

IN THE HIGH COURT AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 154 OF 2014

STATE

-v-

SULIASI NASARA

Counsel: Mr. J. Niudamu with Ms. R. Uce & Ms. S. Naibe for State
Ms. S. Dunn for Accused

Date of Summing Up: 2nd June, 2017

Date of Judgment: 6th June, 2017

JUDGMENT

1. The Accused was charged with one count of Murder Contrary to Section 237 and one count of Aggravated Robbery contrary to Section 311 (b) respectively of the Crimes Act 44 of 2009.
2. The Information upon which the Accused was charged is as follows:

FIRST COUNT
Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

SULIASI NASARA on the 16th day of November 2014, at Lautoka in the Western Division, murdered NITIN NAVINESH KUMAR.

SECOND COUNT
Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (b) of the Crimes Act 2009.

Particulars of Offence

SULIASI NASARA on the 16th day of November 2014, at Lautoka in the Western Division, robbed **NITIN NAVINESH KUMAR** of Nissan Vanette Van Registration Number CG 638 valued at \$3000 belonging to Vijay Lakshmi and at the time of the robbery used an offensive weapon namely, a wheel spanner.

3. At the conclusion of the trial, Assessors unanimously found the Accused not guilty of Murder as charged and found him guilty of lesser offence of Manslaughter. On the second count, they unanimously found the Accused guilty of Aggravated Robbery.
4. I am unable to concur with the opinion Assessors have expressed in respect of the 1st count although I am in full agreement with their opinion on the 2nd count. Having directed myself with my own summing up, I proceed to give my reasons as follows.
5. The Prosecution called 11 witnesses to prove their case. At the close of the Prosecution case, Accused exercised his right to remain silent.
6. The Prosecution relies on confession made by the Accused to police in the caution interview (PE.11) and the charge statement (PE.12), and also on circumstantial evidence to prove the charges.
7. The Assessors have basically accepted the version of the Prosecution except as regards the malicious aforethought or *mens rea* of Murder. Assessors by their decision in finding the Accused guilty of Manslaughter have rejected the version of the Prosecution that Accused, at the crucial time, had been activated by a murderous intention or reckless as to causing the death of the deceased. Therefor, I will focus my discussion to explain as to why I do not agree with Assessor's opinion on the fault element of Murder. Since the Defence vehemently challenged the truthfulness of the caution interview at the trial, I would also give reasons as to why I decided to rely on confessions of the Accused.

8. The Accused had admitted in answer to question 61 of the caution interview that he struck a wheel spanner several times on the deceased's head until the deceased was found dead. Accused had also admitted that he, after having struck the deceased with a wheel spanner, took the vehicle CG 638 out of deceased's possession together with the radio fitted into the van. Basically he had confessed to both offences in the Information.
9. The Defence hotly challenged the truthfulness of confessions made to police on the basis that they were obtained against Accused's free will and also that they were fabricated by police officers.
10. During the course of the trial, I revisited my finding recorded after the trial within trial on voluntariness. I am satisfied that the confessions and admissions made in the caution statement and the charge statement are voluntary statements of the Accused.
11. I do not find any valid basis as regards the allegation that those statements were fabricated by police officers. It was alleged that caution statement was not given to the Accused for him to read before signing. According to the text of the caution interview, the Accused had made crucial incriminating statements on day one of the interview (19th November, 2014) and, from the record (Q. 84 to Q. 86), it appears that the Accused had been given ample time to read over the contents on the laptop before the hard copy was presented to him for signature. This position was reinforced by police witnesses who were involved in the interview process.
12. The name and the signature of the witnessing officer do not appear in the charge statement. The witnessing officer confirmed that he was present throughout the interview and said that he may have forgotten to place his signature in the charge statement.
13. The fact that a witnessing officer was not present during the charge will hardly strengthen the allegation of fabrication. As a matter of good practice, the presence of a witnessing officer is encouraged to ensure that the interviews and charging are conducted freely and fairly.
14. There is no evidence to suggest that police officers had an overt or ulterior motive to falsely implicate the Accused in this serious crime. Furthermore, Accused's statements, both caution interview and charge, contain a possible defence of self defence. If police officers had such a motive, I can't see why they should fabricate a story that will help the Accused to exculpate himself.

15. In view of the challenge raised by the Defence, I further delved into the issue of fabrication. In deciding whether the Accused had told the truth to police, I compared his statements with other types of evidence led in this trial.
16. In his caution interview, at questions 47 to 50, the Accused had informed police about his early morning meeting with the bowser attendant at Lale's Service Station. Accused had told the bowser attendant that he was working for a logging company. The bowser attendant, Mohammed Ali, in his evidence confirmed the caution statement of the Accused.
17. Defence contended that Ali is not a reliable witness because, prior to giving evidence in court, he had never mentioned to police that he had met the Accused again at the Natabua Remand Centre. Ali came to court as an independent witness. There is no reason why he should go and specifically inform police that he had met the Accused again in the remand centre.
18. Even if Ali's evidence were to be rejected completely, Prosecution witness Salote Volita's unshaken evidence is consistent with what the Accused had told police in his caution statement. The Accused had informed police at question No. 71 that he had arrived at KB Maharaj shop after the incident. Witness Salote Volita in her evidence confirmed that she saw the Accused at KB Maharaj shop shortly after she had seen the van being pushed to the drain by the Accused at Naviyago.
19. Witness Salote's evidence more or less corroborated the information that had been given by the Accused to police. When directing myself in accordance with Turnbull guidelines, I am satisfied that Salote had positively identified the Accused at Naviyago.
20. Salote is an independent witness. She is also related to the Accused and had no apparent reason to falsely implicate the Accused, her nephew, in this serious charge.
21. Pathologist's evidence in respect of head injuries noted on the deceased is also consistent with the Accused's account as to the manner in which the deceased had received injuries.
22. A radio and number of other items connected to the crime and Accused had been recovered by police on information provided by the Accused himself at the caution interview. The recovery of those items further confirms the truthfulness of his caution statement. Although the radio was not exhibited at the trial, it had been shown to the Accused at the interview (question 90). Some of the exhibits including a radio speaker, car radio, one handbag and a

scarf had been handed over to the exhibit writer by the investigating officer Tuitai. Witness Vijay Lakshmi had identified her radio at the Lautoka Police Station.

23. Having considered these pieces of evidence, I am satisfied that the contents of the caution statement and charge statement are truthful statements of the Accused. At the end of the day, the only inference that could be drawn from the facts proved by the Prosecution is that it is the Accused and nobody else is responsible for the death of the deceased.

24. Causation of death or the second element of the offence of Murder, namely, that Accused's willful act caused the death of the deceased was proved by the Prosecution. Pathologist confirmed that the injuries sustained by the deceased in itself had a low survival rate, less than 15-20%, even if he had been admitted to the Intensive Care Unit. PE 6 (photo 5) shows the amount of blood shed at the crime scene itself. Deceased had succumbed to his injuries within an estimated time frame of five hours post hospitalization. The Pathologist opined that the cause of death was extensive subarachnoid and subdural hemorrhage, basically severe traumatic head injury caused by blunt force trauma. I am satisfied that the injuries caused to deceased's head had resulted in his death or they had substantially contributed to his death.

25. I am also satisfied that the Prosecution had proved the fault element of Murder. Accused's Murderous intention, not to mention his recklessness, can be inferred from the circumstances established by evidence although Accused had stated in his charge statement that *"I admit that I killed, I did not mean to kill the Indian boy"*.

26. In his caution statement, the Accused had stated at Q 61:

"then I struck the wheel spanner again on his head, and I did this several times until he dropped to the ground and whilst he was on the ground motionless I struck his head again about three times with the wheel spanner".

27. According to above answer, Accused had used a wheel spanner, a kind of a solid blunt iron rod to attack the deceased. He had struck the wheel spanner several times until the deceased dropped to the ground. The strokes had landed on deceased's head, the most vulnerable part of the body. Whilst the deceased was on the ground motionless he had struck deceased's head again about three times with the wheel spanner. Accused took no effort to transport the deceased to the hospital and fled the scene in the van .

28. The pathologist said that the deceased had received severe traumatic head injuries caused by blunt force trauma. He opined that a high energy force would have been used to cause such an extensive damage. Upon external examination, pathologist noted multiple injuries over the back of the head and the top part of the head. These were deep tears of the skin that exposed the skull and a little bit of brain tissues. Three deep tears and a fracture of the skull were noted over the top of the head.
29. Upon internal examination, pathologist had noted extensive bruising under the fat of the skin. Numerous fragments were also noted over the top part of the head and towards the back. Upon the removal of the top of the skull (calverium), he noted extensive subarachnoid hemorrhage (bleeding within or underneath the second layer covering of the brain) and also pockets of subdural hemorrhage (bleeding underneath the first layer covering of the brain).
30. Before coming to the final conclusion as to the intent, the only issue to be resolved, in light of following answers he had given in the caution interview, is whether the Accused had exercised his right to self defence.

Q.56: Then what did you do?

A: I kept sitting inside thinking that he was staying in that house, but he kept forcing me to get off. I told him if I get off then he too should also get off and by this time we were swearing to each other and as soon as he got off he came around to my side and punched me on my face and I pushed him back.

Q.57: Then what happened?

A: Then this guy picked a stone and whilst coming for me he told me in the Hindi language... "ao ya maichod ajj tum marjai".

Q.58: Do you know the meaning of the words he told you?

A: Yes, it means "come here motherfucker today you'll die".

Q.60: Then what happened after that?

A: When I saw him coming for me with the stone I also looked around for something and that was when I got hold of the wheel spanner from the side of the driver's door. He threw the stone at me and missed and when he came for me I struck his chest with the wheel spanner, then he

tried to grab the wheel spanner from me and by this time we were moving towards the side of the house.

Q.61: *Then what happened?*

A: *He tried but couldn't and tried to punch me, then I struck the wheel spanner again on his head, and I did this several times until he dropped to the ground and whilst he was on the ground motionless I struck his head again about three times with the wheel spanner.*

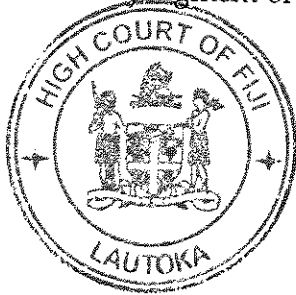
Q.62: *Then what did you do after that person was lying motionless on the ground?*


A: *I came to where the van was parked and just threw the wheel spanner back inside the van and sat in the driver's seat for a while trying to get over what I had just done. Then I drove the van back down towards the main highway and went towards Naviyago.*

31. Accused, in his caution statement, while admitting the commission of the acts, had stated that he acted in self defence. These statements can be described as 'out of court mixed statements' containing both confession and exculpatory assertions. Exercising their right to remain silent, Accused elected not to give evidence and therefore his excuse in his caution statements was not supported by evidence under oath. Therefore, this excuse does not have the same weight that I would attach to admissions in his caution statement. (See: *Findlay Duncan* (1981) 73 Cr. App.R. 7.7.1981, *Regina v Sharp* (1988) 86 Cr. App.R 274)
32. The Defence is rigorously challenging the voluntariness and truthfulness of these statements and accused's main defence would account for the falsehood or complete denial. Upon an inquiry before the Summing up, the Counsel for Defence specifically stated that she is not relying on the defence of self defence. The stance taken by the Defence Counsel comes as no surprise in light of the dilemma faced by an Accused running other defences which could only be weakened by the admission of his right of self defence.
33. Although I could not attach much weight to Accused's exculpatory statements, reliance on the above contents of the cautioned-interview by the Prosecution necessitated me to address the issue of 'self-defence' albeit this defence was not specifically raised by the Defence. Furthermore, there is no burden on the Accused to prove that he was acting in self defence and the Prosecution must prove, beyond reasonable doubt, that defendant was not acting in lawful self defence.

34. In *Pemble v. The Queen* [1971] HCA 20; (1971) 124 CLR 107, (High Court of Australia) Barwick CJ had at pages 117-118 emphasized that the fact that counsel for the defence did not rely on available evidence to take up a particular defence "*did not relieve the trial judge of the duty to put to the jury with adequate assistance any matters on which the jury, upon the evidence, could find for the accused.*" (emphasis added)
35. In the House of Lords decision of *Regina v. Coutts* [2006] 1 WLR 2154 [HL], Lord Bingham with whom the other Law Lords agreed, observed (at paragraph 23),:
- "The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support."*
36. Having considered above foreign authorities and also the Fiji Supreme Court Judgment in *Ram v State* [2012] FJSC 12; CAV0001.2011 (9 May 2012), I directed the Assessors at paragraphs 106 to 108 as to how they should approach the issue of self defence.
37. Even if I were to rely on Accused's exculpatory statement, and, even if the Accused had genuinely believed that he needed to defend himself, the force he had used had not been reasonable. His reaction was highly disproportionate to the nature of the alleged threat. Accused went way beyond what was needed to defend himself from the alleged threat offered by the deceased.
38. Accused had stated in Q 61:
- "He tried but couldn't and tried to punch me, then I struck the wheel spanner again on his head, and I did this several times until he dropped to the ground and whilst he was on the ground motionless I struck his head again about three times with the wheel spanner."*
39. In view of this statement, I find that the Accused had not lawfully exercised his right to self defence even if his exculpatory statements were to be relied upon by this Court. The inevitable conclusion that this Court can draw from these pieces of evidence is that the Accused, at the time of the attack, was activated by a murderous intention.

40. I accept the version of the prosecution, and reject that of the Defence and also the unanimous opinion of the Assessors on count one.
41. I find the Accused guilty of Murder as charged.
42. I agree with the unanimous opinion of the assessors on count 2 which is available on evidence led in the trial. I find the Accused guilty of Aggravated Robbery.
43. Prosecution discharged its burden and proved each element of counts 1, 2, beyond reasonable doubt.
44. I find the accused guilty on both counts and convict him accordingly.
45. That is the judgment of this Court.




Aruna Aluthge
Judge

On this 6th June, 2017
At Lautoka

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Accused.