

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC013 of 2017

STATE

vs.

- 1. NIKO BALEIWAIRIKI**
- 2. ERONI RAIVANI**

Counsel: Ms. S. Serukai for the State
Mr. E. Koroi for Accused 1
Ms. L. Manulevu with Ms. P. Mataika for Accused 2

Date of Hearing: 22nd, 25th to 29th March 2019 and 1st April 2019

Date of Summing Up: 08th April 2019

Date of Judgment: 11th April 2019

JUDGMENT

1. The second and third accused persons, namely Mr. Niko Baleiwairiki and Eroni Ravani have been charged with another accused with one count of Murder, contrary to Sections 237 and 46 of the Crimes Act and one count of Aggravated Robbery, contrary to Section 311 (1) (a) of the Crimes Act. The particulars of the offences are that:

FIRST COUNT

Statement of Offence

MURDER: *Contrary to Section 237 read with section 46 of the Crimes Act 2009.*

Particulars of Offence

NIKO BALEIWAIRIKI and ERONI RAIVANI on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, murdered JAI PRASAD.

SECOND COUNT

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (a) of the Crimes Act 2009.

Particulars of Offence

NIKO BALEIWAIRIKI and ERONI RAIVANI on the 1st day of January, 2017 at Lokia, Rewa, in the Central Division, in the company of each other robbed JAI PRASAD of a 15 Horsepower Yamaha Outboard Engine valued at \$5, 950.00.

2. The hearing of this matter commenced on 22nd March 2019 and concluded on the 1st April 2019. The Prosecution presented the evidence of 8 witnesses. The second accused opted to give evidence but did not call any other witnesses for his defence. The third accused exercised his right to remain silent. Subsequently, the two learned counsel for defence and the learned counsel for the prosecution made their respective closing addresses. I then made my summing up.
3. The three assessors in their opinions unanimously found the two accused guilty to both counts as charged in the information.
4. Having carefully taken into consideration the evidence adduced during the hearing, the respective closing addresses of the learned counsel, the summing up and the opinions of the assessors, I now proceed to pronounce my judgment as follows.
5. The prosecution alleges in the information that Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani had formed a common intention to prosecute an unlawful act, which was to rob the outboard engine of Jay Prasad. They then went on to execute the said unlawful plan

in the early hours of 1st of January 2017. While executing the said joint enterprise, Waisea Motonivalu had gone beyond as planned and assaulted Jay Prasad and killed him. Meanwhile, they managed to rob the outboard engine from Jay Prasad as well. Therefore, the prosecution alleges that Niko Baleiwairiki and Eroni Raivani are liable to the killing of Jay Prasad, even though Niko Baleiwairiki had only punched on the face of the deceased and Eroni Raivani had not taken part in any way in assaulting Jay Prasad. The prosecution alleges that the death of Jay Prasad is a probable consequence of the execution of the joint enterprise that was formed by the three accused in order to rob the outboard engine of Jay Prasad.

6. In order to prove the charges against the second and third accused, the prosecution mainly relies on the caution interviews and the charging statements of the two accused. The prosecution alleges that the two accused have made statements in those interviews, admitting their respective responsibilities in committing these crimes. In contrary, the second and third accused deny in making such admissions and claim that they were fabricated by the respective interviewing and charging officers.
7. I first take my attention to the caution interview of the second accused. The second accused alleges that he was assaulted, threatened and intimidated by the police officers after he was arrested at his home at Lokia village on the 4th of January 2017. He was then taken to Sawani, near Colo-i-suva instead of taking him directly to the Nausori Police Station. He alleges that he was threatened, slapped and intimidated by the police officer, forcing him to admit the offence.
8. The second accused said that he was afraid, feeling hungry and weak when the caution interview was recommenced on the 5th of January 2017. In contrary, Cpl. Sevuloni and IP Esili said that the second accused was taken to the Nausori Police Station after he was arrested at his village on the 4th of January 2017. They further denied that the accused was taken to Colo-i-suva. Moreover, Cpl. Maivusa said that the accused was given his breakfast at the Nakasi Police Station. The medical examination report, which is tendered as an agreed document by the prosecution, specifically states that the second accused appeared

calm when he was presented to the medical examination in the morning of 5th of January 2017. The contents of the medical examination report are admitted by the prosecution and the defence as one of the agreed facts, hence, the medical examination report and its contents are being considered as proven facts beyond reasonable doubt. Accordingly, in contrary to his testimony in the court, the second accused has already admitted that he was clam in the morning of 5th of January 2017, before the recommencement of the caution interview. Moreover, the doctor who conducted the medical examination has not found any injuries or any marks on the body of the accused, apart from his swollen arm, which the accused claimed was caused by an accident that he met on the 31st of December 2016.

9. Cpl. Maivusa and DS Raqio in their respective evidence said that the second accused appeared normal and cooperative during the recording of the caution interview and the charging statements. The second accused was given the printed copy of the caution interview at the end of each day, for him to read and sign in it. Moreover, the second accused was given nearly 40 minutes to read the caution interview, when it was concluded. He had then signed it.
10. The second accused in his evidence admitted that the Interviewing Officer asked him whether he wanted to add, alter, or correct anything in the record of the caution interview. That is the question number 220. The second accused further admitted that he answered to it. The question and answer of the question 220 states that:

Q: "Do you wish to add, alter or correct anything in this statement?"

A: "I wish to state that when we went to the house of Jaipu, Eroni called out Jaipu and not Wise. When Jaipu opened the door then Eroni came and hid. That's all."

11. During his evidence, the second accused said that he went to Jay Prasad's house with Waisea Motonivalu, as Waisea Motonivalu asked him to come. Then Waisea Motonivalu entered into the house, while the second accused was staying outside. In a while, he heard a sound like someone was running inside the house and thuds. He then heard that Jay

Prasad was shouting. With that, the second accused got scared and left the place. The second accused denied giving answer to many of the questions that have been recorded in the caution interview. However, the second accused admitted in his evidence that the Interviewing Officer had asked him the question 220 and he answered to it.

12. In view of these reasons, I am satisfied that the second accused has actually made the admission in the caution interview. Moreover, I find the admissions in the caution interview are true and credible admission. According to the admission made by the second accused in his caution interview, he has admitted that he made a plan to rob the outboard engine of Jay Prasad with two other accomplices in the early morning of 1st of January 2017. Three of them then went to the house of Jay Prasad in order to execute the said plan. They knew Jay Prasad was still awake and drinking beer inside his house. One of the accomplices had assaulted Jay Prasad, while the second accused and other accomplice tried to remove the outboard engine. While they were trying to remove the engine, the second accused had also gone to Jay Prasad and punched on his face several times while he was lying on the ground. They then managed to remove the outboard engine and left the scene with the outboard engine.
13. The third accused contends that the answers in his caution interview were fabricated by the Interviewing Officer. He contends that the time of the recommencement of the caution interview on the 5th of January 2017 as recorded is not correct, as at that time he was attending to the medical examination at the Nausori Medical Centre. The Interviewing Officer said that he put the time as indicated in his computer and did not check the actual time, when he recommenced the interview. However, the defence did not challenge or dispute the occurrence of the caution interview. The main contention of the defence is that the interviewing officer fabricated the answers of certain questions. He had not properly and accurately recorded the answers actually given by the third accused to those questions.
14. The learned counsel for the third accused pointed out the inconsistent nature of the evidence given by the Interviewing Officer with the record of the interview. The Interviewing Officer said in his evidence that whenever he completed a page in the

computer, he had printed a copy of it and gave the third accused to read and sign it. However, according to question 48 of the caution interview, the Interviewing Officer had advised the third accused that he would give a printed copy of the interview to the accused when the interview is concluded, for the accused to read and sign. The Interviewing Officer in his evidence confirmed that though it was recorded as such under question 48, he gave the printed copy of each page whenever he completed a page in the computer for the accused to read and sign.

15. According to the Interviewing and Charging Officers of the third accused, the third accused had been cooperative and normal during the recording of the caution interview and the charging statement.
16. Having taken into consideration the above reasons I do not find the recommencement of the caution interview and Question 48 have adversely affected the credibility and reliability of evidence given by the Interviewing Officer. Hence, I am satisfied that the prosecution has proven beyond reasonable doubt that the third accused has in fact made an admission in his caution interview, accepting his responsibilities in committing this crime. Moreover, I find the contents in the admission of the 3rd accused are truthful, reliable and credible. According to the admissions made in the caution interview, the third accused had formed a joint enterprise with two accomplices to rob the outboard engine of Jay Prasad in the early hours of 1st of January 2017. Three of them have then gone to the house of Jay Prasad in order to execute the said unlawful plan. While executing the said unlawful plan, one of the accomplices had assaulted Jay Prasad and killed him.
17. I am mindful of the fact that the admissions in the caution interview of an accused can only be used against the maker of the statement. Therefore, it is the onus of the prosecution to provide further evidence to identify the accomplices that the second and third accused have mentioned in their respective caution interviews.
18. Ulaiasi Tuikoro in his evidence said that Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani were in the drinking party at Penelope's house in the early morning of 1st of

January 2017. Three of them then left the drinking party without telling the others. Ulaiasi Tuikoro and seven other friends also left the drinking party nearly one hour after those three left the party. While Ulaiasi Tuikoro and his friends were walking towards the Lokia village, they met Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani at the junction of Lokia village and Turaki Settlement. Ulaiasi Tuikoro then confronted them asking why they have left the drinking party without telling others. Eroni Raivani had then told them that they came for Jay Prasad's outboard engine. At that time Waisea Motonivalu and Niko Baleiwairiki started to walk towards Lokia village. Ulaiasi Tuikoro also went to Lokia village and Eroni Raivani too joined with them. Moreover, the second and third accused have admitted in the agreed facts that they were at the drinking party at Penelope's place. Therefore, I accept the evidence of Ulaiasi Tuikoro as reliable and credible evidence.

19. Accordingly, I am satisfied that the prosecution has proven beyond reasonable doubt that three individuals have made a joint enterprise to rob the outboard engine of Jay Prasad in the early hours of 01st January 2017. Two of them were Niko Baleiwairiki and Eroni Raivani. While Niko Baleiwairiki and Eroni Raivani were executing their joint enterprise with the 3rd accomplice, the 3rd accomplice had assaulted Jay Prasad and killed him.
20. I now draw my attention to determine whether the death of Jay Prasad was a probable consequence of the execution of the unlawful common purpose formed by the three accused persons.
21. The Fiji Court of Appeal in **Talala v State [2019] FJCA 50; AAU155.2015 (7 March 2019)** held that:

“In my view for one to be liable under section 46:

- (i) There should be the involvement of 2 or more persons.*
- (ii) They should have formed a common intention to prosecute an unlawful purpose in conjunction with one another, and*
- (iii) 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.

(iv) *Section 46 thus envisages a situation where an offence is committed which is distinct from the unlawful purpose the offenders had formed a common intention to prosecute in conjunction with one another. The sine qua non of liability under section 46 is that the offence committed should be of such a nature that its commission should have been a probable consequence of the prosecution of such purpose in the mind of offender sought to be made liable. In this context the word 'probable' means something more likely to happen than the use of the word 'possible'.*

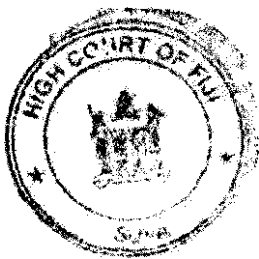
(iv) *The rationale for joint enterprise liability rule is that one party, by intending to prosecute an unlawful purpose in conjunction with another, consciously accepts the risk that the other person might commit another offence.*

22. Accordingly, the court has to determine whether the death of the deceased was a probable consequence of the execution of the said joint enterprise made by the three accused. If then, the court is further required to determine whether the two accused knew, contemplated, or consciously accepted the risk, when they formed and executed the said joint enterprise, that one of them might assault and kill someone.

23. The second and third accused knew that Jay Prasad was awake and drinking beer inside the house. Then the accomplice told them that he will handle Jay Prasad while second and third accused go inside the house and remove the outboard engine. The third accused had then gone and knocked the door in order to get the door opened. Hence, the second and the third accused knew that Jay Prasad was awake and would probably resist or retaliate with them if they execute their plan of robbing the outboard engine. Moreover, both the accused knew that their accomplice would handle Jay Prasad if such an event occurs. Furthermore, the second accused had also gone and punched Jay Prasad on his face, while he was lying

on the ground. This evidence have sufficiently, established beyond reasonable doubt that the second and third accused knew, contemplated or consciously accepted the risk that the death of Jay Prasad was a probable consequence of the execution of their joint plan of robbing the outboard engine of Jay Prasad. The death and the cause of the death of Jay Prasad were not disputed by the prosecution and the defence.

24. The evidence of the second accused is not reliable and credible. His evidence is infested with contradictions and inconsistency with his own evidence and also with his own agreed facts. Therefore, I find the evidence of second accused is not true. Moreover, I do not find the evidence of the second accused has created any doubt about the case of the prosecution.
25. Accordingly, I find the prosecution has proven beyond reasonable doubt that the second and third accused guilty to the offences of Murder and Aggravate Robbery as charged. Therefore, I do not find any cogent reasons to disagree with the unanimous opinion of guilty given by the three assessors.
26. In conclusion, I hold that the second accused Niko Baleiwairiki and third accused Eroni Raivani guilty to the offence of Murder contrary to Sections 237 and 46 of the Crimes Act and offence of Aggravated Robbery, contrary to section 311 (1) (a) of the Crimes Act. I convict the second and third accused to these offences accordingly.



A handwritten signature in black ink, appearing to read "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
11th April 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Koroi Law for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.