

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 08 of 2019
[CRIMINAL JURISDICTION]

STATE

V

TIMOCI CAKAU

Counsel : Ms. S. Tivao and Mr. S. Shah for the State
Ms. T. Kean for the Accused

Hearing on : 18 January – 22 January 2021

Summing up on : 25 January 2021

Judgment on : 28 January 2021

JUDGMENT

1. The accused is charged with the following offence;

Statement of Offence

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

Particulars of Offence

TIMOCI CAKAU between the 23rd day of December, 2018 and the 24th day of December, 2018 at Suva, in the Central Division, unlawfully assaulted **RATU EMOSI SERU TAGIVAKATINI**, which caused the death of the said **RATU EMOSI SERU TAGIVAKATINI** and at the time of such assault was reckless as to causing serious harm to **RATU EMORI SERU TAGIVAKATINI**.

2. The assessors were directed to consider the lesser offence of assault causing actual bodily harm if they find the accused not guilty of the above offence.

3. The assessors have returned with the unanimous opinion that the accused is guilty of manslaughter as charged.
4. I direct myself in accordance with the summing up delivered to the assessors on 25/01/21 and the evidence adduced during the trial.
5. The prosecution called five witnesses. The accused gave evidence in his defence.
6. The first four prosecution witnesses were eye witnesses of the alleged incident. The fifth prosecution witness was the doctor who conducted the post mortem examination of the deceased.
7. In this case the accused does not dispute that he had a fight with the deceased and that he punched the deceased. However, he says that he acted in self defence. The prosecution also acknowledges that the accused acted in self defence but says that the response of the accused was not reasonable given the circumstances.
8. Given the circumstances of the case, in my view, the best way to approach this case is to find the answers to the following questions, as I have instructed the assessors in the summing up;
 - a) What was the conduct that caused the death of the deceased?
 - b) What was the accused's conduct that is relevant to this case?
 - c) Whether that conduct caused the death of the deceased or whether that conduct substantially contributed to the death of the deceased?
 - d) Whether that conduct a reasonable response to defend himself given the circumstances.
9. According to the medical evidence, the cause of death was 'right subarachnoid haemorrhage' or in simple terms bleeding in the right side of the brain. As I have

noted in the summing up, PW5 failed to explain how such bleeding in the brain could cause the death of a person.


10. It was noted that PW5 had heavily relied on the history provided to him by the Investigating Officer in drawing up his conclusions in PE1. This history PW5 had relied on was inconsistent with the evidence presented in court and it also does not provide a proper and a complete picture of what had taken place as revealed in the evidence. Given the manner the history has been provided it suggests that the deceased may have fallen backwards as a result of being punched twice on the face.
11. According to the evidence presented in this case, the deceased did not fall down as a result of being punched on the face, during the fight between the deceased and the accused. Further, it is pertinent to note that, according to PW5, there was no injury at the back of the deceased's head and the only head injury observed by PW5 was on the right frontal area.
12. PW5 has mentioned blunt force trauma as the second cause directly leading to the death of the deceased in his report, PE1. In his opinion a punch, a blow to the head or even a change in velocity could cause the relevant brain injury.
13. The next hurdle is to determine the conduct of the accused relevant to this case because the four eye witnesses for the prosecution gave four different accounts in relation to the conduct of the accused.
14. All four witnesses testified that they saw the deceased falling down and hitting his head during the fight between the deceased and the accused outside the night club. However, they were at variance with regard to what caused the accused to fall.

15. According to PW2, the deceased fell because he himself tripped. According to PW3, the deceased fell when the accused lifted him. According to PW1, the accused tackled the deceased while the deceased was holding onto the accused's shirt and because of that the deceased fell and hit his head. But then the accused pulled the deceased up and they went inside the nightclub. According to PW4, the accused pushed the deceased from the accused's shoulder when the deceased tried to grab the accused's shirt. Then the deceased fell and hit his head heavily against the concrete. Even after that the accused shook the deceased causing the deceased's head to hit the concrete on several occasions and then head-butted the deceased. A third person lifted the deceased up.
16. There were no reasons offered to explain the inconsistencies between the accounts given by the four eye witnesses so that either the four accounts could be reconciled or one account could be accepted over another.
17. It was noted that the prosecution preferred the evidence of PW4. However, in addition to there being three other versions which were inconsistent with PW4's version as stated above, I also found PW4's evidence regarding the manner the deceased hit his head on the footpath to be unreliable in view of the fact that there was no corresponding injury found at the back of the head of the deceased during the post mortem examination. If the deceased did hit his head against the concrete footpath in the manner PW4 elaborated when he fell down and then when the accused shook the deceased from the shirt collar, I find it improbable not to have a corresponding injury at the back of the deceased's head.
18. PW5 said in his evidence that death can occur after hours or even days from the time an injury that caused the bleeding as noted in the deceased's brain was sustained and therefore the medical evidence was not capable of providing an estimated time when the relevant injury may have occurred.

19. On the other hand, the evidence led by the prosecution itself revealed that there were at least four other instances where the deceased may have encountered blunt force trauma to the head at the Temptation 2 Nightclub, incidents which the accused had no involvement. Three of those instances were where the deceased fell on his back after being punched on the face before the deceased fought with the accused and the other incident was after the said fight. Moreover, no evidence was led to exclude the possibility of the deceased having sustained the relevant injury before he came to Temptation 2 Nightclub and after he left the Nightclub. The evidence was that the deceased was still alive but drunk when he was sent from the nightclub to the Yue Lai Hotel.
20. All in all, although it is not disputed that the accused and the deceased fought at the material time, I find that the prosecution has failed to establish beyond reasonable doubt what really happened during that fight, thus, failing to establish a particular conduct relevant to the charge. Moreover, I am not satisfied that the prosecution has established beyond reasonable doubt that it is the conduct of the accused that caused the death of the deceased or substantially contributed to the death of the deceased.
21. In the circumstances, in my judgment, the prosecution has failed to establish the offence of manslaughter and therefore I am unable to agree with the unanimous opinion of the assessors.
22. As I have highlighted above, the accounts given by the four eye witnesses regarding what exactly happened during the fight between the deceased and the accused were inconsistent and there was no explanation offered for those inconsistencies that would enable a particular version to be accepted over another. For this reason, there is no basis to reject the version of PW2 that the deceased fell because he himself tripped.

23. Therefore, I am not satisfied that the prosecution has proved beyond reasonable doubt that the accused's response to the threat he perceived from the deceased at the material time was not a reasonable response given the circumstances.
24. In the result, I find the accused not guilty of manslaughter as charged, and not guilty of the lesser offence of assault occasioning actual bodily harm under section 275 of the Crimes Act 2009.
25. The accused is hereby acquitted accordingly.




Vinsent S. Perera
JUDGE

Solicitors;

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