

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 354 of 2018

[CRIMINAL JURISDICTION]

STATE

V

MICHAEL JUNIOR MOW

Counsel : Mr. M. Vosawale for the State
Ms. S. Nasedra and Ms. N. Mishra for the Accused

Hearing on : 27 – 29 January 2020

Summing up on : 31 January 2020

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 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 his 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 accused. You have been given a copy 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 proof 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 an accused is guilty of an offence and an accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused's guilt.
11. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offences the accused is charged with and matters that will enable you to decide whether or not the charges have been proved.

12. 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.
13. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offences;

FIRST COUNT

Statement of Offence

Manslaughter: contrary to Section 239 of the Crimes Act, 2009.

Particulars of Offence

MICHAEL JUNIOR MOW on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of **PAULO BELAGIO** and at the time of driving, the said **MICHAEL JUNIOR MOW** was reckless as to the risk that his conduct would cause serious harm to another.

SECOND COUNT

Statement of Offence

Manslaughter: contrary to Section 239 of the Crimes Act, 2009.

Particulars of Offence

MICHAEL JUNIOR MOW on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused the death of **VILIVO MASAU** and at the time of driving, the said **MICHAEL JUNIOR MOW** was reckless as to the risk that his conduct would cause serious harm to another.

THIRD COUNT

Statement of Offence

Dangerous Driving Occasioning Grievous Harm: contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.

Particulars of Offence

MICHAEL JUNIOR MOW on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to **JONE RAVILI**.

FOURTH COUNT

Statement of Offence

Dangerous Driving Occasioning Grievous Harm: contrary to Section 97 (4) (c) and 114 of the Land Transport Act No. 35, 1998.

Particulars of Offence

MICHAEL JUNIOR MOW on the 2nd day of November 2017, at Viwa Road, Tailevu, in the Eastern Division, drove a motor vehicle registration number EP113 along Viwa, Kings Road in a manner that caused grievous bodily harm to VILIMONI TUIVUYA.

14. The accused is charged with four counts. When his plea was taken at the commencement of the trial, he pleaded not guilty to the first two counts but pleaded guilty to the third and fourth counts. Therefore, you are not required to deliberate on the third and fourth counts. However, you should not assume that the accused is guilty of the first two counts simply because he had pleaded guilty to the third and fourth counts. Even with regard to the first and second counts please remember to consider each count separately. That is, you should consider the evidence against each count separately. In the event you find the accused guilty of one count you should not simply assume that he must be guilty of other count as well. It is necessary that you consider whether the prosecution has proved each charge beyond reasonable doubt.

15. On the first two counts the accused is charged with the offence of manslaughter. To prove the offence of manslaughter, the prosecution should prove the following elements 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 serious harm to that person,
or
accused was reckless as to a risk that the conduct will cause serious harm to the other person.

16. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.

17. "Engage in a conduct" means –
 - (a) do an act; or
 - (b) omit to perform an act.

18. However the conduct should be a product of the will of the accused. In order to prove the second element, the prosecution has to prove beyond reasonable doubt that the act of the accused in question or the omission of the accused to perform the act in question was deliberate and not accidental.
19. Further, you should also remember that the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct substantially contributed to the death of the deceased, that is sufficient to satisfy the third element above.
20. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause serious harm to the deceased or that the accused was reckless as to a risk that his conduct will cause serious harm to the deceased. The prosecution should prove only one of the two limbs of this fourth element.
21. In this case, the prosecution is relying only on the second limb that is based on recklessness. An accused will be reckless with respect of a risk of causing serious harm to the deceased, if;
 - a) He was aware of a substantial risk that serious harm will occur due to his conduct; and
 - b) Having regard to the circumstances known to him, it was unjustifiable for him to take the risk.
22. It is not possible to have direct evidence regarding a person'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.

Evidence

23. Now let us look at the evidence. 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 evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

24. The prosecution led the evidence of four witnesses. At the end of the prosecution case you heard me explain several options to the accused. The accused had those options because he does not have to prove anything. The burden of proving the accused's guilt beyond reasonable doubt remains on the prosecution at all times. The accused chose to remain silent. That is his right. You should not draw any adverse inference due to the fact that he decided to exercise that right.

25. The first prosecution witness was Joji Bilowalu ("PW1"). He said in his evidence that:

- a) *On 02/11/17 after 4.45 pm he met the accused, Paula Belagio and the school bursar. He said that the accused and Paula were drinking alcohol inside the car. There were three bottles of 'stubbies' left. He joined them and went to drop the school bursar at her home. Then they went to Natovi Beach to finish those remaining bottles. After finishing the three bottles at Natovi Beach, they went to Korovou town and bought one carton of Fiji Gold.*
- b) *On the way back to Natovi they, including the accused who was driving, were all consuming liquor. At Natovi they picked up Lario and Masau. Then they went to Burelevu village and on the way they picked up a form 7 student. They also picked up Tuivouya from a bus stop. At this point he went and sat in the boot with the form 7 student.*
- c) *They went to Korovou and bought another carton of Fiji Gold. From there. They headed towards Wainibuka. While they were on their way to Wainibuka they were drinking. He said he was talking with the student. He said that suddenly 'the incident happened' and he blacked out.*

26. The second witness for the prosecution was Akuila Vakadraru ("PW2"). He said that;

- a) *He is a driver at Gokal's Company. He said that on 02/11/17, an accident took place while he was approaching the Korovou Town. He said that while he was conversing with his 'lorry-boy', they heard the sound of an oncoming vehicle which sounded like a motorbike.*
- b) *While his vehicle was still on the straight road, he saw this other vehicle reaching the bend and crossing over to the opposite lane (the lane that he was on). He applied breaks. Then he saw the said other vehicle moving back to its proper lane.*
- c) *After his vehicle came to a stop, all of a sudden, the other vehicle again crossed over and crashed onto the passenger side of his vehicle. He said that he cannot exactly*

say the speed in which this other vehicle was travelling, but, the impact caused his vehicle to turn.

- d) *During cross-examination he said that if [the accused] was not speeding, [the accused] could have avoided the accident. A photographic booklet was tendered as PE1.*

27. The third witness for the prosecution was Miliana R. Werebauinona ("PW3").

She said that;

- a) *She is a Principal Scientific Officer in the Forensic Unit. She said she analysed a blood sample of the accused on 03/11/17 and the result was 175 milligrams (mg) of Ethanol for 100ml of blood. She said that the legal limit is 80mg per 100ml of blood. According to studies, even at 80mg per 100ml of blood, a person would have lack of self-control, poor coordination, poor judgment and even memory loss. She said that 175mg indicates that the relevant person was highly intoxicated. She tendered the report she prepared as PE2.*
- b) *She also analysed the blood samples for Paula Belagio and Vilivo Masau. Paula Belagio's blood sample had 168mg per 100ml of blood and Vilivo Masau's sample had 46mg. The respective reports were tendered as PE3 and PE4.*
- c) *During cross-examination she said that the effects of alcohol on a person would vary depending on the body weight, how much the person had eaten before consuming alcohol and the rate which the alcohol was consumed.*

28. The third prosecution witness gave her evidence based on the test she conducted and her 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 evidence given by the third prosecution witness. Evaluating her evidence will therefore include a consideration of her expertise, her findings and the quality of the analysis which supports her findings.

29. The fourth and the final witness for the prosecution was PC 3617 Ravikesh Prasad ("PW4"). He said that;

- a) *He is a police officer serving in the traffic branch at the Korovou Police Station. He inspected the scene of the accident relevant to this case on 02/11/17. He said he prepared a rough sketch plan and a fair sketch plan and the two documents were tendered as PE5 and PE6 respectively. He said that the accused was interviewed in May 2018 and the delay was due to the fact that the accused was also injured during the accident and took time to recover.*

30. The following documents were tendered with consent;
- a) *Post Mortem Report of Paulo Belagio as PE07;*
 - b) *Post Mortem Report of Vilivo Masau as PE08;*
 - c) *Medical Report of the accused as PE09;*
 - d) *Cautioned Interview Statement of the accused as PE10;*
 - e) *Medical Report of Vilimoni Tuivuya as PE11; and*
 - f) *Medical Report of Jone Ravili as PE12.*
31. You would note that in the cautioned interview of the accused [PE10] there are admissions and also an explanation. You cannot fairly evaluate the admissions 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.
32. 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.
33. The following facts are the admitted facts in this case which you should consider as facts proved beyond reasonable doubt;
1. *Michael Junior Mow (hereinafter referred to as the accused) resided at Nayavu, Wainibuka in 2017.*
 2. *On the 2nd of November 2017 he was driving vehicle registration EP 113 (a black Toyota, Station Wagon).*
 3. *Earlier that day (2nd November 2017) the accused went to St. Vincent's college Natovi to pick the school bursar to take him to Suva.*
 4. *Upon leaving Natovi, the accused had Paulo Belagio (1st deceased) and the bursar as passengers in the vehicle, Paulo Belagio sat in the front passenger seat.*
 5. *The deceaseds names are Paulo Belagio (1st deceased) and Vilivo Masau (2nd deceased) as per the information.*

6. *The two deceased persons were related and we acquainted with the accused.*
7. *On the afternoon of the 2nd of November 2017 at around 5pm the accused dropped the school bursar back at St. Vincent College Natovi and returned with Paulo Belagio to Korovou Town for grocery shopping.*
8. *The accused and Paulo Belagio wanted to drink some more, so they headed back to Korovou Town and bought 1 carton of beer.*
9. *After buying the carton of beer they returned back to Natovi, the accused met some other friends who requested him to take them to Korovou Town to buy some more beers and grog for their break-up party that evening.*
10. *His friends were Lario (sat in the middle of the backseat), Vilivo Masau (2nd deceased- who sat at the back of front passenger seat), Vilimoni [Tuivuya] (sat behind the drivers' seat); Jone Ravili and Joji Bilowalu sat in the boot of the vehicle while Paulo Belagio remained in the front passenger seat.*
11. *On the 2nd of November 2017 a 5 tonne-delivery truck registration IL915 belonging to D Gokals was travelling along the Kings Highway at Viwa.*
12. *A collision occurred between the 5 tonne delivery truck and EP113.*
13. *Paulo Belagio and Vilivo Masau died after the collision.*
14. *Vilimoni Tuivuya and Jone Ravili sustained serious injuries after the collision.*
15. *Vilimoni Tuivuya and Jone Ravili were examined by Doctor Illisapeci Lasaro of Korovou Police Station.*

Analysis

34. Given the admitted facts and the evidence given by the prosecution witnesses, you may find that there is no dispute over the following facts;
 - a) That the accused was the driver of the vehicle EP 113 which collided with the 5 ton delivery truck IL 915 on 02/11/17 at Viwa along the Kings Highway;
 - b) Paulo Belagio was a passenger in the vehicle EP 113;
 - c) Paulo Belagio died as a result of the collision between the vehicles EP 113 and IL 915;
 - d) Vilivo Masau was a passenger in the vehicle EP 113; and

e) Vilivo Masau died as a result of the collision between the vehicles EP 113 and IL 915.

35. The prosecution says that the accused was intoxicated and the accused's level of intoxication led to the collision between the vehicles EP 113 and IP 915 which caused the death of the passengers Paulo Belagio and Vilivo Masau. Prosecution argues that the conduct of the accused was reckless.
36. On behalf of the accused it was argued that he was not reckless. It was pointed out that it was not possible for the accused to have been aware of a substantial risk that serious harm will occur to the two deceased persons who were drinking together with him. It was also pointed out that, according to the cautioned interview (PE10) the accused had said that the steering wheel of the vehicle was pulling to the right.
37. With regard to the two counts of manslaughter, it is admitted that each deceased died as a result of the collision and that each deceased was travelling in the vehicle EP 113 which the accused was driving. The issue you have to decide is whether the accused's conduct caused the death of the deceased and whether the accused was reckless as to the risk that his conduct will cause serious harm to the deceased.
38. To decide whether the accused was reckless you have to see whether the accused;
 - a) was aware of a substantial risk that serious harm will occur due to his conduct; and
 - b) having regard to the circumstances known to him, it was unjustifiable for him to take the risk.
39. What was the conduct of the accused that led to the death of each deceased relevant to the two charges? The evidence of PW1 was that, before the collision, those who were travelling in the vehicle EP 113 were drinking beer inside the car

including the accused who was driving. However, PW1 was unable to say the number of bottles consumed by the accused. According to PW3, the accused had 175mg of alcohol per 100ml of blood where the legal limit is 80mg.

40. Further, in PE10 (which was tendered with consent) the accused had said that he drank the previous night, he was also drinking during day time (Q & A 98). Moreover, the accused had said that there was a defect in the vehicle where the steering wheel was pulling towards the right side (Q & A 57), and that he was advised by a mechanic that the vehicle need to be repaired but he thought it safe [to drive] (Q&A 60). However, remember that you should consider the entire cautioned interview and decide what statements of the accused you consider as true and should rely only on the statements you consider as true. On the other hand there is no evidence to suggest that it was not safe for the vehicle to be driven, given the aforementioned defect the accused had mentioned in PE10.
41. The evidence does not reveal the amount of alcohol in the blood before the accused started driving the vehicle that evening and the exact amount the accused consumed while driving. What the evidence reveal is that when he was tested after the accident there was 175mg of alcohol per 100ml of blood. The evidence does not disclose the point at which the alcohol content in the accused's blood exceeded 80mg per 100ml.
42. Therefore, you may decide that the conduct that led to the death of each deceased is driving the vehicle which had a mechanical defect under the influence of liquor. According to the evidence, both the deceased persons were drinking together with the accused. The issue is, was the accused aware of a substantial risk that serious harm will occur to the two deceased persons when he was driving the vehicle and having regard to the circumstances known to him was it unjustifiable for him to take the risk? At what point should the accused have realized that his conduct would cause serious harm to the two deceased? If you are satisfied beyond reasonable doubt that the accused was aware of a substantial

risk that his conduct will cause serious harm to the two deceased persons he was drinking with and having regard to the circumstances known to him it was unjustifiable for him take the risk, you should find the accused guilty of manslaughter.

43. If you are not satisfied beyond reasonable doubt that the evidence is sufficient to establish recklessness, then you should consider whether the accused had committed the alternative offence of aggravated dangerous driving occasioning death. The elements of this offence as relevant to this case are;

- a) the accused;
- b) drove a vehicle;
- c) that vehicle got involved with an impact occasioning a death of another person;
- d) at the time of the impact, the accused was driving the vehicle under the influence of intoxicating liquor; and
- e) at the time, more than the prescribed concentration of alcohol was present in the accused's blood.

44. If you are satisfied beyond reasonable doubt that all the above elements are established, then you should find the accused guilty of the offence of aggravated dangerous driving occasioning death.

45. Any re-directions?

46. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charges 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.

47. Your opinion should be as follows;

1st Count (manslaughter) – guilty or not guilty

If not guilty

aggravated dangerous driving occasioning death – guilty or not guilty

2nd Count (manslaughter) – guilty or not guilty

If not guilty

aggravated dangerous driving occasioning death – guilty or not guilty


Vincent S. Perera
JUDGE



Solicitors:

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