

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 433 of 2018

[CRIMINAL JURISDICTION]

STATE

V

- 1. KELEPI DURI TAUTAUMACALA KOLINISAU**
- 2. SELEMA STEVEN DENNIS TIKOENABUREVERE**

Counsel : Mr. M. Vosawale for the State
Ms. B. Malimali for the 1st Accused
Mr. A. Naco for the 2nd Accused

Hearing on : 14 - 29 October 2019

Summing up on : 30 October 2019

Judgment on : 31 October 2019

JUDGMENT

1. The accused are charged with the following offence;

Statement of Offence

Murder: contrary to Section 237 of the Crimes Act, 2009.

Particulars of Offence

KELEPI KOLINISAU and SELEMA TIKOINABUREVERE on the 11th day of October 2018, at Suva in the Central Division, murdered **JOSEUA LALAUVAKI** also known as **JOSUA LALAUVAKI**.

2. The assessors were directed to consider the alternative offence of manslaughter and the lesser offence of assault causing actual bodily harm respectively.
3. The assessors returned with the unanimous opinion that both accused are not guilty of murder; the first accused is guilty of manslaughter and the second accused is not guilty of manslaughter. Two assessors opined that the second accused is guilty of assault causing actual bodily harm and one assessor found him not guilty of that offence.
4. I direct myself in accordance with the summing up delivered to the assessors on 30/10/19 and the evidence adduced during the trial.
5. The prosecution called nine witnesses. Both accused gave evidence. First accused called two other witnesses in his defence and the second accused called one witness.
6. The first three prosecution witnesses were the main eye witnesses of the alleged incident. It was clear that they had witnessed the events from different positions or angles and under different circumstances. Therefore, I am mindful that I cannot expect their versions to be identical.
7. According to PW1, she looked at the deceased when the deceased screamed and she saw the deceased lying on the ground and a person in civilian clothes stomping the deceased. According to her evidence the second accused was not there near the deceased when this happened. She was preoccupied with covering her sister who was drunk and without a blouse just before she witnessed the stomping. Her evidence does not suggest that there was a meeting of minds between the second accused and the one who stomped the deceased. I accept the above evidence of PW1

as credible and reliable though I find that she did not give a truthful account in relation to her behavior that morning.

8. According to PW2, he first saw an exchange of punches between the deceased and the second accused. However, he said that he did not see the punching very clearly because he was trying to control PW1 who was swearing. The next moment he saw the deceased lying on the ground and he saw the first accused stomp the deceased on the stomach and kick the deceased on the hip. He did not see how the deceased fell down. His evidence does not show that there was a meeting of minds between the first and the second accused as he did not say (and was not asked) what the other accused was doing at the time he saw each accused assault the deceased. I accept this evidence of PW2 as credible and reliable evidence with regard to what he perceived that morning.
9. According to PW2 it was PW3 who had the best view of the incident. According to PW3, there was no exchange of punches between the second accused and the deceased and it was the deceased who punched the second accused and the second accused dodged the punch. PW3 also saw the second accused hold the deceased from the neck, raise the deceased off the ground and push the deceased onto the ground. He (PW3) then pushed the second accused away from the deceased with two others. Then he saw the first accused walk slowly towards the deceased and stomp the deceased on the stomach. His immediate reaction was to push the first accused away. Even according to PW3, there appear to be no agreement reached between the first accused and the second accused to perform an unlawful purpose. In my assessment, PW3 was a credible and a reliable witness.
10. The prosecutor's argument is that, it became possible for the first accused to stomp the deceased because the second accused pushed the deceased onto the ground and

therefore the two of them acted together and had a common intention to carry out an unlawful purpose. I did not dismiss this argument at the no case to answer stage, because that could be taken as a possible inference to draw based on the evidence adduced. However, when the evidence of the three main eye witnesses are carefully assessed, it is manifestly clear that the said argument does not hold water. The evidence of the three main eye witnesses taken as a whole does not lead to the irresistible inference that the two accused acted with a common intention to execute an unlawful purpose concerning the deceased and the evidence suggests that the two of them were acting independently.

11. All in all, the evidence does not establish beyond reasonable doubt that the two accused were joint offenders in prosecution of a common purpose or that there was a complicity between the two in relation to executing an unlawful purpose against the deceased.
12. Having dealt with that issue, I will first consider the case against the second accused since the events leading to the alleged stomping commenced with the deceased's encounter with the second accused.
13. Even though PW2 said that he saw an exchange of punches between the second accused and the deceased, given his admission that he did not see the punches very clearly and his evidence that it was PW3 who had the best view of the incident, I am inclined to accept the evidence of PW3 that the second accused did not punch the deceased and it was the deceased who ran towards the second accused and threw a punch at the second accused. Since the deceased was moving towards the second accused, and because the evidence revealed that the second accused was taller than the deceased, I do not find the account given by PW3 that the second accused held the deceased from the neck and lifted the deceased off the ground to be impossible

or improbable. In my view, it is a possible occurrence given the circumstances and especially because the deceased was in motion towards the second accused. According to PW3, the second accused then pushed the deceased onto the ground. It was also his evidence that this incident involving the second accused happened 'so fast' as he agreed with the suggestion of the counsel for the second accused to that effect.

14. In my judgment, this conduct of the second accused was an instantaneous move in response to the threat posed by the deceased of an assault towards him and it was carried out in self defence. I find the said conduct of the second accused to be a reasonable response in the circumstances as he perceived them.
15. It is clear from the unanimous opinion of the assessors that they have concluded that the two accused persons did not act with a common intention to carry out an unlawful purpose. However, the two assessors who found the second accused guilty for the lesser offence of assault causing actual bodily harm seem to have concluded either that the conduct of the second accused was not carried out in self defence or the conduct was not a reasonable response in the circumstances. Given the reasons I have explained above I am unable conform to the said majority opinion.
16. In the circumstances, I find that the second accused is not criminally responsible for an offence based on his conduct in relation to the deceased on 02/09/18 as revealed by the evidence.
17. With regard to the first accused, based on the evidence of PW2 and PW3, I find that the first accused walked slowly towards the deceased and stomped the deceased on the stomach and kicked the deceased on the side of the hip while the deceased lay motionless on the ground. PW4 was evasive. It was noted that in certain instances

he tried to avoid telling the truth by saying "I can't recall". I did not find him as a reliable witness. PW5, PW6, PW9, 1DW2, 1DW3 and 2DW2, according to their evidence were not eye witnesses of the encounter between the deceased and the first accused. Considering all the evidence, I do not find the account given by the first accused or the second accused in relation to what took place at the Totogo Police Station on the morning in question to be credible. Therefore, the aforementioned finding which is based on the evidence of PW2 and PW3 is not disturbed by the evidence of the other witnesses including the defence witnesses.

18. I accept the evidence of PW7 and PW8. Based on their evidence, I am satisfied beyond reasonable doubt that the first accused's stomping the deceased on the stomach and kicking the deceased on the side of the hip caused 75% of the circumference of the deceased's duodenum to be ruptured and his pancreas to be damaged. Further, I am satisfied beyond reasonable doubt that the said injury caused by the first accused substantially contributed to the death of the deceased.
19. Given the circumstances as revealed by the evidence including the fact that the first accused was a police officer and the circumstances under which he stomped and kicked the deceased, I am not satisfied beyond reasonable doubt that the first accused either intended to cause the death of the deceased or was reckless as to the risk of causing the death. However, I am satisfied beyond reasonable doubt that the first accused was reckless as to the risk of causing serious harm to the deceased when he engaged in that conduct of stomping and kicking.
20. In the circumstances, I agree with the unanimous opinion of the assessors that both accused are not guilty of murder, that the first accused is guilty of manslaughter and that the second accused is not guilty of manslaughter. However, for the reasons stated above, I am unable to agree with the majority opinion of the assessors that

the second accused is guilty of the lesser offence of assault causing actual bodily harm.

21. Accordingly, I find the first accused not guilty of murder as charged, but guilty of the alternative offence of manslaughter under section 239 of the Crimes Act. I find the second accused not guilty of murder, manslaughter and assault causing actual bodily harm.
22. In the circumstances, the first accused is hereby convicted of the offence of manslaughter under section 239 of the Crimes Act and the second accused is hereby acquitted.




Vincent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Pacific Chambers for the 1st Accused
Naco Chambers for the 2nd Accused**