

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION
CRIMINAL CASE NO. HAC 140 OF 2020S

STATE

VS

JOSEVATA WERELALI KOROI

Counsels : Mr. Y. Prasad, Mr. S. Komaibaba and Ms. M. Lomaloma for
State
Mr. I. Romanu for Accused

Hearings : 24, 25, 26, 29, 30 and 31 March, 2021

Judgment : 6 April, 2021.

JUDGMENT

1. On the first day of the trial, 24 March 2021, the following information was read over and explained to the accused, in the presence of his counsel:

“Statement of Offence

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

Particulars of Offence

***JOSEVATA WERELALI KOROI on the 1st day of May, 2020 at Waima Village,
Vunidawa in the Eastern Division murdered one ADI ELENANI WAIDRAU.”***

2. He said, he understood the charge and pleaded not guilty to the same. The prosecution opened their case and called five witnesses. They were as follows:
 - (i) D/Cpl 3908 Emosi Nokonokovou (PW1);
 - (ii) Ms. Nelly Seforosa Suliana (PW2);
 - (iii) Mr. Saimoni Batilada (PW3);
 - (iv) D/Sgt 3352 Leone Davila (PW4); and
 - (v) Doctor Avikali Mate (PW5).

3. The prosecution presented the following exhibits:
 - (i) Prosecution Exhibit No. 1 – Interview Disc No. 1
 - (ii) Prosecution Exhibit No. 2 – Interview Disc No. 2
 - (iii) Prosecution Exhibit No. 3 – Interview Disc No. 1 English Transcript
 - (iv) Prosecution Exhibit No. 4 – Interview Disc No. 2 English Transcript
 - (v) Prosecution Exhibit No. 5 – Knife
 - (vi) Prosecution Exhibit No. 6 – Booklet of Photos
 - (vii) Prosecution Exhibit No. 7 – PW5’s Curriculum Vitae
 - (viii) Prosecution Exhibit No. 8 – Deceased’s Post Mortem Report.

4. The parties submitted an “Agreed Facts”, containing 8 paragraphs, dated 24 March 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 the accused had a case to answer. The defence submitted the accused had no case to answer because the accused was provoked into allegedly committing the crime. The prosecution submitted that the accused had a case to answer, given the totality of the evidence, so far laid in court. The court ruled that the accused had a case to answer on the basis of the evidence, so far placed before the court. The accused was given his standard

options. He chose to give sworn evidence (DW1), in his defence, and called no witness.

6. The defence presented the following exhibits:
 - (i) Defence Exhibit No. 1 – Deceased’s Alcatel Mobile Phone.
 - (ii) Defence Exhibit No. 2 – Deceased’s Nokia Mobile Phone
 - (iii) Defence Exhibit No. 3 – Deceased’s Memory Card.
 - (iv) Defence Exhibit No. 4 - itaukei Transcript of Memory Card
 - (v) Defence Exhibit No. 5- English Transcript of Memory Card.

7. At the end of the defence’s case, both parties made their verbal closing submissions to court. There were a total of 6 witnesses and 13 exhibits, on which the court will have to make a decision. The court adjourned to 6 April 2021 to deliver its judgment.

8. 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 proven guilty beyond reasonable doubt in a court of law.

9. 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.

10. 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.
11. 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.
12. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 9(iii) (a) and 9(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.
13. 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.

14. 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.
15. 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 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.
16. The court will now examine the prosecution’s case. It was the prosecution’s case that the accused, on 1 May 2020, allegedly stabbed the deceased on the chest and the back, that caused her serious injuries, leading to her death. It was also the prosecution’s case that, when he did the above, the accused allegedly intended to cause her death, or in the alternative, was reckless in causing her death.
17. In terms of the elements of the offence of murder as described in paragraphs 9 to 14 hereof, and especially paragraph 9 (i), the first question becomes: Did the accused do a wilful act, at the material time? It was the prosecution’s case that the accused, at the material time, stabbed the deceased once on the top right

chest and later, four times on the left part of her back. The prosecution provided three types of evidence in proving the above. First, prosecution relied on the accused's alleged confession, as contained in his two interview discs, tendered as Prosecution Exhibit No. 1 and 2. The conversations in the above discs were transcribed and tendered in evidence as Prosecution Exhibit No. 3 (Disc No. 1) and No. 4 (Disc No. 2). Second, the prosecution relied on an eye witness (PW2), who saw the accused stabbed the deceased in the right breast, at the material time. Third, the prosecution relied on photos of the deceased's body, taken by D/Sergeant 3352 Leone Davila (PW4), at the CWM Hospital mortuary, before the post-mortem examination. The above photos were contained in a Booklet of Photos, tendered in evidence, as Prosecution Exhibit No. 6.

18. We will now examine the above evidence. The prosecution's most important piece of evidence was the accused's alleged confession to the charge of murder, as contained in his police caution interview discs tendered as Prosecution Exhibits No. 1 (Disc No. 1) and No. 2 (Disc No. 2). The court had carefully watched and listened to the above interview during the trial. The interview was transcribed in English and tendered in evidence, as Prosecution Exhibits No. 3 (Disc No. 1 Transcript) and No. 4 (Disc No. 2 Transcript). The court had read both transcripts. Disc No. 1 Transcript had 25 pages. The pages were marked page 1 to page 25. Disc No. 2 Transcript had 6 pages. The pages were marked page 1 to page 6. The prosecution failed to mark the questions and answers in both Disc. In order to understand this important piece of evidence, the court had mark the questions and answers in both Disc No. 1 and 2. Disc No. 1 had 230 Questions and Answers marked accordingly in Prosecution Exhibit No. 3, while Disc No. 2 had 47 Questions and Answers marked accordingly in Prosecution Exhibit No. 4.

19. The defence did not challenge the admissibility of the accused's alleged confession contained in the above Disc No. 1 and No. 2. This position was adopted and confirmed by the defence on 17 July 2020, in a pre-trial conference. During the trial, the defence did not ask for a voir dire hearing. In my view, looking at the two discs and their transcripts, the interview of the accused was conducted fairly by the police. In my view, the accused gave his caution interview statements voluntarily and out of his own free will. The police gave him all his rights, gave him the standard meal and rest breaks.

20. In Prosecution Exhibit No. 3 (Transcript for Disc No. 1), in Questions and Answers 29 (page 4) and 59 (page 7), the allegation of murdering the deceased was put to the accused, and he said, he understood the same. In Questions and Answers 163 to 169 (page 20), 170 to 179 (page 21) and 211 to 212 (page 23), the accused admitted stabbing the deceased multiple times in her chest and back. In Prosecution Exhibit No. 4 (Transcript for Disc No. 2), in Questions and Answers 12 (page 2), 26 (page 3) and 28 (page 4), the accused admitted stabbing the deceased multiple times in her chest and back. In my view, after observing disc No. 1 and 2, the accused voluntarily admitted that he stabbed the deceased multiple times in the chest and back, at the material time. In my view, his confession above was true.

21. We will next discuss the evidence of Ms. Nelly Seforosa Suliano (PW2). She was the deceased's younger sister and they resided in the same house, at the material time. In her evidence, PW2 said, she saw the accused punched the deceased in the mouth and dragged her into their room. Later, PW2 said, she saw the accused holding a knife in his right hand and stabbing the deceased's right breast with the same. After observing PW2 give evidence in court, in my view, she was a credible witness. I accept her evidence.

22. Third, we consider the prosecution's Booklet of Photos, tendered in evidence as Prosecution Exhibit No. 6. The same was prepared by D/Sgt 3352 Leone Davila (PW4). He took the photos of the deceased at the CWM Hospital mortuary. PW4, in his evidence, referred us to Prosecution Exhibit No. 6, Tab 3, Photos 5, 6, 7, 15, 16, 17, 18, 19, 20, 21, 22 and 23. Photo 5, 6 and 7 showed the stab wound to the deceased's right breast. The rest of the photos showed the stab wounds to the deceased's left back.
23. Looking at the above evidences, the answer to the question posed in paragraph 17 hereof, would be: Yes, the accused did a wilful act at the material time, that is, he stabbed the deceased once in the right breast and four times in her left back, as shown in Prosecution Exhibit No. 6, Tab 3, Photos 5, 6, 7, 15, 16, 17, 18, 19, 20, 21, 22 and 23. The prosecution had therefore proven beyond reasonable doubt the first element of murder, as described in paragraph 9 (i) hereof.
24. The next question would be: Did the above stabbing cause the deceased's death? The answer to this question was a medical one. The prosecution called Doctor Avikali Mate (PW5) to answer the above question. Doctor Mate was an experienced pathologist, having done more than 900 post-mortem examinations. She did the post-mortem on the deceased on 3 May 2020 at the CWM Hospital. She prepared a post-mortem report to record her findings and she tendered the same as Prosecution Exhibit No. 8. PW5 said, the cause of the deceased's death was excessive loss of blood from the heart due to the stab wound to the same, and the multiple stab wounds to the back that caused injuries to the lungs. PW5 said, "...The injury to the chest is severe, given the internal injury caused. The force used to the chest injury must be moderate to severe. The stab to the chest went as far as the right side of the heart. This injury is enough to cause the person's death. Three of stab wounds to the back punctured the lungs. With the stab wounds to the chest and the 4 stab wounds to the back, the chance of

survival was 2 %...” After examining Doctor Mate’s evidence, in my view, she had answered the question posed above - the stabbings by the accused to the deceased’s chest and back, at the material time, caused the deceased’s death.

25. The third question now becomes: At the time the accused stabbed the deceased in the chest and the back, did he intend to kill the deceased? Alternatively, when the accused stabbed the deceased in the chest and back, at the material time, was he reckless in causing her death? I had considered all the evidence given by the prosecution’s five witnesses, including the accused’s sworn evidence. The accused said, he knew the deceased, his wife, was having an affair with another man, for 3 years prior to the stabbing. He said, he gave them a chance to stop it. He said, he had two children with the deceased. On the day in question, that is, 1 May 2020, he said he found out a recording of a conversation between a man and woman in his wife’s phone’s memory card. He said, he came home to confront his wife. He said, he got a knife from his house. He said, he confronted his wife with what he discovered. He said, he stabbed his wife first in the right breast and 4 times in the back. He admitted, he intended to kill his wife. On his admission alone, in my view, the prosecution had proven beyond reasonable doubt that, when he stabbed the deceased at the material time, he intended to cause her death. In my view, he was also reckless in causing her death. He knew very well that there was a substantial risk that the deceased would die if he stabbed her on the chest and 4 times on the back. It was unjustifiable to take the risk of stabbing her, as mentioned above. He nevertheless took the risk. The deceased died as a result. He was obviously reckless in causing her death.
26. Given the above, the prosecution had proven beyond reasonable doubt that the accused murdered the deceased, at the material time. In his evidence and in their closing submission, the defence appear not to deny the above. They appear to argue that the accused was provoked into killing the deceased at the material

time, thus he was not guilty of murder, but guilty of the lesser offence of manslaughter. If the defence was correct on this issue, then that was what the law required. We will therefore look at the defence of provocation.

27. 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”.

28. Does the defence of provocation apply in this case? The accused himself had admitted that he knew since 2017 that his wife was having an affair with another man. He said, he knew the identity of the man. He said, he had asked his wife to stop the affair. He said, he always wanted to use his wife’s mobile phone, but she doesn’t want him to do so. On 1 May 2020, the accused took his wife’s mobile phone, took out the memory card, put it on his mobile phone, and heard his wife talking to another man. He said, he couldn’t take it. He went home and got a knife. He said, he wanted to confront his wife and came to her family’s house ready to kill her. He said, he first stabbed her in the chest, and thereafter four stabs to her back. He admitted he wanted to kill her. He came prepared with a kitchen knife. In my view, the above stabbings was not done in the heat of

passion. There was no sudden provocation. He was aware of his wife's affair for 3 years prior to stabbing her. So, it was not something he just suddenly discovered after hearing the memory card recordings. Three years was enough time to cool down. In any event, a reasonable person in the shoes of the accused, would not be deprived of self-control and induced into stabbing his wife to death. A reasonable person in the shoes of the accused would either seek reconciliation or divorce proceedings in the Family Court. In my view, the defence of provocation does not apply in this case.

29. I had looked at and carefully considered the evidence of all the prosecution and defence's witnesses, including the exhibits submitted. I had compared and analysed all the evidence. I accept the evidence of the prosecution's witnesses, as I find them credible. I accept some of the accused's evidence and reject others.

30. Given the above, and after considering the totality of the evidence, I make the following my finding of facts:
 - (i) That the accused, on 1 May 2020, at Waima Village, Vunidawa in the Eastern Division, repeatedly stabbed Adi Elenani Waidrau, in the right chest and left back, with a kitchen knife;
 - (ii) That the above stabbings ruptured the deceased's heart and lungs leading to massive bleeding that caused her death;
 - (iii) That at the time of stabbing the deceased, the accused intended to cause her death, and alternatively, he was reckless in causing her death;
 - (iv) The defence of provocation does not apply in this case, for the reasons mentioned in this judgment.

31. 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
MIQ Lawyers, Suva

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

Salesi Temo
JUDGE