

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 420 OF 2016S

STATE

VS

MARIANNE PREMILA DEVI

Counsels : Ms. J. Fatiaki and Ms. S. Lodhia for State
Mr. L. Qetaki and Ms. T. Kean for Accused

Hearing : 11 June, 2018

Ruling : 12 June, 2018

Written Reasons: 28th December, 2018

WRITTEN REASONS FOR VOIR DIRE RULING

1. The accused was charged with the following information:

“Statement of Offence

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

Particulars of Offence

MARIANNE PREMILA DEVI on the 17th day of November, 2016 at Sakoca, Nasinu, in the Central Division, with intent to cause the death of BAL KRISHNA NAIDU, set fire to the said BAL KRISHNA NAIDU, which caused his death on the 24th day of November 2016.”

2. During the pre-trial conferences, the prosecution indicated to the court that they would be applying for permission to use the hearsay statements of three prosecution's witnesses, to whom the deceased identified his attacker, on the day he was allegedly set on fire on 17 November 2016, before he died on 24 November 2016. They said, they were relying on the "res gestae" principle, which is an exception to the hearsay rule. The prosecution said, they were relying on the authority of **State v Mataiasi Ului & Others**, Criminal Case No. HAC 52 of 2014, High Court, Lautoka.
3. The defence objected to the prosecution's application, on the ground that, the intended statements were hearsay evidence. They relied on the authority of **State v Peniasi Tirikula**, Criminal Case No. HAC 105 of 2006, High Court, Suva.
4. The matter proceeded to a voir dire hearing on 11 June 2018. The prosecution called the three witnesses, whose hearsay statement, they would like declared as admissible evidence under the "res gestae" rule. The witnesses were Mr. Samuela Viviaturaga (PW1); PC 3712 Mr. Navnit Chandra (PW2) and Mr. Aseri Saurara (PW3).
5. Mr. Samuela Viviaturaga (PW1) said, he had known Mr. Bal Krishna Naidu (the deceased) for about 3 months prior to the alleged incident on 17 November 2016. He said, he lived in Sakoca Settlement near to the deceased's residence. He said, he had lived there for nearly 50 years. He said, he recalled the 17th November 2016, between 5 pm and 6 pm. He said, he was standing near the deceased's residence. He said, he heard and saw a man yelling. He said, he saw the man standing outside his house, on his porch and saw his body on fire. He said, the man had a black short on. He said, he ran to him to assist him. He said, he told the deceased's wife to bring a bed sheet for them to wrap the man's body with. He said, he later assisted the man to a taxi to take him to CWM Hospital. He said, the man's skin had peeled off from his leg, thigh, stomach and both arms. He said, he asked the man how he got burnt. He said, the man told him his wife poured kerosene on him and set him on fire. He said, the man spoke slowly and softly. He said, he later drove the man in a taxi to CWM Hospital. The man died 7 days later from his burn injuries.
6. PC 3712 Navnit Chandra (PW2), a police officer, was at the time based at Valelevu Police Station. PW2 said, while at Valelevu Police Station, he received a call from CWM Hospital that

one Bal Krishna Naidu was admitted at the hospital as a result of burn injuries. He was instructed by his superiors to attend to Mr. Naidu. He said, he went to CWM Hospital after 7.50 pm on 17 November 2016. He said, he was directed to the burns unit where he met Mr. Naidu. He said, he saw Mr. Naidu heavily bandaged from his neck, stomach, chest, thighs, legs and hands. He said, he spoke to Mr. Naidu in hindi. He said, he asked him "how he received his injuries?" He said, Mr. Naidu told him, "he was at home a bit drunk, then he had a fight with his wife, whereby his wife accused him of having an affair. His wife was very angry and later threw kerosene on him and later set him on fire." PW2 said, Mr. Naidu was not moving when he spoke to him, as he was in pain. PW2 said, Mr. Naidu was crying when he related the above to him. PW2 said, he later briefed his superiors about the above.

7. Mr. Aseri Saurara (PW3) next gave evidence. PW3 had worked for CWM Hospital 5 years prior to the 17 November 2016 incident as a staff nurse. On 19 November 2016, he was on duty at the burns unit where Mr. Naidu was a patient. At about 8.30 am, he attended to Mr. Naidu as he was in extreme pain. PW3 said, he gave him a morphine injection to relieve his pain. After a while, PW3 said Mr. Naidu's pain was relieved. PW3 said, he then asked Mr. Naidu, "how he got burnt?" PW3 said, he spoke to him in English. PW3 said, Mr. Naidu told him "his wife threw kerosene on him and lit the fire." PW3 said, Mr. Naidu was weak and sad at the time. PW 3 said, when Mr. Naidu told him the above, he saw tears coming out of his eyes and he spoke in a slow and weak tone. He was severely burnt from the neck down to the legs.
8. The law on this matter was best summarized by the headnotes to **R v Andrews** [1987]1 All ER, 513 to 521:

"The appellant and another man knocked on the door of the victim's flat and when the victim opened it the appellant stabbed him in the chest and stomach with a knife and the two men then robbed the flat. The victim was found some minutes later. The police were called and they arrived very soon after. The victim, who was seriously wounded, told the police that he had been attacked by two men, and gave the name of the appellant and the name and address of the other man before becoming unconscious. He was then taken to hospital where he died two months later. At the trial of the appellant for murder the Crown sought to have the victim's statement to the police admitted in evidence. The trial judge ruled the statement was admissible. The appellant was convicted of manslaughter. He appealed to the Court of Appeal, contending that the victim's statement was inadmissible under

the rule against the admission of hearsay evidence. The appeal was dismissed and the appellant appealed to the House of Lords.

Held - Hearsay evidence of a statement made to a witness by the victim of an attack describing how he had received his injuries was admissible in evidence, as part of the *res gestae*, at the trial of the attacker if the statement was made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with the event to preclude the possibility of concoction or distortion. In order for the victim's statement to be sufficiently spontaneous to be admissible it had to be so closely associated with the event which excited the statement that the victim's mind was still dominated by the event. If there was a special feature, e.g. malice, giving rise to the possibility of concoction or distortion the trial judge had to be satisfied that the circumstances were such that there was no possibility of concoction or distortion. However, the possibility of error in the facts narrated by the victim went to the weight to be attached to the statement by the jury and not to admissibility. Since the victim's statement to the police was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was thus no possibility of any concoction or fabrication of identification, the statement had been rightly admitted in evidence. The appeal would accordingly be dismissed (see p 514 *f to h*, p 519 *j* and p 520 *c to 521 a h*, post).

Ratten v R [1971] 3 All ER 801 applied.

R v Bedingfield (1879) 14 Cox CC 341 overruled."

9. Applying the above principles to the facts of this case, I will deal first with Mr. Samuela Vивиaturaga's (PW1) evidence. The deceased's statement to him that his wife threw kerosene at him and later set him on fire was certainly hearsay evidence. The deceased uttered the statement on 17 November 2016 and he died 7 days later as a result of his injuries. Can the statement be admitted as part of the *res gestae*? Was the statement made in conditions which were sufficiently spontaneous and sufficiently contemporaneous with his burning to preclude the possibility of concoction or distortion? Was the statement so closely associated with his burning which excited his statement that the victim's mind was still dominated by the burning? I would answer the above questions by saying yes. The deceased's statement to PW1 was made by a seriously injured man in circumstances which were spontaneous and contemporaneous with the attack and there was thus no possibility of any concoction or fabrication of identification, the statement should rightly be admitted in evidence. Mr. Naidu's mind was still dominated by his burning.

10. When the above principles are applied to Mr. Naidu's statement to PW2 and PW3, I would answer the same questions with a yes, although in PW2's case, it was made approximately 1 ½ to 2 hours after the event, and in PW3's case, 2 days after the event. When Mr. Naidu gave his statement to PW1, the man was seriously injured because of his burn injuries. He was bandaged from neck to toe, and he was continually in pain, presumably until his death on 24 November 2016. He was speaking slowly and in tears and was getting continuous morphine injection to relieve the pain. In my view his mind was still dominated by the burning incident. On the principles expounded in **R v Andrews** (supra), Mr. Naidu's statements to PW1, PW2 and PW3 as to the identity of his attacker ought to be admitted on the "res gestae" principle. I ruled so accordingly.

11. The above are my reasons for my ruling on 12 June 2018.




Salesi Temo
JUDGE

Solicitor for State : **Office of DPP, Suva**

Solicitor for Accused : **Legal Aid Commission, Suva**