to take the risk, and the deceased suffered serious harm, the accused would be reckless. If it was otherwise, he would not be reckless. It is a matter entirely for you.

(d) The Defence's Case

40. In his evidence, the accused (DW1) denied ever punching the deceased on the mouth, at the material time. He said, he saw the deceased unlawfully climbed through the window into the smoke room. He said, he ran towards him, and told him to come out through the window. He said, he slapped him on the ear. He denied punching the deceased's mouth with two hard straight rights. He denied ever punching the deceased on the mouth or head at all. He said, he later went into the smoke room to get the deceased out of the nightclub. He said, the deceased resisted him and other staff. He said, the deceased held the table and later threw

punches at them. The accused said, he punched the deceased in the stomach to enable them to take him out of the nightclub.

41. The defence later called William Pawa Tuiono (DW2). He said, he was in the smoke room at the material time. He said, he saw another i-taukei man, with a check shirt, throw two hard straight right hand punches at the deceased's jaw. He said he saw no one punching from outside the window into the smoke room. DW2 said, he came between the two and asked why he punched the other boy. DW2 said, when he turned around, the staff were taking the deceased out. When cross-examined, DW2 said the punches landed on the youth's left jaw near the mouth.
42. If you accept the defence's version of events, then you will have to find the accused not guilty as charged. It is a matter entirely for you.

(e) The Need to Consider All the Evidence:

43. Eight witnesses gave evidence for the prosecution. Three witnesses gave evidence for the defence. Six exhibits were tendered by the prosecution, that is, the Booklet of Photos, the doctor's curriculum vitae, the deceased's post mortem report, the accused's interview notes on 26 and 27 April 2015, 30 June 2015 and 31 August 2015. The defence tendered three exhibits, that is, video records for camera 3, 4 and 7. You must consider all the evidence together to find out whether or not the accused is guilty as charged.

I. SUMMARY

44. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
45. Your possible opinions are as follows:
- (i) Manslaughter – Guilty or Not Guilty

46. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.




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JUDGE

Solicitor for State
Solicitor for Accused

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Office of the Director of Public Prosecution, Suva.
N.Shivam, Barrister & Solicitor, Suva.