

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 261 OF 2015S

STATE

vs

- 1. JOSAI VUSUYA**
- 2. KELEPI SAMUTA QAQA**
- 3. TEVITA DAKUITURAGA**

Counsels : **Ms. S. Serukai and Ms. S. Tivao for State**
Ms. A. Tuiketeki and Mr. S. Vuki for Accused No. 1
Ms. T. Kean for Accused No. 2
Ms. E. Leweni for Accused No. 3

Hearings : **27 to 31 March, 3, 6, 7, 10 and 11 April, 2017**

Summing Up : **13 April, 2017**

Judgment : **18 April, 2017**

JUDGMENT

1. On 27 March 2017, in the presence of their counsels, the accuseds pleaded not guilty to the counts in the following information:

FIRST COUNT

Statement of Offence

MURDER: Contrary to section 237 of the Crimes Act No. 44 of 2009.

Particulars of Offence

JOSAIA VUSUYA, KELEPI SAMUTA QAQA and TEVITA DAKUITURAGA on the 18th day of July 2015 at Nausori, in the Central Division, murdered EPINERI WAQAWAI.

SECOND COUNT

Statement of Offence

ACT INTENDED TO CAUSE GRIEVOUS HARM: Contrary to section 255(a) of the Crimes Act No. 44 of 2009.

Particulars of Offence

KELEPI SAMUTA QAQA on the 18th day of July, 2015 at Nausori in the Central Division, with intent to cause grievous harm to SAVENACA NAITABA unlawfully wounded the said SAVENACA NAITABA by hitting his head with a beer glass.

2. The trial then went on before myself and three assessors for 10 days from 27 to 31 March, 3, 6, 7, 10 and 11 April 2017. I delivered my summing up to the assessors on 13 April 2017. They returned with a mixed opinion on Count no. 1, but were unanimous on Count no. 2. Assessors No. 1 and 3 found all 3 accuseds guilty as charged on Count no. 1. Assessors No. 2 found all accuseds not guilty as charged on Count no. 1, but found all guilty of the lesser offence of "manslaughter". On Count no. 2, all assessors unanimously found accused no. 2 guilty as charged.
3. The law at this stage of the trial is section 237(1) and (2) of the Criminal Procedure Act 2009, which reads as follows:
 - "...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.***
 - (2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...***
4. I had reviewed the evidence called in the trial, and I had directed myself in accordance with the Summing Up I gave the assessors on 13 April 2017. The assessors' verdict was not perverse. It

was open to them to reach such conclusion on the evidence. Assessors are there to assist the trial judge come to a conclusion on whether or not the accuseds were guilty as charged. The final decision on whether or not the accuseds were guilty as charged, rested with the trial judge, after considering the assessors' opinions: Ram Dulare, Chandar Bhan and Permal Naidu v Reginam [1956 – 57] Fiji Law Report, Volume 5, pages 1 to 6, page 3. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witness, I agree with the majority opinions of Assessors No. 1 and 3 that all accuseds were guilty as charged on Count no. 1. On Count no. 2, I agree with the unanimous guilty opinion of all three assessors.

5. My reasons were as follows.
6. I find Ms. Alesi Ranadi (PW3) to be the most credible witness in this trial. She was not related to any of the litigants in this trial. She was not related to the deceased and his brother Savenaca (PW1). Neither was she related to any of the accuseds. She had been selling BBQ foods 10 to 15 footsteps away from the crime scene for the past 10 years. She knew the area well, and she said street fights were a common occurrence there for the time she conducted her BBQ business from the area. When giving evidence, I found her to be a forthright witness, and was not evasive when cross-examined. Although she was emotional at times, this was to be expected when she witnessed a chain of events that led to a person's death.
7. I had summarized PW3's evidence in paragraph 37 of my summing up. She knew the deceased and Savenaca (PW1). She also knew the three accuseds. I accept her evidence that Kelepi and Tevita were attacking Epineri prior to Josaia joining the two on 18 July 2015. I accept PW3's observation and evidence that Josaia, by conduct, joined Kelepi and Tevita to jointly attack Epineri at the material time. This was when he threw a straight hard left punch on Epineri's right jaw, that fell him to the ground. I accept PW3's evidence that she saw Josaia, Kelepi and Tevita repeatedly stomped Epineri on the face and chest, repeatedly punched and swore at him, while he lay unconscious on the concrete ground. I accept PW3's evidence that Tevita hurt his knee as a result of his repeatedly stomping Epineri on the hard concrete drain and surface.
8. I had heard Josaia's evidence on what occurred, at the material time, from his point of view. He pleaded self-defence as a justification in assaulting Epineri, at the material time. However, I found Josaia not to be a credible witness. He was so evasive during cross-examination, that it was hard to get a straight answer from him on most questions. In a sense, he revealed himself

during cross-examination not to be a forthright witness. He was trying to “ram his self-defence view down our throats”, without enlightening us on other angles of the case by giving straight answers to questions. Even if we accepted his self-defence argument, he went over the top by applying excessive force to Epineri, when he repeatedly stomped on his face and chest, when he was unconscious on the ground.

9. As for the evidence of his brother, Mr. Sirino Vakatawa (DW3), I accept his evidence that he saw his brother Josaia throw a left hand punch at Epineri’s right cheek/jaw at the material time. I also accept his evidence that Tevita was standing behind Epineri at the time. I accept DW3’s evidence in cross-examination that Epineri did not attack Josaia with a broken beer glass. To some extent, in my view, DW3 was not a credible witness. In my view, he was there only to support his brother, and at times, was inconsistent on whether or not Epineri attacked Josaia with a broken beer glass. On the whole, DW3 was not an impressive witness.
10. Ms. Alesi Ranadi’s (PW3) view on Josaia punching Epineri and he joining Kelepi and Tevita repeatedly stomped on Epineri, while he was unconscious on the ground, appeared to be supported by other State witnesses. Her husband, Mr. Moape Batigai (PW4), was with PW3, at the material time. Both were selling BBQ food at the time. PW4 said, he also saw Josaia fell Epineri with a punch to his right jaw. PW4 said, he saw Josaia, Kelepi and Tevita repeatedly stomped Epineri’s head, chest and stomach while he was on the concrete ground. Mr. Pita Rabaka (PW2), who was at the crime scene at the material time, also saw what PW3 and PW4 saw. PW2 said, he saw Kelepi , Tevita and another person repeatedly stomping Epineri while he was lying unconscious on the ground, at the material time. Epineri’s brother, Savenaca (PW1), was at the crime scene, at the material time. PW1 said, he also saw Josaia, Kelepi and Tevita attack Epineri and repeatedly stomped on his chest and ribs, while he was unconscious on the concrete ground. I accept the evidence of PW1, PW2, PW3 and PW4 in that they saw the three accuseds attacking Epineri at the material time by punching and stomping him repeatedly.
11. Because of the above, I reject all accuseds’ version of events. I reject Accused No. 1’s version that he was defending himself at the material time. He was not a credible witness, and I reject his version of events on the self-defence issue. Even if I accept his view, in my view, he applied excessive force when he joined Kelepi and Tevita to repeatedly stomped and punch Epineri when he was unconscious on the ground. I reject Kelepi’s version of events. I also reject Tevita’s version of events. This was because of what PW1, PW2, PW3 and PW4 said.

12. As to the cause of Epineri's death, I accept Doctor James Kalougivaki's (PW7) evidence as highlighted in paragraphs 39 and 40 of my summing up. After looking at all the evidence, I make the following finding of facts:

- (i) That, at the material time, Kelepi and Tevita jointly attacked Epineri by repeatedly punching him. They were later joined by Josaia, who fell Epineri with a hard left punch to his right jaw. Epineri fell on the concrete ground. Josaia, Kelepi and Tevita then repeatedly stomped and punched Epineri, while he lay unconscious on the ground;
- (ii) That the abovementioned "wilful acts" by the three accuseds caused Epineri's death, when he died as a result of massive brain injuries arising out of the abovementioned "wilful acts",
- (iii) That all three accuseds, when repeatedly assaulting Epineri at the material time, were reckless as to causing his death.

13. Because of the above, I find the three accuseds guilty as charged on count no. 1 and I convict them accordingly.

14. On count no. 2, I accept Savenaca's (PW1) evidence as highlighted in paragraph 44 of my summing up. I find Accused No. 2 guilty as charged on count no. 2 and I convict him accordingly.




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JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Nausori.**
Solicitor for Accused No. 1 : **Ana Tuiketeki, Barrister and Solicitor, Suva.**
Solicitor for Accused No. 2 : **Legal Aid Commission, Suva.**
Solicitor for Accused No. 3 : **E. Leweni, Barrister and Solicitor, Suva.**