

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 119 of 2015

STATE

V

PAULIASI NAUASARA

Counsel : Mr. S. Babitu for the State.
: Ms. V. Narara with Ms. P Reddy [LAC] for the
Accused.

Dates of Hearing : 27, 28 September, 01, 02 October, 2018
Closing Speeches : 03 October, 2018
Date of Summing Up : 04 October, 2018
Date of Judgment : 05 October, 2018

JUDGMENT

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

MURDER: contrary to section 237 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PAULIASI NAUASARA, on the 25th of June, 2015 at Lautoka in the Western Division murdered **MICHAEL SEMITI OSBORNE**.

2. The three assessors had returned with a unanimous opinion that the accused was not guilty of murder but guilty of manslaughter.
3. I adjourned overnight to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called seven (7) witnesses and the accused gave evidence for the defence.
5. Albert Pickering informed the court that on 21st March, 2015 at about 3pm he was drinking liquor with the deceased and the accused at the multi-purpose court. After a while the witness went to sleep at the back seat of the car belonging to the accused. At this time the accused was not around.
6. The deceased drove the car to drop the witness home. They were accompanied by Aporosa as well. On their way to Natabua three others namely Teu, Warren and Pado joined in. After buying some more drinks they all went in the car to Field 40.
7. By this time it was almost 7pm. At the Oriana junction the deceased stopped the car to turn around. The accused came in a twin cab and stopped behind the car driven by the deceased. The accused came and gave the deceased two (2) punches on the side of his face whilst the deceased was sitting in the car. At this time the deceased knocked out. The witness saw this since he was sitting in the back seat of the car in the middle.
8. The accused pulled the deceased out of the car, the deceased did not do anything, and was thrown on the road. The accused stood on the deceased head and was punching the deceased, by this time the witness was standing at the back of the car. The deceased and the accused were about 5 or 10 meters away from the witness.

9. The witness clearly saw what was happening, although it was dark the stomping and punching to the head of the deceased was done by the accused under the street light.
10. The accused was punching and stomping at the same time. The witness recalled 10 or more punches were thrown by the accused. The witness demonstrated what he saw in court.
11. At the time the accused was stomping and punching the deceased he was shouting "mortuary", "mortuary", the deceased was lying on his stomach facing down.
12. The witness shouted at the accused to stop, the accused left the deceased and ran after him, the witness tried to defend himself but fell in the process. The person who had come with the accused came and stopped the accused. The accused was wearing a vest, shorts and canvas, the person with the accused was James a school mate of the witness. The accused again ran to the deceased and started hitting him by kicking and punching on the back of his head.
13. The deceased was unconscious the witness described the punches and kicks as heavy punches and kicks. The witness then begged James to stop the accused otherwise the victim will die because of the repeated punching to the head. According to this witness the deceased was smaller and slimmer than the accused in physical appearance.
14. James went and pulled the accused away. Both then went away in the twin cab they had come. The witness went to the deceased and turned him over. He could not recognize the deceased since his mouth and face were swollen he was struggling to breathe, blood was coming out of his nose and mouth. The deceased was still

unconscious. The witness found a van, with the help of Warren and Pado they took the deceased to the hospital.

15. Warren Pickering said on 21st March, 2015 at about 7.40pm he was at the Oriana junction, before going to Field 40, the witness was picked from Natabua junction by the deceased, who was accompanied by Albert, Varo, Poasa and Aporosa in a black car.
16. At the Oriana junction the deceased stopped the car. The accused came and punched the deceased twice on his face and dragged the deceased out of the car. The accused punched, kicked and stomped the deceased on his face and head. There was a streetlight which was dim. This witness also informed the court what PW3, Albert Pickering had told the court except this witness did not say anything about the accused running after Albert and then going to punch and kick the deceased again. This witness said he was present at the scene where the accused had assaulted the deceased.
17. Eminoni Varo said on 21st March, 2015 he left his home to buy 6 bottles of beer, after drinking with Teu whilst heading home he saw a car parked at Natabua Park. The witness joined in, Albert was sitting at the back seat, Teu was in the front passenger seat, they picked Aporosa also known as Bond on the way.
18. From Natabua they went and bought 4 bottles of beer, on the way they picked Warren. At the Oriana junction the deceased stopped the car. The accused came without saying anything threw two (2) or three (3) punches on the side of the deceased face. The witness then saw the deceased was unconscious since the head of the deceased had tilted back on the seat and he was not moving after the punches.

19. When the deceased got punched Teu opened the door and ran away. Albert and Warren opened the door and went to the driver's side. Aporosa was sleeping.
20. The accused opened the door and dragged the deceased out of the car. After getting out of the car he saw the accused punching, kicking and stomping the deceased on his face and body. This witness told the court similar to what Albert Pickering (PW3) and Warren Pickering (PW5) had informed the court.
21. The eye witnesses Albert, Warren and Varo who had witnessed the assault mentioned that when the accused was assaulting the deceased he was yelling "mortuary", "mortuary". This aspect of the prosecution evidence was not disputed by the accused in cross examination.
22. Dr. Poonam Pala on 21st March, 2015 was at the Lautoka Hospital Emergency Department she was the receiving doctor. The victim who was unidentified at that time was brought to the Emergency Department he was unconscious and bleeding from his mouth and nose and clearly had a deformed and fractured jaw.
23. After the victim was stabilized he was admitted to the intensive care unit. The doctor stabilized the victim's airways, he was bleeding into his mouth and nose. There was lot of blood around his nose, mouth and face which was compromising his airways and his ability to breathe. The witness described the injuries as blunt force injuries to the face and jaw.
24. Dr. Praneel Kumar the Pathologist confirmed conducting the autopsy on the deceased on 2nd July, 2015. The estimated date of death was 25th June, 2015. The history given to the witness was that the

- deceased was punched and kicked in a brawl and was admitted at the intensive care unit at the Lautoka Hospital on 21st March, 2015.
25. Upon examination of the lungs the witness noted it was filled with edema and was congested, usually the lungs are just air sacs that shouldn't have fluid but in this case the lungs were filled with fluid leading to septicemia or infection.
 26. Also the deceased had developed large bed sores, bacteria can multiply in that area and eventually go into the blood stream and cause septicemia. Although the brain was normal on gross inspection, however, there was something called diffuse axonal injury which results from high velocity trauma and assault.
 27. The deceased was in a persistent vegetative state meaning he was not able to move his limbs that led to bed sores which led to septicemia and then death. To get diffuse axonal injury the assault has to be severe. Trauma was the main cause of the persistent vegetative state. In this case it was highly likely the trauma sustained by the deceased caused this persistent vegetative state of the deceased because the deceased was like that throughout his hospitalization.
 28. The cause of death was:
 - (a) Septicemia;
 - (b) Multiple bed sores;
 - (c) History of head injury and assault.
 29. The body of the deceased was identified by the brother of the deceased at the Lautoka Hospital.

30. The investigating officer PC 3899 Ashneel Ravinesh confirmed the deceased was Michael Semiti Osborne who was admitted at the Lautoka Hospital for 3 months until he passed away. The accused was Pauliasi Nauasara.
31. The accused informed the court that on 21st March, 2015 he was driving his vehicle in town when he saw the deceased and others trying to stop a vehicle, all of them were drunk. He stopped his vehicle since he knew the deceased and the others well.
32. There were four of them namely the deceased, Aporosa, Albert and another whom the accused did not know. The accused took all of them to Natabua. At Natabua the accused was requested to go again to town to buy beer. From town he was requested to go to the multi-purpose court. At the multi-purpose court the accused parked his vehicle and went to relieve himself. When he came back he saw his vehicle was not there. The accused was not drinking.
33. From the multi-purpose court the accused went to his workplace and requested his boss (James Ledger) to assist in locating his vehicle. Whilst fueling at a service station at Field 40 the accused heard loud music he saw it was his vehicle that had gone past.
34. The accused and his boss followed the vehicle, at this time he was thinking of getting his vehicle back. The deceased was driving his vehicle. After a while the vehicle of the accused was spotted. The vehicle in which the accused was, stopped behind the vehicle the deceased was reversing. While reversing, the deceased bumped the vehicle at the back. The accused got out of the vehicle opened the driver's door and pulled the deceased out. At this time the deceased punched the accused. When the deceased was out of the vehicle he punched the accused again.

35. The accused also punched the deceased with his right hand to try and stop the deceased there was an exchange of punches. The accused punched the deceased three (3) times who fell down. The accused did not see anyone else there. When the deceased was on the ground he was verbally abusing the accused.
36. The deceased landed on the ground face up since the deceased continued swearing the accused punched the deceased. The reasons given by the accused for his actions were firstly when he pulled the deceased out of the car the deceased had punched him, secondly his vehicle had been damaged by the deceased, thirdly the accused tried to protect himself since the deceased was drunk and swearing.
37. After his last punch the accused kicked the deceased who was lying down he does not know where the kick landed. When he was punching the deceased he did not have any intention to kill the deceased since they knew each other very well. After kicking the deceased the accused's boss Ledger came and took him back to his vehicle and they went away.
38. I accept the evidence of all the prosecution witnesses as truthful and reliable. The eye witnesses gave a truthful account of what the accused had done to the deceased. They were able to recall the manner in which the accused had assaulted the deceased that evening. I accept that the deceased was unconscious after he was assaulted in the car before being pulled and dragged by the accused to the roadside.
39. The prosecution witnesses Albert Pickering and Warren Pickering were referred to their police statements which they had given to the police when facts were fresh in their minds with their evidence in

court. When answering questions in respect of the inconsistencies the witnesses were able to refer to certain portion of their statements which had similar connotation to what they had stated in court. In any event the inconsistencies did not create any doubt on the credibility of these witnesses.

40. There is no law that requires witnesses to give evidence strictly in accordance with their police statement. A witness may due to his or her memory testify in much more detail or in much less detail. Human beings do not possess a photographic memory. There are factors such as passage of time, the skills of the person who wrote their statements and the way their evidence is led in court. A police statement is not evidence of the truth but what is said by a witness under oath is evidence.
41. Both witnesses gave evidence after three (3) years of giving their police statements and it is natural there will be omissions, contradictions and discrepancies between what they told the police compared with their evidence in court.
42. I would have been surprised if the witnesses had given their evidence without any inconsistencies. The inconsistencies did not discredit the entire evidence of these witnesses to adversely affect the reliability of their evidence. The inconsistencies were not significant as well.
43. The doctors also gave a clear account of the injuries suffered by the deceased. Dr. Pala described the injuries as blunt force injuries to the face and jaw of the deceased. The deceased was bleeding into his mouth and nose which was compromising his ability to breathe. The jaw was deformed and fractured.

44. According to the Pathologist Dr. Kumar, the deceased had developed a condition called diffuse axonal injury due to severe assault which was the main cause of the persistent vegetative state of the deceased. This led to septicemia and then death of the deceased.
45. The accused on the other hand whilst admitting he had assaulted the deceased that evening was indicating to the court that he had not assaulted the deceased to the extent and severity suggested by the prosecution witnesses. This was contrary to what the two doctors told the court.
46. The fact that the deceased had punched the accused first does not give any credence to the evidence of the accused that he was acting under self defence. I do not accept that the deceased was stronger than the accused. If this was so, then after the fist fight as stated by the accused I am sure the accused would have sustained some injuries, the accused did not say so.
47. Also when the deceased was on the ground in an unconscious state the accused punched and kicked the deceased. The evidence of the two doctors point to very serious and severe injuries which is suggestive of the use of excessive force on the deceased. The force used by the accused was unreasonable in the circumstances. The prosecution has disproved the defence of self defence beyond reasonable doubt. I reject this defence raised by the accused.
48. The accused also informed the court that he was provoked by the deceased who had damaged his car which was gifted to him by his father. Naturally the accused would have been angry but there was no evidence before the court as to how the accused lost his self-control. The anger expressed by the accused shows his own bad temper as opposed to loss of his self-control. During the cross

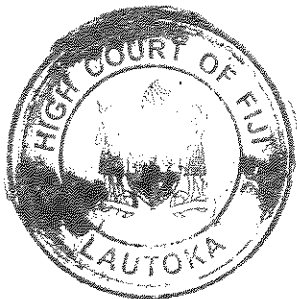
examination of the prosecution witnesses Albert, Warren and Varo it was not put to any of them that the deceased had damaged the car of the accused.

49. Furthermore, the accused said when the deceased was on the ground he was swearing at the accused. The accused did not tell the court the nature of the swearing and how the swearing made him lose his self-control.
50. There was no evidence before the court that the accused was provoked by the deceased which made the accused lose his self-control and act in the way he did that evening. The accused agreed in his cross examination of Albert, Warren and Varo he did not put to them that the deceased was swearing at him. I reject the defence of provocation as well.

CONCLUSION


51. I reject the evidence of the accused as untruthful and unreliable he did not tell the truth in court. I am unable to accept on the totality of the evidence that the accused did not intend to cause the death of the deceased by his conduct. The prosecution witnesses were forthright in their evidence and also consistent with each other. They were not shaken in cross examination as well. Their demeanour was consistent with their honesty.
52. The accused had acknowledged that he was in good relationship with the three eye witnesses since they knew each other well. There was no suggestion by the defence put to the three eye witnesses that they had lied in court. The eye witnesses in cross examination had maintained they told the court what they had seen that evening.

53. The defence was not been able to create any reasonable doubt in the prosecution case.
54. I am satisfied beyond reasonable doubt that on 21st March, 2015 the accused had engaged in the conduct of punching, kicking and stomping the deceased on his face and head wearing his canvas when the deceased was in a state of unconsciousness causing the death of the deceased and the accused intended to cause the death of the deceased by his conduct.
55. I overturn the unanimous opinion of the assessors that the accused is not guilty of murder but guilty of manslaughter.
56. In view of the above, I find the accused guilty of murder as charged and I convict him accordingly.
57. This is the judgment of the court.



At Lautoka

05 October, 2018


Sunil Sharma
Judge

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.