

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case Number: HAC 48 of 2011

BETWEEN : **THE STATE**

AND : **1. PURATAKE TAPOGE**
2. KITIONE VESIKULA
3. FILOMENE ULUIVITI

BEFORE : **HON. MR. JUSTICE PAUL MADIGAN**

Counsel : Mr. M. Mataiva for State
All accused in person

Dates of hearing : 2-6 August 20213
Date of Summing Up : 8 August 2013

SUMMING UP

- [1] Madam and Gentlemen assessors
- The time has come now for me to sum up the case to you and to direct you on the law involved so that you can apply those directions to the facts as you find them.
- [2] I remind you that I am the Judge of the Law and you must accept what I tell you about the law. You in turn are the Judges of the facts and you and only you can decide where the truth lies in this case. If I express any particular view of the facts in this summing up then you will ignore it unless of course it agrees with your view of that fact.
- [3] Prosecuting Counsel has addressed you on the facts but once again you need not adopt his view of the facts unless you agree with him. You will take into account all of the evidence both oral and documentary. You can accept some of what a witness says and reject the rest. You can accept all of what he or she says and you can reject

all. As judges of the facts you are masters of what to accept from the evidence.

- [4] You must judge this case solely on the evidence that you heard in this Court room. There will be no more evidence, you are not to speculate on what evidence there might have been or should have been. You judge the case solely on what you have heard and seen here.
- [5] In judging this case solely on the evidence produced in this Court and nothing else and you must use that evidence to apply it to the principles of law that I direct you on in this summing up as they apply to the crime of murder that these accused face.
- [6] I am not bound by your opinions but I will give them full weight when I decide the final judgment of the Court.
- [7] It is most important to remind you of what I said to you when you were being sworn in. The burden of proving the case against this accused is on the Prosecution and how do they do that? By making you sure of it. Nothing less will do. This is what is sometimes called proof beyond reasonable doubt. If you have any doubt then that must be given to the accused whose case you are considering and you will find him or her not guilty - that doubt must be a reasonable one however, not just some fanciful doubt. None of these accused have to prove anything to you. If however you are sure that each of these accused whose case you are considering, engaged in conduct which led to the death of the deceased, then you will find him or her guilty of murder or manslaughter.
- [8] Murder is made up of three elements each of which must be proved by the State to the required standard. These three elements are:
- (i) a person engages in conduct;
 - (ii) that conduct causes the death of another person;

- (iii) the person intends to cause the death, or is reckless as to causing the death of the other person by that conduct.

- [9] So conduct can be anything such as stabbing, strangling, poisoning, punching chopping etc., and if that conduct causes the other person to die, then the third element comes into play. The State in this case are saying that Take the first accused engaged in the conduct of chopping Iowane and that it caused his death. I do not think that you will have any trouble with the first two elements of murder. There is ample evidence that both Take and Kitone engaged in conduct (slashing with a knife and hitting with a piece of wood) that resulted in Iowane's death. The State is saying that they were not necessarily intending to kill him but they say in the alternative, that they were each nevertheless reckless in causing his death. Now a person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him, it is unjustifiable to take that risk. So in our case you must find proved that Take, the first accused engaged in conduct that caused the death and that he knew that there was a risk that what he was doing might kill him and also that he was not justified in taking that risk.
- [10] An alternative verdict to murder which is available for you to find, is guilty of the lesser offence of manslaughter. Manslaughter has the same first two ingredients of murder; that is to say that the accused engages in conduct which caused the death of another, but instead of the recklessness as to causing the death by his conduct, he just has to be reckless as to whether his conduct will cause serious harm to the victim.
- [11] So, what does this mean for us in this case? If you find that the conduct of either Take, the first accused or of Kitone, the second accused caused the death of Iowane, looking at their cases separately,

you must consider their respective intentions. If you think that either Take or Kitone intended to kill that person then he is guilty of murder. However if you think he didn't intend to kill, you must consider his recklessness in what he did. If you think that he was so reckless that there was every chance of death occurring by his actions, then he is guilty of murder; however if you think his recklessness extended only to the causing of serious harm to Iowane, then he is not guilty of murder but guilty of the lesser offence of manslaughter. It is all about the degree of the violence, and I think that the post-mortem evidence will help you here.

- [12] There are three accused in this case charged with murder. In order to make them jointly liable for the alleged murder of Iowane, the prosecution is relying on and running its case on the concept of "joint enterprise." "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence." In considering each accused, you will have to ask yourselves the following questions: Did each of them form a common intention with the others to attack the deceased? If so, when the deceased was allegedly murdered as a result of the violent attacks, was this a probable consequence of the common intention? If your answer to the above questions for a particular accused was yes, and you are satisfied beyond reasonable doubt that the elements to murder are satisfied, he's guilty of murder.
- [13] When a criminal offence is committed by 2 or more persons, each of them may play a different part, but if they are in it together as part of a joint plan or agreement to commit it, they are each guilty. The words "plan" or "agreement" do not mean there has to be any formality about it. An agreement to commit an offence may arise on the spur of

the moment. Nothing need be said at all. It can be made with a nod or a wink or a knowing look. An agreement can be inferred from the behaviour of the parties. So if they all set off to attack, carrying weapons, you might find that that is evidence of a plan to commit an offence. The essence of joint responsibility for a criminal offence is that each accused shared the intention to commit the offence and took some part in it (however great or small) so as to achieve that aim.

[14] The law goes further than that. The law says that if one of the participants in the joint enterprise carries out an act that was not originally planned, and if that act was a probable consequence of the enterprise, then they are all liable and responsible for that act.

[15] There is evidence that Kitione, the second accused, used the piece of wood to bash Iowane on the head and there is evidence from Kitione himself that he punched Iowane so hard that he fell to the ground. There is also evidence that Take, the first accused, used the cane knife to slash him on the head (although Take denies this) and we know that Iowane died of head wounds – then it is up to you whether you think the actions of Kitione or Take caused Iowane's death. If you think it did you must then decide whether in the joint enterprise, each of the accused (looking at them separately and in turn) would expect such recklessness to result in a death. If yes then each is guilty of murder but if not then the unlawful act and that act causing death, you may think that each is then guilty of manslaughter.

[16] Now all of this sounds terribly complicated and difficult but I am now going to sum up the evidence in the trial and when I have done that I will come back to the legal principles and try to put them in context for you.

[17] The first witness was a man who was walking with his son. He came across many drunken men in front of a shop. He followed three of

them (at a distance of about 20-22 metros). When they got to some houses, two ladies came out and one of them was pointing at one of the drunkards. Two of the men then ran away and the ladies ran after them. A "fat man with big hair" came out and "stiff-armed" one of the drunks hitting him in the chest. The drunk staggered and then fell to the ground. The man on the ground was then struck by the fat man who was using a piece of timber about 3" x 2", with light green paint on it. It was about 3.30pm. The fat man then ran after the two who had run away. The witness then saw a fat lady come out of the house to where the man was on the ground. She struck the man on the ground twice; he could hear the knife cutting through bone. He had a clear view and was about 15m away at this time. The fat man came back got the wood and struck the man again on the head. The witness then helped load the victim into a vehicle which he himself stopped. He noticed that blood was oozing from the head of the man.

- [18] PW2 was Petero. He had been drinking all day with a group of men including the deceased. In the early afternoon he and some of the boys were walking towards Tavuki and when he had passed Richard's house he looked back and saw Tima (Eramasi's daughter) following his friend Solomone. She was swearing at him and in her right hand she had a stone: in her left hand she was carrying a stick. PW2 told Solomone to run. He then saw a boy with big hair come out from the compound. He was holding on to something and hitting with it but the witness could not see what he was holding or who he was hitting. Iowane had been behind him and Solomone but he didn't know what had happened to Iowane after he and Solomone had run. PW2 knew Kiti from that compound and identified him in Court. He went to school with Tima and Filomena and he also identified Filomena (3rd accused) in Court. The man with big hair who looked like a Kioan person was not in Court. PW2 was sure that the big hair man had a cane knife and he hit "something" twice with it.

[19] PW3 was Paulini Suka who worked at the Taveuni Hospital. She had finished work at 4.30 and went to Wairiki to do some shopping. She had spent a long time in Taveuni and knew most of the people involved in the incident. When she was passing Eramasi's house she saw Kitione (2nd accused) run out from the house and pull a boy who was passing to the middle of the road. She saw punches thrown. She could see Iowane lying on the ground, near the drain. She was about 50 metres away. There was a big tree in the way so she couldn't see what Kitione was doing. She then saw Filomena (3rd accused) coming out of the house with a big knife. Another person was following her with a big stick. She was unable to see a lot of what was happening because of the tree but she did see Take, the first accused jump into the road with the same knife that Filo had brought out from the house. Take struck Iowane on the head once only. She had known Take for a while having passed his compound many times. She said he was fat and had big hair.

[20] I jump now to PW5, because he is another eye-witness. Iliavu Suka had been a neighbour of the Eramasi people. On the 28th July he was on his way home from training. He is the son of Richard and they were neighbours of the Eramasi children. He was able to identify all three of the accused in Court. When he was walking at about 5pm, he saw 2 drunken boys up ahead. He knew that they were from Tavuki. He then saw three more drunken youth passing Eramasi's house. One of these was Iowane, the deceased. When these boys got closer a fight erupted between them and Kitione, Filomena and Tima. It was a brawl with punching. Two of the boys ran away, leaving Iowane there. Tima was holding a stone. Kitione punched Iowane and he fell to the ground. Kitione then got a stick and beat Iowane with it. After that "the Kioan" boy was standing by Iowane. Filomena (3rd accused) brought a knife and gave it to the Kioan boy. The Kioan then used the knife to hit Iowane's head twice with the knife. This Kioan boy is Take the first accused. PW5 was about 10m away and his view was not

obstructed. He knew that a week before Kitione had got into a fight with some boys in the First Light Bar and Kitione had got hurt.

[21] We then heard from some Police witnesses who told us about the investigation into Iowane's death including the questioning of Kitione, the 2nd accused. The lady police constable (PW4) escorted Filomena when she was questioned and while she was in the cells. Filomena did not make any admissions when interviewed. Filo and Kiti were in different cells but they did manage to converse one day when the officer overheard Kitione telling Filo not to worry - that he would "take the burden." Madam and gentlemen, what you make of that evidence is up to you.

[22] One constable told us of how he collected the three accused from their house on the instructions of their father; they were taken to Taveuni Police Station where they were kept in safe custody.

[23] PW8, PC Daniele interviewed the second accused under caution. You have a copy of the record of that interview. If you think that the answers that Kitione gave in that interview are true, then they become evidence for you to accept or reject in the normal way. You will be aware of course that the version he gave in the interview and the version he gave in his evidence before us are different; in his evidence he says that he only punched Iowane and nothing more; to the Police he says that he punched and then subsequently he used the timber twice to hit Iowane, but he couldn't remember what part of the body he hit. Well, members of the Panel it is for you to decide which version you prefer.

[24] Similarly, Kitione made a statement to the Police when he was formally charged. He said that he struck him twice with the timber but didn't use the knife. Again this is evidence for you to accept or reject. I do have to tell you however as a matter of law that what he

says in that statement about the first accused is not evidence that you can take into account. Whatever somebody says in a Police interview is evidence against them alone and not anybody else, so I would ask you to ignore what he says about Take in his charge statement.

- [25] We heard in the Prosecution case from two medical witnesses, the Doctor at the Taveuni Hospital who saw Iowane when he was first taken in and from the Pathologist who told us more about the injuries that Iowane suffered and what was in his expert opinion the cause of death.
- [26] Dr. Sowane said he was notified at around 5pm that a patient had been brought in and needed his attention. He saw the patient and realised that he was not responding to his voice, there was blood coming out from his eyes and he suspected that the patient had a head injury. His face was swollen. He found a large laceration on the scalp as well as a "small rugged laceration with softness" near the first wound. He could not feel bone as he should have been able to do with a normal skull. He decided not to stitch the laceration because he suspected that there was internal hemorrhaging. He said that in his opinion the large laceration which was about 10cm long would have been caused by a sharp object such as a knife and the smaller area could have been caused by a blunt object. The patient was breathing, but noisily, and his blood pressure steadily fell until he succumbed after about 30 minutes.
- [27] The Pathologist gave evidence which you might find very helpful to decide issues in this case. The Dr. spoke about his Post Mortem Report that he had prepared after an examination of Iowane's body. He noted two head injuries. There was an 11cm deep cut over the head on the top right a cut so deep that it was exposing bone. There was in addition, and on the left side of the upper head a fracture of the temporal bone and parietal bone. There was extensive brain

haemorrhaging on the left side. He said that these injuries were marks of violence and that they were the antecedent causes leading to the cause of death which was the hemorrhages of the brain tissue.

[28] It is entirely a matter for you but you might find that these injuries which caused Iowane's death were caused either by blows from the cane knife and/or blows from the piece of wood.

[29] That Madam and Gentleman was the end of the prosecution case.

[30] You heard me explain to the accused what their rights were in defence and how they could remain silent and say that the State had not proved the case against them to the requisite standard or they could give evidence in which case they would be cross-examined. As you know all three of the accused elected to give sworn evidence.

[31] Now I must tell you that the fact that an accused gives evidence in his or her own defence does not relieve the State of the burden to prove their case to you beyond reasonable doubt. Even if you don't believe a word an accused person says, you must still be **sure** that he or she is guilty of the crime that he or she is charged with.

[32] The first accused, Take, said that he is 25 years old and that he comes from Kioa. He is married to Filomena, the third accused. On the 28th July he had been drinking all day with the second accused and some other men. In the afternoon they were told that there was a problem in that some of the Tavuki boys were coming to fight. Filo's elder sister Tima came to tell him. The Tavuki boys were outside swearing and were relieving themselves in public. He (1st accused) didn't do anything. He stayed inside. He came to know that evening that Iowane got injured somehow. He was told that Kitione had gone out and injured the boy, but he didn't know if anyone left the house that evening. He didn't see Kiti leave the house. Filo was home and

didn't leave the house. The Police came that evening and took them away. In cross examination when it was put to him that witnesses had seen him outside the house, he said that he didn't admit to anything.

[33] The second accused, Kitione, is 23 and a farmer. He immediately told the Court that he didn't hit anybody with the timber. He recognised the timber - he had seen it in their compound. On the 28th July, he was drinking beer and rum and he was drunk. The boys came from Tavuki and they were outside. Tima spoke to the boys and asked them why they were swearing. He knew these boys and Iowane always used to swear at people - even at his grandmother. Kiti saw Iowane throw a punch at Tima and then he threw a punch at Kiti. They then punched each other until he (deceased) fell down. Kiti then went after the other boys but came back and Iowane was still lying on the roadside. He then arranged for a vehicle to take Iowane to the hospital. He told the Police he had used the timber, just to get them off his back because they were pestering him. In cross-examination he admitted that he had had an argument with the Tavuki boys a week earlier.

[34] The third accused Filo gave sworn evidence. On the 28th when the boys were drinking she was at home, not drinking. She didn't know that the Tavuki boys were outside. She later got to know that one of them got injured. She knew Iowane because he was related to her mother and she used to see him at the shops. She has never seen the wood or the knife before: at that time they didn't have a cane knife. She never carried the knife to Take and she pointed out that a lot of the eyewitnesses were inconsistent.

[35] All three accused called one witness in their defence and she was Tima, the elder sister of Filo and Kiti. She said that on the 28th she had been sitting on the steps of the house when four boys from Tavuki

came along. Iowane was swearing and calling out their father's name. He had an unacceptable attitude. He unzipped his pants and relieved himself in front of her. She approached him and asked him why he was swearing and he then grabbed her by the collar and punched her chest. Kiti came and they started punching. Iowane fell to the ground and Kiti ran off after the other three boys. She never saw Kiti with the wood. She never saw Filo come out of the house and Take was not there.

[36] Madam and Gentlemen, you may think that this witness' evidence has less value than it could have had for the very reason that she had been sitting in Court throughout and had heard all of the evidence and was able to tailor her evidence accordingly. However that again is a matter for you.

[37] Well members of the Panel that was all the evidence and it is evidence that you must assess within the law as I have directed you. The law in this field is not easy and I will now try to break up your decision making to try to make it easier.

[38] Your first step will be to decide whether this is a joint enterprise between all three to assault Iowane. You will probably have no difficulty in deciding that Take and Kiti were acting together but it is for you to decide if Filo was "in on it." If you believe the evidence from Paulini and Iliavu that she had brought out the knife and had given it to Take, then you may well think that she was playing a part in the attack. Remember you can be a part of a joint enterprise no matter what part you play, large or small. She doesn't have to have had struck any blows or thrown any punches. If you think that she was not part of the attack then you will find her not guilty of anything.

[39] If you find that there was a joint enterprise between the three, then you will decide if Iowane's death was caused by any one of the

accused and if so then all three are guilty of either murder or manslaughter. It doesn't really matter who landed the killing blow and whether it was by knife or wood. If it is one of them who was responsible then they all are.

[40] Having decided that point, you will then go on to decide whether they are guilty of murder or guilty of manslaughter. If you think that the fatal blow was inflicted by the person who made it recklessly with no regard to whether death might ensue by it then it is murder; however if you think that the person who inflicted the fatal blow was only being reckless in doing very serious injury to Iowane then you will find each of them guilty of manslaughter.

[41] That is all I wish to say to you in this summing up. You will now retire and consider your opinions. You need not all be agreed on your opinions but it would be better if you are.

[42] When you return you will be asked individually three times (for the 1st, 2nd, 3rd accused) if you find him or her guilty of murder. If you think he or she is, you will say guilty. If you say not guilty, you will then be asked for your opinion on the offence of manslaughter.

[43] Please let a member of my staff know when you are ready with your verdict and I will reconvene the Court.

[44] You may now retire.

Paul K. Madigan
JUDGE

At Labasa
8 August 2013