

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 225 OF 2019S

STATE

VS

MOSESE KOROI SIGABALAVU

Counsels : **Ms. E. Rice for State**
Ms. S. Nasedra and Ms. L. David for Accused

Hearings : **16, 17, 18, 19 and 22 March, 2021**

Judgment : **23 March, 2021.**

JUDGMENT

1. On the first day of the trial, 16 March 2021, the following information was read over and explained to the accused, in the presence of his counsels:

“Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

MOSESE KOROI SIGABALAVU on the 7th of June 2019 at Suva in the Central Division murdered SEINI TAGILALA.”

2. He said, he understood the charge and pleaded not guilty to the same. The prosecution opened her case, and called seventeen witnesses. They were as follows:

- (i) Mr. Tevita Kautoga (PW1);
- (ii) Mr. Gabiriele Kautoga (PW2);
- (iii) Ms. Losalini Marama (PW3);
- (iv) Ms. Olita Senicevuga Tuisorisori (PW4);
- (v) Mr. Sakiusa Bulukaru (PW5);
- (vi) Ms. Maraia Matu (PW6);
- (vii) Ms. Susana Liku Gutugutuwai (PW7);
- (viii) Ms. Atelina Duguivalu (PW8);
- (ix) PC 4817 Lagani Tokalauvere (PW9);
- (x) Cpl 4576 Jeke (PW10);
- (xi) PC 6631Sujen Sardar (PW11);
- (xii) Mr. Jeremaia Valevatu (PW12);
- (xiii) Doctor James Kalougivaki (PW13);
- (xiv) PC 5343 Jone Naitini (PW14);
- (xv) D/Sgt 4485 Viliame Naupoto (PW15);
- (xvi) W/Cpl 3142 Arieta Samosi (PW16) and
- (xvii) DC 3563 Josaia Bukaniraraki (PW17).

3. The prosecution presented the following exhibits:

- (i) Prosecution Exhibit No. 1 – PW13's Curriculum Vitae.
- (ii) Prosecution Exhibit No. 2 – Deceased's Post Mortem Report
- (iii) Prosecution Exhibit No. 3 – Bed Sheet
- (iv) Prosecution Exhibit No. 4 – Pillow Case
- (v) Prosecution Exhibit No. 5 (A) – Rough Sketch Plan
- (vi) Prosecution Exhibit No. 5 (B) – Fair Sketch Plan
- (vii) Prosecution Exhibit No. 6 – Booklet of Photos

- (viii) Prosecution Exhibit No. 7 (A) – Accused’s i-taukei interview notes
 - (ix) Prosecution Exhibit No. 7 (B) – Accused’s English interview notes
 - (x) Prosecution Exhibit No. 8 – Studio 6 Receipt
 - (xi) Prosecution Exhibit No. 9 (A) – Accused’s i-taukei charge statement
 - (xii) Prosecution Exhibit No. 9 (B) – Accused’s English charge statement.
4. The parties submitted an Agreed Facts, containing 10 paragraphs, dated 25 February 2021.
5. At the end of the prosecution’s case, both parties were invited by the court to make a submission on whether or not there was a case to answer by the accused. Both agreed that the accused had a case to answer. The court agreed with counsels and ruled that, on the basis of the evidence so far laid in court by the prosecution, the accused had a case to answer. The standard options were put to the accused. He chose to give sworn evidence in his defence and called no witness. At the end of the defence’s case, the parties submitted their verbal closing submissions. The court then adjourned to 23 March 2021 for judgment.
6. The burden to prove the accused’s guilt beyond reasonable doubt still rest on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. There is no obligation on the accused to prove his innocence. He is presumed innocent until proved guilty beyond reasonable doubt in a court of law.
7. For the accused to be found guilty of “murder”, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) that the accused did a wilful act; and
 - (ii) that wilful act caused the death of the deceased; and
 - (iii) at the time of the wilful act, the accused either;
 - (a) intended to cause the death of the deceased; or

(b) is reckless as to causing the death of the deceased.

8. On the first element of murder, a “wilful act” is a voluntary act by the accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder.
9. On the second element of murder, “the wilful act must cause the death of the deceased”. This simply meant that the accused’s wilful act, substantially contributed to the death of the deceased. The accused’s wilful act must be a substantial contributor to the death of the deceased. In other words, the accused’s wilful act was a substantial cause of the deceased’s death.
10. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 7(iii) (a) and 7(iii) (b). It would appear that the prosecution is running its case on both fault elements. It need only satisfy one fault element, to prove the charge of murder. The court will therefore begin by discussing the first fault element, and then move on to the second fault element.
11. On the first fault element, the prosecution must make the court sure that when the accused did “the wilful act”, he “intended to cause the death of the deceased”. You cannot cut open the accused’s head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But the court can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted her. If the court finds that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.

12. As to the second fault element of murder, the prosecution must make the court sure that when the accused did “the wilful act”, he “was reckless as to causing the death of the deceased”. A person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk was unjustifiable is one of fact for the court. Was the accused aware of a substantial risk that the victim would die if he assaulted her? If he was aware of the substantial risk that the deceased would die if he assaulted her, and he nevertheless took the risk, he was reckless. If otherwise, he was not reckless.
13. If the court was sure that all the elements of murder, as expressed above, are satisfied by the prosecution beyond a reasonable doubt, then the court will find the accused guilty as charged. If the court finds that some of the elements of murder, as described above, are not satisfied beyond a reasonable doubt by the prosecution, then the court will find the accused not guilty as charged. It is a matter entirely for the court.
14. We will now examine the prosecution’s case. In their closing submission to the court, it was the prosecution’s case that the accused allegedly punched and assaulted his girlfriend, the deceased, several times, at Studio 6 Hotel and at his home, on 7 June 2019. It was the prosecution’s case that the above alleged assaults caused the deceased serious head and brain injuries leading to her death. It was also the prosecution’s case that the nature of the above alleged assaults showed that the accused intended to cause her death or was reckless in causing the same. The difficulty for the prosecution in this case was that, they did not produce any eye witness to say that he or she saw the accused assaulting the deceased, at the material time. Also, the alleged assaults at 22 Stock Street,

Nasese, on 7 June 2019 between 7.45 pm and 11.45 pm, occurred in the presence of the accused's parents (PW5 and PW6) and his sisters (PW7 and PW8). However, none of them said they saw the accused assaulting the deceased, at the material time. Also, at the Studio 6 Hotel, on the morning of 7 June 2019, no one said, they saw the accused assaulting the deceased, at the material time. This was obviously, a difficulty for the prosecution.

15. To connect the crime of murder, to the accused, the prosecution relied on what is often termed as "circumstantial evidence". Reference has been made to the type of evidence given in this case. Sometimes a judge is asked to find some fact proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw an accused commit a crime; if there is a video recording of the incident which plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against him. On the other hand, it is often the case that direct evidence of a crime is not available, and the prosecution relies upon circumstantial evidence to prove guilt. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a judge can say "I now know everything there is to know about this case". But the evidence must lead to the sure conclusion that the charge which the accused faces is proved against him. Circumstantial evidence can be powerful evidence, but it is important that it is examined with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence the court should consider whether it reveals any other circumstances which are or may be of

sufficient reliability and strength to weaken or destroy the prosecution's case. Finally, the court should be careful to distinguish between arriving at conclusion based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor the court should do that.

16. We will now look at the evidence of the various circumstances relating to the crime and the accused which the prosecution say when taken together, will lead to the sure conclusion that it was the accused who committed the crime.
17. **The Agreed Facts submitted by consent of the parties.** The "Agreed Facts" was dated 25 February 2021, signed by prosecution and defence counsels, including the court. It had 10 paragraphs. The facts stated therein were not disputed by the parties, and as such, are established facts. They provided a background to the case. It showed that the deceased was the accused's girlfriend and they resided at the accused's family residence at 22 Stock Street, Nasese. By virtue of paragraph 10 of the Agreed Facts, the parties agreed that photos numbered 1 to 12 in the Booklet of Photos (Prosecution Exhibit No. 6) was the "scene of death", or the crime scene. This meant something happened at the crime scene that caused and/or contributed to the deceased's death.
18. **Accused, when caution interviewed by police, admitted assaulting the deceased at Studio 6 Hotel and at home, between 6 and 7 June 2019.** The accused was caution interviewed by police at Totogo Police Station on 9 and 10 June 2019. He was asked a total of 111 questions and he gave 111 answers. He did not challenge the admissibility of his caution interview statements in a voir dire hearing. The caution interview statements were tendered into evidence as Prosecution Exhibits 7 (A) – itaukei version, and 7 (B) – English version. The

allegation that between 6 and 7 June 2019, he assaulted the deceased to death was put to him before Question 5. He said he understood the allegation. In Question and Answer 84, the accused admitted assaulting the deceased at Studio 6 Hotel. He said, that was why she was injured in the left cheek. In Questions and Answers 86, 87, 89 and 90, the accused admitted assaulting the deceased, that is, punching the deceased at 22 Stock Street, Nasese, at the material time. In Question and Answer 96 and 97, the accused again admitted punching the deceased at home. In Questions and Answers 102, 103 and 104, the accused admitted punching the deceased's head and eyes at Studio 6 Hotel, at the material time. As a result of the above admissions, the accused was admitting to the first element of the offence of murder, as explained in paragraph 7 (i) and 8 hereof, that is, he did a "wilful act" when he repeatedly assaulted/punched the deceased, at Studio 6 Hotel and at 22 Stock Street, Nasese, on 7 June 2019.

19. **Accused seeking forgiveness for what he did to the deceased in his charge statement.** On 26 June 2019, the police formally charged the accused with murder at Totogo Police Station. The formal charges were tendered into evidence as Prosecution Exhibits 9 (A), the itaukei version, and 9 (B), the English version. Before Question and Answer 7, the formal charge of murder was put to the accused, and he said he understood the same. In Question and Answer 8, he sought forgiveness for what he did to the deceased, and he said he did not mean to cause her death. This was further evidence that he admitted punching the deceased in the head and the mouth, at the material time, that led to her death.

20. **Doctor James Kalougivaki's (PW13) Evidence and the Deceased's Post-Mortem Report.** In murder cases, it was often said that the deceased cannot verbally speak to the court because he or she was dead, but they can "speak" to

the court through the injuries their bodies had suffered, that lead to their death. Doctor Kalougivaki (PW13), on 9 June 2019, did a post-mortem on the deceased at the CWM Hospital. He recorded his findings in a post-mortem report, which he tendered in evidence, as Prosecution Exhibit No. 2. He did an external and internal examination of the deceased's body. He said, the cause of the deceased's death was severe bleeding to the first and second covering to the brain. He said there was also bleeding in the mid brain. He said, the above injuries were caused by fatal blunt force head trauma. The force required, he said, was extreme or significant force like a very strong punch. When cross-examined, the doctor said, "a strong punch to the eye causing the head to twist sideways or backwards could cause the bleeding in the skull". He said, "the trauma noted on the side of the cheeks, the chin, the left of the head and the lips, are basically marks of initiating the twisting of the head". So, in a sense, the deceased's body, through the post-mortem report, was telling us that the deceased died as a result of massive brain/head injuries as a result of blunt force trauma to the head. PW13 said that blunt force trauma could be the result of a very strong punch.

21. **The Accused's Fistic Fight with Susana.** Susana (PW7) said, she was, the accused's elder sister. She said, she returned home to 22 Stock Street on 7 June 2019, at 6.45 pm. She said, the accused and the deceased were in the shed at the back of the house. PW7 said she talked to the accused on why he took the deceased out, as she was pregnant. PW7 said, the accused came into the house and slapped her. Later, the two argued in the shed. PW7 said the accused punched her in the face. PW7 said, she later punched him back. The above episode appears to show that the accused had no reservation whatsoever with punching females. One would say, if he had the ability to do that to his elder sister, why not the deceased?

22. What do the above circumstantial evidence tell the court? The totality of above circumstantial evidence appear to point to the accused as the alleged perpetrator. But I must pause and consider the defence's case.
23. The accused, at the beginning of the trial, pleaded not guilty to the charge of murder. In his evidence, he admitted punching the deceased four times. He said, he punched her on the head. He said, they were arguing. He said, the deceased was repeatedly swearing at him and his parents. He said, she was also shouting and yelling at him. He said, he wanted to stop her doing the above and that's why he punched the deceased four times. He said, the deceased provoked him to do the above.
24. Section 242 (1) and (2) of the Crimes Act 2009 reads as follows:

“(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in subsection (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.

(2) The term “provocation” means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when –

(a) done to an ordinary person;

to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered”.

25. Looking at the facts of this case, does the defence of provocation apply here? The facts appear to show that the deceased was first assaulted repeatedly at the Studio 6 Hotel in the early morning of 7 June 2019. Thereafter they checked out

of the hotel after 10 am. They went around town in a taxi and returned to 22 Stock Street, Nasese at 6.45 pm. From 6.45 pm to before the grog session at 9 pm, the accused and the deceased were together. From what the accused was saying that the deceased was swearing and shouting at him and the family, at the time, were not alluded to by his parents (PW5 and PW6). Neither his sisters (PW7 and PW8) alluded to the above. PW5, PW6, PW7 and PW8 were at home at the time, and neither of them heard the deceased swearing, yelling and shouting, at the deceased, at the time. The lack of evidence to the contrary by PW5, PW6, PW7 and PW8 as to the above, makes the accused's assertion suspect and appear not tenable. In my view, given the above, it does not appear that the deceased was assaulted by the accused in the heat of passion. There was enough time for him to cool down after the alleged assaults. In any event, if the accused's version was to be accepted, in my view, no reasonable person would be deprived of self-control and induced to punch his girlfriend to death. In my view, the defence of provocation does not apply in this case.

26. I have looked at and carefully considered the evidence of the 17 prosecution's witnesses. I have also carefully considered the accused's sworn evidence. I have carefully considered the demeanours of all the witnesses. I had carefully compared and analysed the evidence of all the 18 witnesses. I had carefully considered the prosecution's circumstantial evidence and the defence's denial of murder and their defence of provocation.
27. I accept the evidence of all the prosecution's 17 witnesses. I find their evidence credible, although I understand it was hard for the accused's family to give evidence against him. I find the accused was not a credible witness and his evidence was against the weight of Doctor Kalougivaki's evidence and the post-mortem report of the deceased.

28. Given the above, and after considering the totality of the evidence, I make the following my finding of facts:

- (i) That the accused, on 7 June 2019, at Suva in the Central Division, punched the deceased several times in the head and face, first at Studio 6 Hotel in the morning, and later at 22 Stock Road, Nasese, in the evening;
- (ii) That the above multiple punches to the head and face, collectively caused massive head and brain injuries, as itemised in the deceased's post-mortem report, that eventually led to her death;
- (iii) That at the time of unleashing the above punches to the deceased's head and face, the accused intended to cause her death, and in the alternative, was reckless in causing her death.

29. Given the above, I find the accused guilty as charged, and I convict him accordingly.



Solicitor for State :
Solicitor for Accused :

Office of the Director of Public Prosecution, Suva
Legal Aid Commission, Suva

A handwritten signature in blue ink, appearing to read "Salesi Temo".

Salesi Temo
JUDGE