IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 133 OF 2022

BETWEEN	:	**STATE**
AND	:	**TEVITA QAQA KAPAWALE**
Counsel	:	**Ms T Sharma & Mr E Samisoni for the State** **Mr T Ravuniwa & Mr E Veibataki for the accused**
Hearing	:	**14-17 & 27-31 January** **3-5 & 7 February 2025**
No case to answer	:	**21 February 2025**
Ruling	:	**18 March 2025**

RULING ON NO CASE TO ANSWER

[1] The accused is charged with five counts of murder, a count of attempted murder and a count of criminal intimidation in respect to events on 17 and 18 May 2021. He has pleaded not guilty to the offences.

[2] The trial commenced in January 2025. The prosecution called 15 witnesses and produced 58 exhibits. The Prosecution case is that 8 crew members left Suva on 8 May 2021 on a fishing vessel for an extended period at sea to catch fish. Five of the crew did not return and remain unaccounted for – none of the 5 have been sighted since about 17 May. The remaining 3 crew are the accused, PW1 and PW2. PW1 and PW2 lay the blame for the missing 5 crew at the door of the accused. The accused, in turn, blames PW1 and PW2.

[3] The accused was found floating in a raft and picked up by a naval boat on 20 May 2021. PW1 and PW2 were found floating in the sea and picked up by a fishing vessel on 21 May 2021. The evidence of PW1 and PW2 is that the accused attacked the crew with an axe on 17 May 2021 causing injuries to some while forcing others to jump overboard into the ocean without life jackets, about 100km from the nearest land, without any prospect of survival - none of the 5 bodies have been found. In short, the prosecution case is that the accused caused the deaths of the 5 missing crew. PW1 and PW2 also gave evidence that the accused either threatened harm or tried to do harm to them – they managed to survive by locking themselves in the fish hold and engine room. The boat sank on 21 May 2021 causing PW1 and PW2 to jump in the ocean with floating equipment and a flare – the flare alerted a passing boat to their presence in the water.

[4] In addition to the evidence of PW1 and PW2 the prosecution relies on admissions by the accused given to the police, to a reporter and to a friend of the accused. There is other evidence from the prosecution –from the employer of the 8 crew, naval officers, an air force officer from NZ, and family members of the missing crew to name a few.

[5] The prosecution has closed its case. The accused has made a submission of no case to answer. I have received detailed written and oral submissions for both parties.

[6] Section 231 of the Criminal Procedure Act 2009 reads:

> *(1) When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is* ***no evidence*** *that the accused person (or any one of several accused) committed the offence.*
>
> *(2) When the evidence of the witnesses for the prosecution has been concluded, the court shall, if it considers that there is evidence that the accused person (or any one or more of several accused persons) committed the offence, inform each such accused person of their right—*
>
> *(i) to address the court, either personally or by his or her lawyer (if any); and*
>
> *(ii) to give evidence on his or her own behalf; and*

(iii) to call witnesses in his or her defence...[1]

[7] The defence advance the following arguments in support of the application that there is no case for the accused to answer:

i. The test to be applied by this Court under s 231 is the two-pronged test used in the Magistrates Court, being, firstly, whether there is no evidence that the accused committed the offence and, secondly, if there is evidence whether it is so discredited that no reasonable tribunal could convict on it. If the Magistrates Court test applies here then the evidence of PW1 and PW2 is not credible and should be disregarded. Further, the admissions by the accused are unreliable and completely at odds with his denials in earlier police interviews.

ii. The absence of the five bodies of the alleged victims is fatal to the prosecution case as the prosecution cannot prove a vital element of the murder counts, being the death of each of the alleged five victims. The prosecution has failed to rebut the civil presumption that a missing person can only be declared dead after 7 years.

[8] The difference between the tests in the Magistrates Court and High Court was explained as follows by Shameem J in *Sahib v State* [2005] FJHC 95 (28 April 2005):

> *On the basis on this evidence, the learned Magistrate found a case to answer. She applied the correct test under section 210 of the Criminal Procedure Code, that is, whether on the prosecution case at its highest, a reasonable tribunal could convict. The test at no case stage in the Magistrates' Courts, is different from the test at no case stage in the High Court. The test in **R v. Galbraith** (1971) 73 Cr. App. R. 124 is two-pronged, first whether there is no evidence that the accused committed the offence, and second if there is evidence, whether it is so discredited that no reasonable tribunal could convict on it. In the High Court, only the first test applies because of the specific wording of section 293 of the Criminal Procedure Code (**Sisa Kalisoqo v. R** Crim. App. 52 of 1984; **State v. Mosese Tuisawau** Cr. App. 14 of 1990). In the latter case, the Court of Appeal said that in assessing whether there was "no evidence", the court was entitled to ask whether the evidence was relevant, admissible and inculpatory of the accused.*

[1] My emphasis.

In the Magistrates' Courts, both tests apply. So the magistrate must ask himself or herself firstly whether there is relevant and admissible evidence implicating the accused in respect of each element of the offence, and second whether on the prosecution case, taken at its highest, a reasonable tribunal could convict...

[9] Shameem J was considering the equivalent provisions in the previous Criminal Procedure Code. The wording of s 293 of the Criminal Procedure Code is, for all intents and purposes, the same as s 231 of the present Criminal Procedure Act. Both provisions require the High Court to be satisfied that there in **no evidence** that the accused committed the offences. Section 210 of the Criminal Procedure Code is identically worded to s 178 of the Criminal Procedure Act – both provisions require a Magistrate to be satisfied, before making any finding of no case to answer, '*that a case is not made out against the accused person sufficiently to require him [or her] to make a defence*'. The defence suggest that the removal of the assessor system in the High Court means that the test in the Magistrates Court for no case to answer now applies in the High Court - the defence rely on the High Court decision of *State v Rokotuiveikau* [2022] Cr. Case No. HAC 378/2019 (22 September 2022).

[10] The prosecution point out that, with the sole exception of the aforementioned decision, the High Court has continued to apply the first test only under s 231- the issue has not yet been considered by the Court of Appeal. For my part, I see no proper basis to depart from the test that has been applied by the High Court up to (and after) the removal of the assessor system. There was no amendment to s 231 when the assessor system was removed - as would be expected if Parliament intended the High Court to apply a different test under s 231.

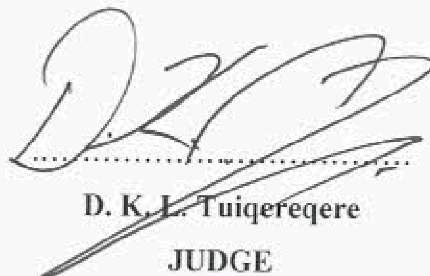
[11] As such, the following test is to be applied, when considering whether there is a case for the accused to answer, as noted by Goundar J in *State v Drugu* [2023] FJHC 782 (7 August 2023):

[4] The test for no case to answer under section 231 of the Criminal Procedure Act is narrow. The test is that there must be some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence (FICAC v Kumar [2010] FJHC 56; HAC001.2009 (11 February 2010)). The credibility, reliability and weight of the evidence are matters not to be considered at this stage (Sisa Kalisoqo v. State Criminal Appeal No. 52 of 1984, State v. Mosese Tuisawau Criminal Appeal No. 14 of 1990).

[12] The prosecution need only show there is some relevant and admissible evidence of each element of the offences charged against the accused. This is not the time in the proceeding to be considering the credibility and reliability of the evidence of the prosecution witnesses.[2] It suffices that the evidence of PW1 and PW2 is relevant and admissible – which it is, as are the alleged admissions by the accused.

[13] As for the argument that the prosecution cannot prove the accused's guilt for murder in the absence of the bodies, this plainly cannot be so. The civil presumption of death 7 years after going missing has no application in criminal proceedings. The prosecution may rely on circumstantial evidence to show that the alleged victims are dead so long as this evidence satisfies the evidential burden of beyond reasonable doubt.

[14] Accordingly, I am satisfied that there is some evidence that the accused committed each of the offences for which he is charged. There is a case for the accused to answer and he is, therefore, put to his defence.



D. K. L. Tuiqereqere
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the accused

[2] The proper time to do so is at the conclusion of the trial.