

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE NO. HAC 85 OF 2016

BETWEEN : STATE

AND : AVINAASH KAMAL

Counsel : Mr S Seruvatu for State
: Ms P Reddy for Accused

Date of Hearing : 21st – 23rd August, 2019

Date of Summing Up : 24th August, 2019

SUMMING UP

- [1] Ladies and Gentleman Assessors, it is now my duty to sum up this case to you. You will then be required to deliberate together and each of you must give a separate opinion whether the Accused is Guilty or Not Guilty of the charge. I will then pronounce the judgment of the Court and your opinions will carry great weight with me in deciding that judgment.
- [2] In coming to your opinions you must apply the law as I explain it to you. It is my duty to direct you on the law. Those directions on the law must be followed by you.
- [3] However, you decide the facts of the case. As I speak to you, you may feel that I have formed some view on a particular question of fact. If you disagree, then please feel completely free to disregard my version. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and decide whether your opinion is guilty or not guilty.
- [4] You must come to that decision solely upon the evidence you have heard from the witnesses, which includes the exhibits that have been produced. If you have previously heard anything about this case or the people involved, through the media or some other source – you must ignore that completely.

- [5] The law requires that the Accused is to be judged solely upon the evidence sworn to in this Court. In considering that evidence you are expected to apply your common sense and everyday knowledge of human nature and people. You must please put aside any feelings of prejudice or sympathy which may occur to you one way or the other and arrive at your opinions calmly and dispassionately.
- [6] The charge against the Accused, is set out in the information that you each have a copy of. This charge is brought by the prosecution and the onus of proving it rests on the prosecution from beginning to end. There is no onus on the Accused at any stage to prove his innocence or to prove anything else. The law is that the prosecution must prove the essential ingredients of the charge beyond reasonable doubt before there can be a finding of guilty. This means that before you express an opinion that the Accused is guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt about the guilt of the Accused, then you must express an opinion of not guilty. It is only when you are satisfied so that you are sure of guilt, that you may express an opinion of guilt.
- [7] The Accused elected not to give evidence. That is perfectly his right. You must not assume that he is guilty because he has not given evidence. The fact the he has not given evidence proves nothing, one way or the other. You will have to decide whether, on the prosecution's evidence, you are sure of his guilt.
- [8] You have been presented with two sets of Admitted Facts. You must accept the Admitted Facts as true when you determine the charge against the Accused.
- [9] The Accused is charged with manslaughter. The prosecution alleges that the Accused on 2 December 2015 at Nadi, engaged in a conduct which caused the death of his father, Amresh Kamal.
- [10] There are three ingredients that must be proved for the offence of manslaughter:
1. That the Accused engaged in a conduct.
 2. That this conduct caused the death of the deceased.
 3. That the Accused was reckless as to a risk that the conduct will cause serious harm to the deceased.

- [11] In this case the prosecution alleges that the accused engaged in a conduct, namely throwing a burning kerosene stove at the deceased in anger. You will see from the Admitted Facts signed by the Accused and his counsel that on 2 December 2015 the Accused and the deceased had an argument which resulted in the Accused getting angry, walked to the kitchen, picked up the kerosene stove and threw it at the deceased. The kerosene from the stove spilled on the deceased's shirt and his pants caught fire. If that is what occurred in this case, then the prosecution has proved that the Accused had engaged in a deliberate conduct or act. However, if the conduct or act is not deliberate but accidental, then the element is not proven and the Accused is not liable for that conduct. It is for you to determine whether the Accused engaged in a deliberate application of force by throwing a burning kerosene stove at his father, the deceased. If you feel sure that the Accused engaged in a deliberate conduct, then go on determine whether it was the Accused's conduct that caused Amresh Kamal's death.
- [12] A person is deemed to cause another person's death if his conduct or act leads to the death of the deceased even if his conduct or act is not the sole or immediate cause of death. For instance if I were to punch someone, and that person were to fall and hit his head on the concrete floor and dies as a result of the head injury, I am deemed to have caused his death, because his fall was caused by my punch. This is so even if the deceased is not taken to the hospital in time to save his life, or even if he refused medical treatment himself.
- [13] In this case, the defence submits that that the Accused is not responsible for the death of Amresh Kamal because the doctors failed to give him proper care. As a matter of law I direct you, the Accused is still deemed to have caused the death of Amresh Kamal if his act caused the injuries leading to death, as long as the doctors treating the deceased did so according to common skill and expertise, and in good faith. Death does not have to occur immediately after the conduct. The offender remains liable for death if it occurs at any time within one year and a day of the conduct provided the death is still caused by that deliberate conduct.
- [14] If you feel sure that the Accused's conduct caused Amresh Kamal's injuries, and that the doctors acted with common knowledge and skill and in good faith to treat Amresh Kamal of the injuries sustained as a result of the conduct of the Accused, and that the deceased

would have died anyway with the best treatment available, then the ingredient of cause of death has been established. That is a matter for you to decide.

[15] If you decide that the cause of death has been established, then go on to decide the fault or the mental element of manslaughter. The fault element alleged is recklessness, that is, whether the Accused was aware of the substantial risk that his conduct will cause serious harm to another person. So the questions that you must ask are:

- (i) Was the Accused aware that throwing burning kerosene stove at another person will result in a serious harm to that person?
- (ii) If the Accused knew there was a substantial risk of serious harm, was he justified in taking that risk?

[16] If you feel sure that the Accused was aware of the substantial risk of serious harm that his conduct will cause and that he was unjustified to take that risk, then the element of recklessness has been proven. But if you are not sure that the Accused was aware of the substantial risk of a serious harm and that he was unjustified to take the risk, then the element of recklessness has not been proven and the Accused cannot be liable for the death of Amresh Kamal.

[17] That completes my explanation to you on the crime of manslaughter.

[18] I will now remind you of the evidence led at the trial. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[19] The first prosecution witness was Dr Tabaikei. She was the doctor that treated Amresh Kamal after he was brought at the hospital with burn wounds on his legs and elbows on 2 December 2015. The patient remained in the hospital under the care of a surgical team until he passed away. The doctor said the patient was placed in the Burns Unit because of the severity of his injuries. Since the patient was immobile due to his injuries, the surgical staff cleaned his wounds and changed his dressings every second day in the Operating

Theatre. Eventually the patient developed sepsis (bacterial infection in the blood) and pneumonia and bed sores. The patient was placed on antibiotics on 9 December 2015 and his condition was monitored daily by Intensive Care Specialists. When the defence suggested to the doctor in cross examination whether the deceased could have died due to lack of care shown by the hospital towards the patient, the doctor said they did the best that they could with the resources that they had, making sure the patient's wounds were cleaned daily, making sure he was in a contained and isolated unit and giving him adequate pain relief and antibiotics and all specialists were involved.

[20] The next witness was Ms Lata. She is the mother of the Accused and the wife of the deceased. She gave evidence contradicting the admission made by the Accused that he had thrown a burning kerosene stove at his father in anger after an argument with him. Ms Lata said on the day in question there was no real argument between her husband and her son, the Accused apart from a few exchange of words and that her son did not intentionally throw the burning kerosene stove at his father. She said her son accidentally dropped the burning kerosene stove at the feet of his father when the father came on her son's path as he was carrying the stove out of the kitchen after it was on fire when she was cooking.

[21] Since Ms Lata's evidence is in direct conflict with the written sign admission made by the Accused in his caution interview and in the Admitted Facts, you may think that Ms Lata is unreliable witness to act upon. You are entitled to accept part of a witness's testimony and reject other parts. A witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and be wide of the mark about another. What weight you want to put to Ms Lata's evidence is a matter for you.

[22] The next witness was Cpl Lalta Prasad, who recorded the caution interview of the Accused. The interview was recorded in Hindi language and translated into English. The Hindi version is Exhibit 1A and the English translation is Exhibit 1B. There was no challenge to the truth of the admissions the Accused made in his interview. You can act upon the admissions if you are satisfied that the admissions were made by the Accused and that the admissions are true. The admissions are as follows:

Q.26: What happen when you woke up on 02/12/2015 at about 08am?

A: My father came to me and told me to bring the rice from the road.

Q.27: Then what happened?

A: I told him that I cannot go as my leg is paining.

Q.28: Then what happened next?

A: Then he punched me on my back and told me to leave the house.

Q.29: Then what you did?

A: I went to the kitchen to brush myself and my father swore at me.

Q.30: Then what happened?

A: In anger I lifted the kerosene stove and threw it.

Q.31: Whom did you throw the kerosene stove at?

A: On my father.

Q.37: Then what happened?

A: My father's clothes caught fire.

Q.38: How did it catch fire?

A: The stove was burning and when I threw it the kerosene spill on him and his clothes caught fire.

Q.39: Then what happened?

A: Then I saw the fire caught below his waist.

Q.40: Avinash Kamal you stated in answer 39 that the fire was caught under his waist. Do you remember this?

A: Yes.

Q.41: Where was the fire caught under the waist?

A: On his trousers.

Q.42: Then what happened after that?

A: I saw my father ran out of the house.

Q.43: Where did you throw the kerosene stove from?

A: From the kitchen.

Q.44: Where was the kerosene stove in the kitchen?

A: On the table.

Q.45: Where was your father when you threw the stove on him?

A: He was in the sitting room.

Q.46: How did you throw the kerosene stove in the sitting room from the kitchen?

A: Through the door.

Q.47: Where was the kerosene stove lying when your father ran outside?

A: In the sitting room on the floor.

Q.48: Was the kerosene stove burning or was it off?

A: The kerosene stove was burning for a while and then went off.

Q.49: When Amresh Kamal went outside then what happened?

A: He shouted and said to get the water.

Q.50: Then what happened?

A: I cannot recall.

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Q.63: Why did you throw the burning kerosene on Amresh Kamal?

A: I was angry that's why I picked the burning kerosene stove and threw on my father.

Q.64: Do you know by doing that what will happen?

A: Fire will be caught.

Q.65: That means you knew that your father will get burnt by throwing the burning kerosene stove at your father Amresh Kamal?

A: Yes.

- [23] The final witness was Dr Kalounivaki. He is a qualified forensic pathologist. He carried out a post mortem examination to determine Amresh Kamal's cause of death. The patient died on 17 January 2016. The doctor made a post mortem report following his examination that contains his findings. The admissibility of the report (Exhibit 3) and the cause of death are not in dispute. The primary cause of death was bilateral pulmonary emboli, meaning clots in the vessel that pumps blood from the heart to the lungs. The doctor said the primary cause was triggered by the secondary causes such as immobilization, pneumonia, bacterial infection in the blood and 35 % third degree burns of the total body surface area. The doctor said that the third degree burns are the most serious burn injuries.
- [24] That was the prosecution case.
- [25] The Accused elected to remain silent and let me remind you that that is his right. The issues in this case must be decided on the basis of the evidence led by the prosecution.
- [26] The first issue for your to consider is whether the Accused engaged in a deliberate and not an accidental conduct of throwing a burning kerosene stove at his father, Amresh Kamal. To decide on this issue you may take into account that the Accused admitted that he threw a burning kerosene stove at his father in anger after an argument.
- [27] If you accept that the Accused threw burning kerosene stove at his father in anger as true, then go on to consider whether Amresh Kamal's death was caused by that conduct of the Accused or by medical treatment which was not applied in good faith and with common skill and knowledge. Are you satisfied that the doctors at the hospital did all they could in good faith and using whatever resources they had to save Amresh Kamal's life. If you are not sure or if you have a reasonable doubt that Amresh Kamal's death was caused by the conduct of the Accused, you must find the Accused not guilty.
- [28] If you feel sure that Amresh Kamal's death was caused by the injuries sustained as a result of throwing of a burning kerosene stove at him, then you must decide whether the Accused knew there was a substantial risk of serious harm and whether he was justified in taking that risk. Of course the state of mind of a person is not always capable of direct proof because a person's state of mind can only be known for sure by the person concerned.

- [29] However, ordinary experience shows that a person's intention can be inferred by his conduct in any given circumstances. In this case, the Accused told the police that he knew that throwing a burning kerosene stop at a person will lit and burn the person. You must ask yourselves whether the Accused in throwing the burning kerosene stove at his father knew that there was a substantial risk of serious harm and whether he was justified in taking that risk. If you feel sure that the Accused knew that there was a substantial risk of serious harm and that he was not justified in taking the risk, then you may find him guilty. But if you are not sure whether the Accused was aware of the substantial risk of serious harm to the deceased then the Accused must be found not guilty.
- [30] Your possible opinions are guilty or not guilty of manslaughter.
- [31] That concludes my summing up of the law and the evidence in this particular trial.
- [32] We have now reached the stage where you must retire to your room to deliberate together and form your individual opinions on the charge against the Accused. You may have with you any of the exhibits that you would like to consider.
- [33] When you have reached your separate decisions you will all come back into Court and you will each be asked to state your opinions. You will not be asked for the reasons for your opinions.
- [34] Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court officer and the Court will reconvene to receive your opinions?



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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused