

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 95 of 2016

STATE

V

ALIPATE NAIMOSO

SAIMONE TUCILA SNR

EPELI TUCILA

SAIMONE TUCILA JNR

Counsel : Mr. Meli Vosawale with Ms. Moira Konrote for the State
Ms. Shantel Hazelman for the 1st Accused
Ms. Vani Filipe for the 2nd Accused
Ms. Talei Kean for the 3rd Accused
Ms. Namrata Mishra for the 4th Accused

Dates of Trial : 5-9, 12-16, 19-23, 26-29 March and 3-6, 9 and 11 April 2018

Summing Up : 17 April 2018

Judgment : 19 April 2018

JUDGMENT

[1] As per the Information filed the four accused were charged with the following offence:

COUNT ONE

Statement of Offence

MURDER : Contrary to Section 237 of the Crimes Act No. 44 of 2009.

Particulars of the Offence

ALIPATE NAIMOSO, SAIMONE TUCILA SNR, EPELI TUCILA, SAIMONE TUCILA JNR on the 17th day of February 2016 at Nasinu, in the Central Division, murdered **SITIVENI JAMIE QALI**.

- [2] The four accused pleaded not guilty to the charge and the ensuing trial was held over 25 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by their unanimous decision, the three Assessors found the four accused not guilty of the charge of Murder. However, by a unanimous decision, the three Assessors found the four accused guilty of the alternative charge of Manslaughter.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the provisions of Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] The Assessors were directed that in order for the prosecution to prove the charge of Murder, they must establish beyond reasonable doubt that;
 - (i) the four accused;
 - (ii) on the specified day (in this case the 17th day of February 2016);
 - (iii) at Nasinu, in the Central Division;
 - (iv) engaged in a conduct; and
 - (v) the said conduct caused the death of Sitiveni Jamie Qali (the deceased); and
 - (vi) the accused intended to cause the death of Sitiveni Jamie Qali; or
the accused were reckless as to causing the death of Sitiveni Jamie Qali by their conduct.
- [7] The above individual elements were further elaborated upon in my summing up.
- [8] The Assessors were informed that in this case, the prosecution says that the offence of Murder was committed by joint offenders in prosecution of a common purpose, what

is commonly known as the principle of joint enterprise. The salient features of the principle of joint enterprise were then explained to the Assessors.

- [9] The Assessors were directed that if they find that the prosecution has failed to establish any of these elements in relation to the offence of Murder beyond any reasonable doubt; as an alternative, that they may consider whether the accused are guilty or not guilty of the lesser offence of Manslaughter, contrary to Section 239 of the Crimes Act, though the accused are not formally charged in the Information for that offence.
- [10] Accordingly, I explained to the Assessors the provisions of Section 239 of the Crimes Act.
- [11] Furthermore, the Assessors were directed that in order to prove Manslaughter, the prosecution must establish beyond any reasonable doubt that;
- (i) the four accused;
 - (ii) on the specified day (in this case the 17th day of February 2016);
 - (iii) at Nasinu, in the Central Division;
 - (iv) engaged in a conduct; and
 - (v) the said conduct caused the death of Sitiveni Jamie Qali (the deceased); and
 - (vi) the four accused persons intended the conduct will cause serious harm to the deceased; or
- the four accused persons were reckless as to the risk that the conduct will cause serious harm to the deceased.
- [12] The above individual elements were further explained in my summing up.
- [13] The salient features of the principle of joint enterprise in relation to the offence of Manslaughter were then explained to the Assessors.
- [14] At this juncture I thought it appropriate to explain to the Assessors on the principle of withdrawal or abandonment of the joint enterprise. They were informed that the law is quite clear that any withdrawal from participation must be effective before further offences are committed.
- [15] It was explained to the Assessors that if they find that one or more of the accused withdrew or abandoned the joint enterprise, then he would be responsible or liable only for his individual acts.
- [16] In determining what offence, if any at all, that accused would be responsible for committing, as an alternative, the Assessors were directed that they were allowed to look at the lesser offence of 'Assault Causing Actual Bodily Harm' to Sitiveni Jamie

Qali, in terms of Section 275 of the Crimes Act, though the accused is not formally charged in the Information for that offence.

[17] The Assessors were directed that in order to prove the offence of Assault Causing Actual Bodily Harm, the prosecution must establish beyond any reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (in this case the 17th day of February 2016);
- (iii) at Nasinu, in the Central Division;
- (iv) assaulted Sitiveni Jamie Qali; and
- (v) thereby caused actual bodily harm to the said Sitiveni Jamie Qali.

[18] The above individual elements were further elaborated upon in my summing up.

[19] In support of their case, the prosecution led the evidence of the following witnesses:

1. Abjit Singh
2. Detective Sergeant (Sgt) Jemesa Lave
3. Waisea Nasili Waqatabu
4. Taniela Tadulala
5. Detective Constable 4232 Raj Avinesh Prasad
6. Dr. Josese Rakuita
7. Detective Constable 4344 Amani Bosenawai
8. Detective Constable 3751 Isoa Vakaciwa
9. Detective Corporal 3154 Aliko Taria
10. Detective Constable 3372 Ame Raogo
11. Detective Constable 4509 Mesulame Narawa
12. Dr. James Kalougivaki
13. Woman Detective Constable 4234 Vani
14. Detective Constable 4791 Jone Tupua
15. Corporal 3464 Vilikesa Gasaudra
16. Dr. Losena Natuva
17. Dorotea Davele

[20] The prosecution also tendered to Court Exhibits which were marked as PE 1, PE 2A, PE 2B, PE 3A, PE 3B, PE 5A, PE 5B, PE 6A, PE 6B, PE 6C, PE 6D, PE 7A, PE 7B, PE 8, PE 9 and PE 10.

[21] All four accused gave evidence in support of their case.

[22] Waisea Nasili and Taniela Tadulala are two eye-witnesses to the incidents which took place in the evening of 17 February 2016, at the Mobil Service Station at Nakasi. The

first part of the incident relates to the exchange of blows between Sitiveni Jamie Qali (the deceased) and the 1st Accused. This part of the incident has been captured in the CCTV footage (PE 1 and PE 10) from approximately 8.03.40 to 8.05.50 on Camera 4. The deceased and the 1st Accused fought each other twice – firstly from 8.03.40 to 8.04.05 at which point the two of them went out of frame and secondly from 8.05.26 to 8.05.50.

- [23] The second part is the incident which took place from approximately 8.07.00 onwards, and has been captured in the CCTV footage on Camera 5. When shown the footage Waisea Nasili, confirmed that at 8.07.05, the 1st Accused is in the frame and was punching the deceased. However, he does not identify the other three accused.
- [24] However, Taniela Tadulala clearly refers to the involvement of 2nd, 3rd, and 4th Accused. At the outset the witness testified to the first part of the incident which related to the exchange of blows between the deceased and the 1st Accused, inter-alia, as follows:

- (i) *On 17 February 2016, around 6.00 in the evening he had returned from playing touch rugby. He had gone and bought juice and was sitting at Carpenters drinking the juice. He was sitting facing the main road. The Mobil Service Station was about 15 meters away on the right.*
- (ii) *After a while some of his friends had joined him. He had been having a conversation with his friends for about half an hour. His friend Inoke (also known as Ritova was also with him at the time).*
- (iii) *After a while, the deceased, Sitiveni had come walking. Inoke had followed him. They were going towards the Mobil Service Station. Then he had seen, the deceased talking with the 1st Accused. He had thought that they were swearing at each other. The deceased had come and touched the 1st Accused. The witness demonstrated how this happened. Then the deceased threw a punch at the 1st Accused. The 1st Accused defended himself because the punches were coming right onto his face. The 1st Accused also punched the deceased back in self-defence. The deceased had fallen down. After that he got up and was walking around the Mobil Service Station. "He was not satisfied".*
- (iv) *At this point in time, the witness had stood up and gone closer to see clearly what was happening. The deceased kept on calling the 1st Accused. The 1st Accused did not respond. The deceased went and started punching the 1st Accused. After that he had seen them fight again. The deceased fell down and the 1st Accused was punching him again. The 1st Accused saw the deceased lying on the ground, he just left him there and went. The deceased stood up and left. The witness*

testified that the deceased really did not leave the place, because he was still not satisfied.

[25] Thereafter, the witness Taniela testified to the second part of the incident, inter-alia, in the following terms:

- (i) *.....The deceased stood up and had gone around the gas station (towards the Suva side). The witness had then moved closer to the service station. The witness testified that after a while he saw the father and sons, the 2nd, 3rd, and 4th Accused, come running towards the service station. They had come running towards the deceased. The deceased was trying to flee, but it was too late.*
- (ii) *He had then seen them punching the deceased. He had seen the 2nd Accused who had thrown the first punch at the deceased. The deceased had blocked his face and his whole body (like he was cuddling/in a curled position). The witness himself had gone and kicked the deceased once on his thigh.*
- (iii) *The witness testified that the 3rd and 4th Accused kept punching the deceased. When asked as to whether he recalls how many punches they threw on the deceased, the witness said four each. These punches had landed on the deceased's stomach, face and head.*
- (iv) *The deceased was trying to breath but he could not. He was breathing slowly. The deceased kept swerving. The 2nd, 3rd, and 4th Accused kept on punching him. After that they stopped for a while as they were concerned for the deceased.*

[26] The witness was then asked the following questions to which he responded as follows:

Q. *What position (posture) was the Siti (the deceased) when the punches were landing on him?*

A. *He was looking for life. He was lying down.*

Q. *When the two brothers were landing the 4 punches, what position was Siti?*

A. *He was leaning on the car.*

Q. *When then, did he fall to the ground?*

A. *With the first punch that landed on him, he fell to the ground.*

Q. *Do you know who threw the first punch?*

A. *Their father.*

.....

- Q. *Who threw the first punch on Siti?*
- A. *Their father.*
- Q. *What happened to Siti?*
- A. *He sat down. The two brothers came and they were punching him also.*
- Q. *What else did they do?*
- A. *He was punched and kicked on his head.*
- Q. *Who was kicking Siti on the head?*
- A. *Saimoni Tucila Junior (4th Accused).*
- Q. *Who did you see punched Siti on the head?*
- A. *Saimoni Tucila Junior (4th Accused).*
- Q. *How many kicks did you see land on Siti's head?*
- A. *3 or 4.*
- Q. *How many punches did you see landed on Siti's head?*
- A. *4.*
- Q. *What was Epeli Tucila (3rd Accused) doing when Siti sat down and was being punched by the 4th Accused on the head?*
- A. *He was also punching.*
- Q. *What was Epeli Tucila (3rd Accused) doing when Siti was being kicked on the head by the 4th Accused?*
- A. *He was also punching Siti.*
- Q. *Can you demonstrate how the 4th Accused was kicking Siti's head?*
- A. *It was not kicks but stomps.*

[27] Dr. James Kalougivaki had conducted the post mortem examination on the deceased. The Post Mortem Examination Report of the deceased, was tendered to Court as Prosecution Exhibit PE 8.

[28] The doctor explained in detail the external injuries found on the deceased's body. Injuries were found on the face, chest and right posterior shoulder. The doctor testified that some of the causes for the bruising, swelling, and abrasions found on the face was due to blunt force trauma. Blunt force trauma is basically injuries caused by a blunt object, which can range from a fist to a foot, baseball club etc. As to what degree of force was needed for such bruising, swelling and abrasions to be present, the doctor said, "There are a varying degrees (of force). The deeper the bruise, the higher the level of energy or force of the blunt force object (was required)". The doctor said that the

injuries on the chest and right posterior shoulder of the deceased could also be caused by blunt force trauma.

- [29] The witness explained further the corresponding internal injuries found on the body of the deceased, namely on the head, which comprises of the scalp, face, skull, meninges and brain. As to the degree of force needed to cause such injuries, the doctor said "You require multiple blows – these blows should be high energy blows – a knock-out punch". These high energy blows could include, stomps and kicks as well.
- [30] When asked as to what would be the likely reaction or what would happen to a person who has received such injuries. The doctor explained that the most or highly likely reaction would be a person losing consciousness. It is also highly likely that the person can have a fatal outcome after the injury (someone dying).
- [31] In his opinion Dr. Kalougivaki concluded that the cause of death was due to:
- (a) Severe Traumatic Brain Injury and Extensive Sub-arachnoid Haemorrhage;
 - (b) Severe Traumatic Head Injury;
 - (c) Multiple Traumatic Injuries;
 - (d) Blunt Force Trauma;
 - (e) History of Assault.
- [32] Considering the totality of the evidence in this case, I am of the opinion that the injuries which substantially contributed to the death of the deceased would have occurred during the latter incident, which took place from 8.07.00 onwards. I am also of the opinion that during the course of that incident, although the 1st Accused is seen dealing a punch towards the deceased (at 8.07.05), immediately thereafter he clearly withdrew or abandoned the joint enterprise that the other accused were continuing in. Therefore, the 1st Accused would only liable for his individual acts.
- [33] In the case of *State v. Rasaqio* [2010] FJHC 284; HAC 155 of 2007 (5 August 2010), His Lordship Justice Madigan held "The law is quite clear that any withdrawal from participation must be "effective" before further offences are committed".
- [34] Justice Madigan referred to the classic test of withdrawal which was expounded by Sloan J.A in *R v. Whitehouse* [1941] 1 WWR 112 (from the Court of Appeal of British Columbia) when he said:

"After a crime has been committed and before a prior abandonment of the common enterprise may be found by a jury there must be, in my view in the absence of exceptional circumstances, something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. Where practicable and reasonable there must be timely communication of the intention

to abandon the common purpose from those who wish to dissociate from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that it will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw."

- [35] As to the CCTV footage, the Defence states that there was an extended version of the footage, up to the point where the Police arrived at the scene and loaded the deceased into the Police vehicle. The Defence position is that the Police officers threw the deceased into the vehicle and whilst doing so, the deceased's head struck the door of the Police vehicle. The defence position is that the police action could have substantially contributed to the injuries caused on the deceased's head.
- [36] The prosecution witnesses have clearly denied that the Police officers threw the deceased into the vehicle and whilst doing so, that the deceased's head struck the door of the Police vehicle. In any event, this position was not put to the Pathologist, Dr. James Kalougivaki, to ascertain from him whether the injuries on the head of the deceased could have been caused by such an act.
- [37] The defence also takes up the position that the 2 kicks given by Inoke (also known as Ritova) on the head of the deceased (at 08:03:47 and 08:03:50 of the footage) could have substantially contributed to the injuries caused on the deceased's head.
- [38] There is no doubt that Inoke kicked the head of the deceased twice, as depicted in the CCTV footage, and also testified to by Taniela Tadulala.
- [39] In this regard, Dr. James Kalougivaki was asked the following question in cross examination:

Q. *If a person was lying on the ground, with his hands over the head, and if another person was to give 2 kicks to the head to the extent that his flip-flop falls off, in your opinion would you agree that this would cause serious injury to the brain-and the kicks are one after the other?*

A. *Yes it is highly likely that such kicks in repetition could cause the injuries (on the head) as seen in the examination and read in the report.*

- [40] In re-examination the Doctor clarified as follows:

Q. *Can you clarify as to what degree of force needed to be exerted in order for the injuries to the brain to be found in your examination?*

A. *You would need significant amount of high energy blunt force trauma.*

Q. *When it was suggested that the person who gave these kicks, had his flip-flop falling off. The flip-flop falling off from a person's feet would that be a sign or an indication of the force used or was it (could it be) just co-incidental?*

A. *I am not in a position to answer that question.*

Q. *Please clarify the types of injuries that could be present from the two kicks on the head?*

A. *It is highly likely to cause severe traumatic brain injury and extensive sub-arachnoid haemorrhage. A kick can be with higher energy than a punch.*

Q. *If such kicks were inserted with such force what could be expected of a person receiving those kicks or what could be the outcome of the injuries?*

A. *As I have mentioned it is likely to cause severe traumatic brain injury and extensive sub-arachnoid haemorrhage, plus loss of consciousness, plus disorientation- not able to be cognitive or cohesive.*

[41] However, soon after receiving these kicks the deceased had stood up and walked, as also depicted in the CCTV footage, and testified to by Taniela Tadulala. Therefore, considering the medical evidence available in this case, it is my opinion that it was unlikely that these 2 kicks dealt by Inoke could have substantially contributed to the injuries caused on the deceased's head.

[42] In this case the prosecution was also relying on the admissions made by the four accused in their caution interview statements. The Defence submits that the caution interview statements were fabricated. However, considering all the circumstances of this case, I find that it is not required for Court to decide on this matter, as there is other cogent evidence in the case for Court to make its determination.

[43] From all the circumstances of this case it is clear from the conduct of the 1st, 2nd, 3rd, and 4th Accused that they did not have the intention to cause the death of the deceased nor were they reckless as to causing his death by their conduct.

[44] In the circumstances, I agree with the unanimous opinion of the Assessors in finding the four accused not guilty of Murder.

[45] In this case, by a unanimous decision the Assessors have found the four accused guilty of Manslaughter. This means that they have believed the evidence of the prosecution

witnesses as truthful and reliable in respect of proving the said charge. Therefore, it is clear that the Assessors have rejected the evidence of the accused in this regard.

[46] In my view, the Assessor's opinion is justified in respect of the 2nd, 3rd, and 4th accused. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the unanimous opinion of the Assessors in finding the 2nd, 3rd, and 4th accused guilty of Manslaughter.

[47] In conclusion, considering the totality of the evidence presented before this Court, it is my considered opinion that the prosecution has proved beyond any reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Manslaughter against the 2nd, 3rd, and 4th accused.

[48] In the circumstances, I find the 2nd, 3rd, and 4th accused guilty for the offence of Manslaughter, in terms of Section 239 of the Crimes Act. I find the 1st Accused guilty for Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act.

[49] Accordingly, I convict the accused as follows:

1st Accused- For Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act.

2nd, 3rd, and 4th Accused- For Manslaughter, in terms of Section 239 of the Crimes Act.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Dated this 19th Day of April 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.