

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 200 of 2018

[CRIMINAL JURISDICTION]

STATE

V

ROZLEEN RAZIA KHAN

Counsel : Ms. S. Serukai and Ms. S. Tivao for the State
Mr. G. O'Driscoll for Accused

Hearing on : 08 - 11 July 2019

Summing up on : 12 July 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are the judges of facts.

2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the deceased. No such emotion should influence your decision.
5. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.

6. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
7. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
8. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in her favour based on the same set of proved facts, then you should not draw the adverse inference.
9. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
10. As a matter of law you should remember that the burden of proving the guilt of the accused always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that she is innocent. The

prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find her guilty. You must be sure of the accused's guilt.

11. In order to prove that an accused is guilty of the offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of the offence. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.
12. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
13. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
14. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Murder: contrary to section 237 of Crimes Act of 2009.

Particulars of Offence

ROZLEEN RAZIA KHAN on the 6th day of May, 2018 at Kasavu, Nausori, in the Central Division, murdered **RAHIKA RAHIDA ALI**.

15. To prove the offence of Murder, the following elements must be proved beyond reasonable doubt;
 - a) the accused

- b) engaged in a conduct
- c) that conduct caused the death of a person
- d) accused intended to cause the death of that person,

or

accused was reckless as to causing the death of that person by the conduct.

16. The following facts are admitted in this case;

1. *THAT the deceased in this matter is Rahika Rahida Ali who was 4 years old at the time of her death.*
2. *THAT the accused in this matter is Rozleen Razia Khan who is the mother of the deceased child.*
3. *THAT the accused is married to one Mohammed Imraz Ali. There are 3 children of marriage namely Mohammed Arshad Ali (17) Rifah Raina Ali (12) and Rahika Rahida Ali (4) who is now deceased.*
4. *THAT the husband of the accused, Mohammed Imraz Ali owns Raaz Hire Services. The family is originally from Dreketi, Bua but would move around to where the husband operated his business.*
5. *THAT the family spent 6 years in Savusavu (2007 – 2013) however they relocated to Dreketi when the accused's mother in law passed away.*
6. *THAT the husband of the accused relocated to Nausori on or about January 2016 and the accused Rozleen Razia Khan and the 3 children of marriage relocated to Labasa to find employment in order to assist in the financial situation of the family.*
7. *THAT the accused and the children of marriage joined her husband and the father of the three children at Nausori on or about January 2018.*
8. *THAT Mohammed Imraz Ali filed an application on the 3rd of May and served the same on 6th of May at the Nausori Family Court to have full custody of all the three children namely Mohammed Arshad Ali, Rifah Raina Ali, and Rahika Rahida Ali.*
9. *THAT on the 6th of May, 2018, the accused took the deceased into the vehicle and drove to Kasavu.*
10. *THAT the accused got off the vehicle and tied the deceased using a scarf around her chest.*
11. *THAT when residents along Kasavu came to the rescue, they were both rushed to hospital.*
12. *THAT upon arriving to hospital, the deceased was already dead.*
13. *THAT the Post Mortem Report of the deceased dated 8/05/18 revealed that she died from Ashyxia, Drowning.*

17. Let us now briefly look at the evidence led in this case. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
18. The prosecution led the evidence of four witnesses and closed the case. At the end of the prosecution case you heard me explain several options to the accused. The accused chose to give evidence on oath and called one witness.
19. The first prosecution witness (PW1) was the police officer who conducted the cautioned interview of the accused. She tendered the cautioned interview as PE1. An accused has the right to remain silent. This right is provided under the 2013 Constitution and the said right is unqualified. An accused also has the right to be informed of this right. However, when the police officer explained the accused's right to remain silent in this case in Question 9, she had told the accused that if she remains silent the police may have to prosecute the accused with the available evidence. This statement is wrong because according to the law in Fiji the right is not subject to any qualification. Therefore, this right has not been properly explained to the accused at the commencement of the cautioned interview which had resulted in the breach of a right of the accused. However, the accused when she gave evidence said that *"I couldn't understand what was going over. So whatever they asked me, all that I know, I told them."* Further, you will note that, in answer to question 34, the answer is *"Refuse to answer"*.
20. When you are dealing with the cautioned interview statement tendered as PE01, you must decide the following;

- a) Did the accused make the statement in question? If you are not sure that she made it, the matter ends there. You should disregard the cautioned interview statement.
 - b) If you are sure that she made the statement that is, she had given the answers, then you should decide whether the answers are true.
 - c) You would find that in PE1 there are admissions and also an explanation. You cannot fairly evaluate the admissions in PE1 unless you evaluate the facts in the excuse and the explanation accompanying it. You should therefore consider the whole statement in deciding where the truth lies.
 - d) You should consider the cautioned interview statement as you would consider the evidence given by a witness. You may accept the entire statement to be true or a part of it is true or you may consider the entire statement is not true. You may rely only on what you would consider to be true.
21. However, when you decide what weight you should give to the answers in PE1, you should take into account the fact that there was a breach of the accused's right in relation to explaining her the right to remain silent.
22. The second prosecution witness was Ifraaz Zoheb Ali (PW2). He said that he pulled the deceased and the accused from the Rewa River around midnight on 07/05/18. He went in a boat with another after he heard the accused scream. He said he couldn't pull the accused when he first tried because the deceased was tied to the accused's waist. He said that the accused told her that the deceased was at the 'bottom'. He first pulled the deceased after the deceased was untied from the accused and then the accused. He noted that the accused is exhausted and did not notice anything else. He said that the accused did not speak to him when she was in the boat. His cousins took the accused and the deceased to the hospital.

23. The third prosecution witness was D/CPL Sakiasi Koroi (PW3). He said that he is attached to the Crime Scene Investigation Unit and he had visited the crime scene and taken photographs of same. He tendered the photographic booklet he had prepared as PE2, and a rough sketch plan as PE3. He said that the vehicle he photographed was stuck in the debris beside the river. He tendered the post mortem report of the deceased as PE4.

24. The fourth prosecution witness was Dr. Kiran B. Gaikwad (PW4). He said he is the current medical superintendent of the St. Giles Hospital. He has obtained his MBBS Degree from Pune University India. He had obtained a post graduate diploma in Mental Health from Fiji National University and an international diploma in Mental Health, Human Rights and Law from India Law Society, Pune, India. He had received training from Black Dog Institute Australia on mood disorders. He has served as a medical officer in the Labasa Hospital from 2002 and transferred to St. Giles Hospital in 2010 for training in psychiatry. Thereafter he was in charge of the Labasa Stress Management Unit for one year. He was posted at the St. Giles Hospital in 2012 - 2013 and works there since then. He is also the acting national advisor for mental health since 2016.

25. Dr. Gaikwad said that he evaluated the accused on 29/05/18 pursuant to a court order. He tendered his report as PE5B. He also tendered the first copy of that report as PE5A and said that in PE5B he had corrected certain typographical errors found in PE5A. Therefore you may only consider PE5B. He said that his report is based on the information received from the accused during his interview with her, the charge, the summary of facts and the court orders received from the police, information obtained from the accused's husband over the phone and the accused's medical records from the Labasa Hospital. He said that there was no evidence or records of the accused having any mental illness in the past or at the time he interviewed her.

26. PW4's opinion was that the accused was normal on the mental state examination. You should remember that the burden of proving diminished responsibility is on the accused and not the prosecution. However, the prosecution called PW4 to give evidence about the mental state of the accused.
27. During cross-examination, he agreed that he was a medical practitioner and he switched to psychiatry in the last 5 to 6 years. He said he cannot remember prescribing medicine to the accused's mother-in-law at Labasa and knowing the accused's brother-in-law. He said that according to the accused, he has seen her in 2006 regarding continuous headaches the accused was having. He said that one of the drugs he had prescribed for the accused was also used as an anti-depressant drug but it was given to the accused to treat the chronic headache for 03 years. He said he had done 4 to 5 psychiatric evaluations where the charge was murder.
28. He said that as per the information he received from the accused, this incident appear to be an impulsive behaviour when the husband informed her that the custody of the children are with the husband and agreed that it appears to be a trigger point. He said that, according to the accused there were ongoing marital conflicts and agreed that any person would be under stress due to such conflicts.
29. PW4 gave his medical opinion based on what he observed and his experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by the fourth prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality of the analysis which supports his opinion.

30. The accused said in her evidence that she got married when she was 16 years old and she had to get married at that age because her father was having financial difficulties and could not support her. It was an arranged marriage. According to her the husband was not living with her and the children for quite some time and he came home only during weekends. The three children were with her. In April 2018, she was staying with the husband, but went to Labasa on 30th April and came back on 05th May. On 05th May they had an argument regarding her going to Labasa. The next morning, the husband brought two police officers home and they served her 'custody papers' saying that the custody of the three children are now with the husband. She begged them to allow her to have one child but they told her that she should solve the problem in court.
31. After the police officers left, she felt that someone was taking the children away from her and the children were with her from their birth until the 30th April. She said she was a bit frightened. She sat down and she went through the papers she was served. She couldn't clearly understand what was written. After her evening prayers, she left with the deceased in the car. She just drove towards Nausori Town. At one point she parked the car and spoke to her mother over the phone to ask her whether she knew about the custody matter and why she did not send the elder daughter. After this conversation she drove back to Nausori Town. She again stopped and called her husband. About that conversation she could only recall him asking her where she is and telling her to come home to prepare tea for the visitors.
32. She was then heading back home, but she stopped and turned the car. She said that, thereafter she ended up at the river bank. She said "the car just went down and had a bang". She got off and saw that the car is damaged. Then she called the husband and told him that the car went off the road and asked for his forgiveness for damaging the car. She gave him her location. She said she was scared after that

conversation that the husband might come and beat her and bring the police again. Then again she said that the husband had never beaten her, but when she came back from Labasa, he tried to slap her. Thereafter she took the deceased and was thinking what to do next. She was waiting for the husband, but the husband did not come. Then she heard a police siren and got really scared. She tied the deceased around her and she jumped into the river. She heard the siren for quite some time.

33. She said that she tied deceased because the deceased was alone there with her and she didn't know what to do. The only thing came to her mind was that her husband has already applied for custody and he will take all her children and this is the only way she can be with the deceased. When she jumped into the water with the deceased tied to her, she knew that she cannot swim and that whatever goes in the water at that place is never found. She said she can't recall what happened after that. She said two men came in a boat and she raised her hand so that they can save the deceased. She and the deceased were taken to the river bank and then to the hospital.
34. She said that PW4 was with her only for 5 to 10 minutes. She said she knew PW4 from Labasa as she used to go to the hospital for medical check-ups. She said that she also met PW4 with her brother-in-law as a friend as PW4 treated her mother-in-law. She said she went to two private doctors for her severe headache she had for a long time. She said she did not share what she was going through in her married life with her family. She said that she had a relationship with a person but she was forced to have that relationship.
35. During cross examination, she said that, after listening to everything, she did not know what she was doing when she was driving the vehicle with the deceased. When it was suggested that she was informed by the police officers that she can fight for her children, her answer was *"As I was served with the custody papers, I asked my*

husband 'why you did this', because I asked him before leaving Labasa, that 'have you filed custody for children' and he said 'no'. So, what was that? And he said to me, 'I have just called you to serve the papers'." She agreed that her husband and her family knew that she was having an affair and she said that the husband knew about the affair for the past 5 years. When it was suggested that she had the intention to kill herself and the deceased, she said that *"After my car went off the road, I called my husband. He didn't respond to me. So I had no other option and I took my daughter with me and I jumped. Because it was dark and there was no one around to help me out"*. In answer to another question she said that *"I just knew that I didn't know how to swim. So, I will be with her never mind dead or alive"*. She also said in answer to another question that her husband threatened to kill her and the person she was going to stay with.

36. The second witness for the defence was Elenani Vulcanivuru (DW2). She said that she is the senior psychologist of the Fiji Corrections Services since 2017. Prior to that, from 2013, she served as the psychologist. She has obtained Bachelors of Law in Psychology, a diploma in counselling and a certificate in mental health nursing. She has 18 years' experience in mental health nursing at the St. Giles Hospital and 5 years' experience as the mental health counsellor at the same hospital.
37. She said that she prepared a psychological report on the accused after conducting 2 sessions with the accused. She tendered the said report as DE1. She spent a total of 03 hours with the accused. Referring to paragraphs 17 and 18 of her report, she said that at the time of the incident, the accused was psychologically traumatised and was not in a right state of mind. During cross-examination she said that the request for her to prepare the report came from a private law firm through the corrections commissioner. When it was suggested to her that a psychologically traumatised person can still control their actions, she said that it depends on the situation. She agreed that her report is based only on the information received from the accused.

38. Now, let us look at what you have to decide in this case. Given the aforementioned admitted facts and the evidence led in this case especially of the accused, there is no dispute that the accused tied the deceased to her body using a scarf and jumped into the river and the deceased died as a result of that conduct. Therefore, you should consider that first three elements of the offence of murder I have mentioned are established beyond reasonable doubt.
39. What is left for you to decide in terms of the charge of murder is the fourth element which consists of the following two limbs;
- a) whether the accused intended to cause the death of the deceased,
 - or
 - b) whether the accused was reckless as to causing the death of the deceased by the conduct.
40. The prosecution should prove only one of the two limbs of this fourth element. It is not possible to have direct evidence regarding the accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
41. In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that she meant to bring about the death or that she was aware that death will occur in the ordinary course of events as a result of her conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
42. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether she had that intention, you should then

consider whether the accused was reckless as to causing the death of the deceased. The accused was reckless with respect of causing the death of the deceased, if;

- a) She was aware of a substantial risk that the death will occur due to her conduct; and
- b) Having regard to the circumstances known to her, it was unjustifiable for her to take the risk.

43. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death of the deceased was a probable consequence or the likely result of her conduct; and yet she decided to go ahead and engage in the conduct regardless of that consequence. Accused must foresee that death was a probable consequence or the likely result of her conduct and after realising that, if she decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then she was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
44. In the event you find that the prosecution has proved the fourth element above and therefore, proved beyond reasonable doubt that the accused had committed the offence of murder, before you find the accused guilty of murder, you should consider whether 'diminished responsibility' applies in this case. The defence submits that it does. If you find that this is a case of diminished responsibility, then you should find the accused guilty of manslaughter but not murder.
45. Diminished responsibility has a particular legal meaning which I need to explain. If the accused, when she killed the deceased, was suffering from an abnormality of mind which substantially impaired her mental responsibility for her act, then her


responsibility is diminished and she should be found not guilty of murder and guilty of the lesser offence of manslaughter.

46. The burden is upon the defence to establish this defence on the balance of probabilities. In other words, before you find the accused guilty of manslaughter on this ground you would need to conclude that it was more likely than not, on the evidence, that the accused's responsibility was diminished.
47. What is 'abnormality of mind'? Abnormality of mind is not a medical term and it does not have to be a mental illness as you would usually understand it. It is a legal term and means a state of mind which is so different from that of ordinary people that you would recognise it as abnormal. The term abnormality of mind covers all its workings, such as the ability to form appropriately, and to exercise, perception, understanding, judgment and will.
48. The defence case is that the accused was suffering from marital problems over a period of years and her conduct of killing the deceased was triggered by the serving of custody papers to her by the police that day where she was faced with the fear of losing her children.
49. The prosecution case is that the decision to kill the deceased was a calculated decision. According to PW4, the accused was normal as far as her mental state was concerned. Therefore, the prosecution takes up the position that there was no abnormality of mind.
50. According to law, for this defence to be available, the abnormality of mind should substantially impair;
 - a) the person's capacity to understand what the person is doing; or

- b) the person's capacity to control the person's actions; or
 - c) the person's capacity to know that the person ought not to do the act (or make the omission).
51. The accused's responsibility was only diminished if you conclude that it is more likely than not that, as a result of the marital problems and then being faced with the fear of losing the children after the documents were served, the accused's capacity to understand what the accused is doing, or, her capacity to control her actions, or, her capacity to know that she ought not to do the act; was substantially impaired.
52. This requires you to consider to what extent the accused's state of mind differed from that of the ordinary person. Was it so abnormal that the accused's mental responsibility was substantially reduced? 'Substantially' is an ordinary English word to which you will bring your own experience. It means less than total and more than trivial. Where you draw the line is for your good judgment.
53. In deciding on this issue, it may be relevant for you to take into account the evidence with regard to the events that took place after the accused was served until the accused jumped into the river with the deceased tied onto her. The defence say that the serving of the papers by the police was the trigger point and because of that she faced the fear of losing the children. In this regard it may be relevant for you to consider the accused's evidence that she was in Labasa from 30 April to 05th May without her children and that while she was in Labasa she asked her husband whether he filed a case for the custody of the children. Further, the accused's evidence was that she jumped into the river because the husband did not respond after waiting for him and after she heard the police siren.

54. Any re-directions?
55. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
56. Your opinion should be as follows;
- Murder – guilty or not guilty
- If not guilty
- Manslaughter – guilty or not guilty




Vinsent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions, Suva for State
O'Driscoll & Associates, Suva for the Accused**

