

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 310 OF 2017S

STATE
vs
EPELI TALAKUBU

Counsels : Mr. E. Samisoni and Ms. J. Fatiaki for State
Mr. J. Rabuku for Accused
Hearings : 16, 17, 18, 21, 22 and 23 October, 2019.
Summing Up : 24 October, 2019

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 victims. 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 ISSUES

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
- (i) On count no. 1, did the accused, on 8 October 2017, at Nasinu in the Central Division, murder Masi Kalaro?
 - (ii) On count no. 2, did the accused, on 8 October 2017, at Nasinu in the Central Division, criminally intimidate Samuel Tabuavou?

E. THE OFFENCES AND THEIR ELEMENTS

9. The accused was charged with “murdering” Masi Kalaro on 8 October 2017, at Nasinu in the Central Division, contrary to section 237 of the Crimes Act 2009 (count no. 1). He was also charged with “criminally intimidating” Samuela Tabuavou on 8 October 2017, at Nasinu in the Central Division, contrary to section 375 (1) (a) (i) and (iv) of the Crimes Act 2009 (count no. 2). It was alleged that during a drinking party at Caubati on 8 October 2017, the accused caused the death of Masi Kalaro by stabbing him twice with a broken beer bottle, and intimidated Samuela Tabuavou by threatening to chop him with a chopper.
10. For the accused to be found guilty of “murder”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) that the accused did a willful act; and
 - (ii) that willful act caused the death of the deceased; and
 - (iii) at the time of the willful act, the accused either;
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.
11. On the first element of murder, a “willful act” is a voluntary act by the accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, if A assaults B in what manner whatsoever, A thereby did a “willful act” to B.

12. On the second element of murder, the “willful act must cause the death of the deceased”. This simply meant that the accused’s willful act, substantially contributed to the death of the deceased. The accused’s willful act must be a substantial contributor to the death of the deceased. In other words, the accused’s willful act was a substantial cause of the deceased’s death. Continuing from the above example, when A assaulted B, it caused serious injuries to the body of B, thereby resulting in B’s death. A’s assaulting B, set in motion a chain of events that led to B’s death, and as such, was a substantial cause of B’s death. B would not have died, but for A’s assault.
13. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 10 (iii) (a) and 10 (iii) (b). It would appear that the prosecution is running its case on both fault elements. It need only satisfy one fault element, to prove the charge of murder. We will therefore begin by discussing the first element, and then move on to the second fault element.
14. On the first fault element, the prosecution must make you sure that when the accused did “the willful act”, he “intended to cause the death of the deceased.” You cannot cut open the accused’s head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But you can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted him. If you find that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.
15. As for the second fault element of murder, the prosecution must make you sure that when the accused did “the willful act”, he “was reckless as to causing the death of the deceased”. A person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable

to take the risk. The question whether taking a risk was unjustifiable is one of fact for you. Was the accused aware of a substantial risk that the victim would die if he assaulted him? If he was aware of the substantial risk that the deceased would die if he assaulted him, and he nevertheless took the risk, he was reckless. If otherwise, he was not reckless.

16. If you find all the elements of murder, as described above, proved beyond reasonable doubt by the prosecution, then you must find the accused guilty as charged. If you find one of the above elements of murder not proved beyond reasonable doubt, then you must find the accused not guilty as charged.

17. If you find the accused not guilty of murder, you may in the alternative, consider the lesser offence of “manslaughter”. A person, as a matter of law, may be convicted of the lesser offence of “manslaughter”, although he was not formally charged with the same. The first and second element of “manslaughter” are similar to that of “murder”, as described in paragraphs 10 (i) and 10 (ii) hereof. The only difference between the two offences are their fault elements. In “manslaughter”, the prosecution must prove beyond reasonable doubt, the following elements:
 - (i) that the accused did a willful act; and
 - (ii) that willful act caused the death of the deceased; and
 - (iii) at the time of the willful act, the accused either;
 - (iv) Intends the willful act to cause the deceased serious harm; or
 - (v) Is reckless as to causing serious harm to the deceased.

Serious harm is any harm to the body of the person, that was considered serious. If you find the accused guilty of “manslaughter”, you may convict him accordingly.

18. For the accused to be found guilty of “criminal intimidation”, the prosecution must prove beyond reasonable doubt, the following element:
 - (i) the accused,

- (ii) Without lawful excuse,
- (iii) Threatens the complainant,
- (iv) With any injury to him, and
- (v) With an intention to cause him alarm,
- (vi) As a means of avoiding the execution of such threat.

19. The above offence is straight forward in its plain English meaning. It involved the accused threatening the complainant in any manner whatsoever. The accused must intend to alarm the complainant to such extent to enable him to avoid carrying out the threat. The accused, when doing the above, must not have any legal justification.
20. There are two counts in the information. You must consider them separately in the light of the total evidence presented at the trial, and come to a separate considered decision on each of them.

F. THE PROSECUTION'S CASE

21. The prosecution's case were as follows. On 8 October 2017, the deceased, Mr. Masi Kalaro (MK) was 41 years old, married with 3 children. The accused, Mr. Epeli Talakubu (DW1) was approximately 47 years old, previously married with 3 children. On 8 October 2017, DW1 was in a defacto relationship with MK's younger sister, Ms. Salasieli Molidagei (DW2). They had been together for the previous 8 years, and had a young son, Sevuloni, who was approximately 1 year 3 months at the time. MK's family and DW1's family live in Batiniwai Settlement, Caubati and are neighbors. They are also brothers-in-law and are very close to each other.
22. According to the prosecution, on 8 October 2017 (Sunday) before lunch, Epeli, his wife DW2, MK, Losalini, Alumecei, Kaminieli (PW2), Virisila and Samuela (PW1) were drinking liquor in Epeli's house. They started off drinking Woodstock liquor and then drank three cartons of long neck Fiji Gold beer. They were sitting on a rug in Epeli's house on the floor,

and were drinking using the “taki” style. According to the prosecution, the problem appeared to have started when Epeli’s young son, Sevuloni, was brought into the party by his mother, DW2. MK objected to the same, because the child might be exposed to cigarette and liquor smells. According to the prosecution, Epeli did not object to his son being present.

23. According to the prosecution, the male members of the drinking party were drunk. It was said that MK and Epeli began to head-butt each other. According to the prosecution, MK and Epeli wanted to fight each other. However, Samuela (PW1) stopped the two by separating them. MK went out of the house and later returned. When he returned, he went and got hold of a bucket which contained 6 or 7 full long neck bottles of Fiji Gold beer. According to the prosecution, Epeli tried to stop him, and took a bottle out of the bucket. According to the prosecution, he allegedly smashed the bottle on a table, and with the broken bottle allegedly stabbed MK twice on the left chest and the left neck. The stab to the chest allegedly severed an artery, leading to excessive blood loss, resulting in MK’s death at 5.35 pm on the same day. According to the prosecution, the accused allegedly intended to cause MK’s death, or was reckless in causing the same. After the above, according to the prosecution, the accused allegedly threatened to chop PW1 with a chopper, without any lawful excuse.

24. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged, on both counts. That was the case for the prosecution.

G. THE ACCUSED’S CASE

25. On 16 October 2019, the first day of trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charges. In other words, he denied the allegations 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 chose to give sworn evidence and called his wife (DW2) as a witness, in his defence. That was his right.

26. The accused's case were as follows. The accused (DW1) in his sworn evidence, admitted he was at the crime scene, his house, at the material time. He admitted, he was drinking liquor with his wife (DW2), the deceased (MK), MK's wife, Samuela (PW1), PW1's wife, Kaminieli (PW2) and PW2's wife, at the material time. DW1 said, it was a family drinking party. They started drinking after 11 am on 8 October 2017, a Sunday. DW1 said, the family enjoyed themselves while drinking. They were drinking using the "taki" style. They started off drinking Woodstock liquor and went on to drinking Fiji Gold. DW1 appeared to say that everyone was drunk as the party went on. DW1 said, MK went out the house, and brought in a neighbor, Aseri (DW3) to join them. DW1 said, MK went and brought his child to the party, and gave him to his wife (DW2).
27. According to DW1, the problem started when Samuela (PW1) kissed his baby, Sevuloni, and told him that Sevuloni would not be registered in DW1's "vola ni kawa bula", but in DW2's family's "vola ni kawa bula". DW1 appeared to say he was not happy with this and questioned PW1. He said, PW1 came and held his collar. DW1 said, at that particular moment, MK came and tried to take the bucket containing 6 long neck full bottles of Fiji Gold. DW1 appeared to say, he disagreed with MK's action, as he was the barman during the drinking party. DW1 said, he tried to stop MK take the bucket of beer bottles. DW1 said, he tried to grab the bucket, but instead grabbed a beer bottle from inside the bucket.
28. DW1 said, the beer bottle broke. DW1 said, at the same time, MK was bending down to pick up the bucket full of beer bottle. DW1 said, PW1 was still holding his collar. DW1 said, he suddenly raised both his hands up, apparently to stop MK taking the bucket of beer bottles. DW1 said, he didn't realize he was still holding the broken beer bottle. DW1 said, everything happened so fast, and he didn't realize that the broken bottle he was holding had struck MK in the left chest. DW1 denied stabbing MK in the left neck. DW1 denied threatening PW1 with a chopper. He denied threatening to kill PW1 with a chopper, at the material time. DW1 said, he did not intend to stab MK with the broken beer bottle, nor was

he reckless in stabbing MK with the same. DW1 said, the stabbing of MK, at the material time, was nothing but an accident.

29. Because of the above, the accused, is asking you, as assessors and judges of fact, to find him not guilty as charged on both counts. That was the case for the defence.

H. **ANALYSIS OF THE EVIDENCE**

(a) **Introduction:**

30. In analyzing 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 and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the Agreed Facts, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(b) **The Agreed Facts:**

31. The parties had submitted an "Agreed Facts", dated 26 February 2018. A copy of the same is with you. Please, read it carefully. There are 3 paragraphs of "Agreed Facts". Because the parties are not disputing the same, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt.

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

32. The State's case against the accused was based fundamentally on the evidence of three of the State's witnesses, that is, Samuela Tabuavou (PW1), Kaminieli Matayabone (PW2) and Doctor James Kalougivaki (PW5). You had watched the three witnesses give evidence. You had observed their demeanor and how they reacted to the questions thrown at them by the prosecution and the defence. I am sure the details of their evidence are still fresh in your minds. However, I will not bore you with the details of their evidence, but will concentrate on the salient points that touches on the issue of whether or not the

prosecution had proven the elements of the charge in count no.1 and 2 beyond a reasonable doubt.

33. We will discuss the offence of murder first. The 3 elements of murder were discussed in paragraphs 10 (i), 10 (ii) and 10 (iii) hereof. The prosecution must make you sure that “the accused did a willful act” first, before it can consider the second and third element of murder. On this issue, the prosecution relied on the verbal evidence of Samuela Tabuavou (PW1) and Kaminieli Matayabone (PW2). PW1 and PW2, according to the prosecution, were present at the crime scene, at the material time. It was not disputed by the parties that all were drinking liquor after 11 am to the time of the alleged incident at about 3 to 4 pm on 8 October 2017, a Sunday. So, the family drinking session had been going on for approximately 4 to 5 hours.
34. According to PW1 and PW2’s evidence, the problem appeared to have started with the bringing of Epeli (DW1) and Sala’s (DW2) child, Sevuloni, to the family drinking party. Sevuloni, at the time, was aged approximately 1 year 3 months old. PW1 said, Masi objected to the presence of the child, as he would be subjected to cigarette smoke and the smell of alcohol. Prior to this, PW1 and PW2 said, Epeli and Masi were head-butting each other. PW1 said, Masi suggested they go to his house, which was next door, to continue the drinking session. PW2 said, after head-butting each other, Epeli and Masi stood up to fight each other. PW1 said, he stood up to separate the two. PW1 said, he stood between the two and pushed them apart.
35. PW1 said, they were all drunk at the time. PW1 said, Masi then tried to pick up the bucket containing approximately 6 long neck bottles of beer. PW1 said, he saw Epeli picked up a long neck beer bottle from inside the bucket, smashed it on a table, and stab Masi twice with the same. PW1 said, he saw Epeli stab Masi on the left chest, and then on the left neck. PW2 said, he only saw Epeli stab Masi in the left chest, before he fled the scene as he was afraid.

36. If you accept PW1 and PW2's evidence that Epeli stabbed Masi on the left chest and neck, at the material time, then the prosecution had proven the first element of murder, and you may proceed to checking whether or not they had made you sure that the above stabbing caused Masi's death. If you reject PW1 and PW2's evidence on the above issue, then you must find Epeli not guilty as charged on murder (count no. 1).
37. On the second element of murder, you must take on board the directions I gave you in paragraphs 10 (ii) and 12 hereof. The issue is, whether or not Epeli's stabbing of Masi, as witnessed by PW1 and PW2, caused Masi's death. On this issue, you will have to consider very carefully Doctor James Kalougivaki's (PW5) evidence. On 9 October 2017, he did a post-mortem examination of the deceased's body. He prepared a report and submitted the same as Prosecution Exhibit No. 3. Please, read the post-mortem report carefully. In the report, the doctor said, the cause of Masi's death was excessive blood loss due to the complete cut to the major artery from the heart that supplied blood to the left side of the chest and left upper limb, due to sharp force or trauma. When questioned by the prosecution, the doctor said, that it was highly likely that the use of a broken beer bottle may amount to "sharp force injury or trauma".
38. In his evidence, the doctor said, "the impact of the sharp object, produced a large wound that has a significant depth. He said, "the force used to cause the above injury and/or trauma must be significant, that is, equivalent to a jab to the left upper chest. It would be a hard jab with the sharp object at the end of the jab". What you make of the doctor's evidence is entirely a matter for you. If you accept the doctor's evidence and find that Epeli's alleged stabbing of Masi caused his death, the prosecution would have satisfied the second element of murder, allowing you to consider the third element of murder. If otherwise, you will have to find the accused not guilty as charged. It is a matter entirely for you.

39. If the prosecution had made you sure that Epeli's alleged stabbing of Masi's chest caused his death, then you must consider the third element of murder. Please, take on board the directions I gave you in paragraphs 13, 14 and 15 hereof. The first question you have to ask yourselves become: Did Epeli intend to kill Masi when he allegedly stabbed him in the chest with a broken beer bottle? On this issue, you will have to examine Epeli's conduct at the time, that is, what he said and did, and the surrounding circumstances, to make reasonable inferences on whether or not he intended to kill Masi, at the material time. You have heard the details of Samuela (PW1), Kaminieli (PW2) and Doctor Kalougivaki's evidence of what allegedly occurred, Why the dispute over the child? Why the argument over the bucket of beer? Why the breaking of the beer bottle? Why didn't Epeli drop the broken beer bottle immediately? If you accept PW1's evidence, why smash the beer bottle on the table? If you accept PW1 and PW2's evidence, why stab Masi in the left chest? The answers to the above questions will tell you whether or not Epeli intended to kill Masi, at the material time. If you find that he did, the prosecution would have proven murder against the accused. If otherwise, you will have to find the accused not guilty as charged for murder. It is a matter entirely for you.
40. If you are sure Epeli did not intend to kill Masi, when he allegedly stabbed him in the left chest, you will have to consider whether or not, Epeli was reckless when he allegedly stabbed Masi in the left chest. On this issue, take on board my directions in paragraph 15 hereof. You will have to ask yourselves the following questions. Was Epeli aware of a substantial risk that Masi would die if he allegedly stabbed him in the left chest with a broken beer bottle? If he was aware of the substantial risk, did he nevertheless take the risk? If you accept PW1 and PW2's evidence, he allegedly took the risk. Was it unjustifiable to take the risk? Your answers to the above question will decide whether or not he was reckless when he allegedly stabbed Masi with a broken beer bottle. If you find he was reckless, the third element of murder would have been satisfied. If otherwise, the third element of murder was not satisfied. How you decide the above is a matter entirely for you.

41. If you find the prosecution had satisfied all the 3 elements of murder as described above, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.
42. On count no. 2, “criminal intimidation”, the State’s case rested entirely on Samuela’s (PW1) verbal evidence. You heard his evidence that when he was allegedly stopping Epeli and Masi from head-butting each other, and stopping them from fighting each other, PW1 said, Epeli got hold of a chopper and told him to stay away from him or he will chop him. PW1 said, he was alarmed as a result. PW1 said, he followed Masi out of the house as a result. If you accept PW1’s evidence, you will have to find the accused guilty as charged on count no. 2. If otherwise you will have to find the accused not guilty as charged. It is a matter entirely for you.

(d) **The Accused’s Case:**

43. I had summarized to you the accused’s case from paragraphs 25 to 29. I repeat the same here. On the issue of whether or not he stabbed Masi with the broken beer bottle, the accused, at first denied the same, but later admitted he stabbed Masi only on the left chest. He denied stabbing Masi, on the left neck. The accused, in his evidence, said the stabbing was accidental, in that, he did not intend to kill Masi. If you accept this evidence, then the third element of murder is not proven by the prosecution beyond reasonable doubt. Nevertheless, you will have to consider whether or not he was reckless in stabbing Masi on the left chest. This is in line with the prosecution’s case. However, if you accept he was not reckless when he stabbed Masi in the chest, you will have to find him not guilty of murder. It is entirely a matter for you.
44. Also, consider my directions in paragraph 17 hereof. If you consider the totality of the evidence supports a manslaughter conviction, you are entitled to find the accused not guilty or murder, but guilty of manslaughter. It is entirely a matter for you.

(e) The Need To Consider All The Evidence:

45. The prosecution called five witnesses:
- (i) Mr. Samuela Tabuavou (PW1);
 - (ii) Mr. Kaminieli Matayabone (PW2);
 - (iii) PC 1803 Keleto Kelekele (PW3);
 - (iv) Cpl 4310 Vodo Naqaravatu (PW4); and
 - (v) Doctor James Kalougivaki (PW5)

The prosecution tendered three exhibits:

- (i) Prosecution Exhibit No. 1 – Booklet of Photos;
- (ii) Prosecution Exhibit No. 2 – PW5's CV;
- (iii) Prosecution Exhibit No. 3 – Deceased Post Mortem Report

The defence called three witnesses:

- (i) Accused (DW1);
- (ii) Ms. Salacieli Molidegei (DW2)
- (iii) Ms. Aseri Rayasikula (DW3)

The defence tendered one exhibit:

- (i) Defence Exhibit No. 1 (a) – PW1 police statement dated 8.10.17 – handwritten
Defence Exhibit No. 1 (b) - PW1 police statement dated 8.10.17 – typed written.

46. You must consider the above evidence together. You must compare them and analyze them together. If I had not mentioned a piece of evidence you consider important, please take it onboard in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

47. 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.

48. Your possible opinions are as follows:

- | | | | |
|------|--|----------|------------------------|
| (i) | Count No. 1: Murder: | Accused: | - Guilty or Not Guilty |
| | Alternative, if not guilty of murder, manslaughter | | - Guilty or Not Guilty |
| (ii) | Count No. 2: Criminal Intimidation : | Accused: | - Guilty or Not Guilty |

49. 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 your decisions



Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused : **Mr. J. Rabuku, Barrister & Solicitor, Suva.**