

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

Criminal Case. No. HAC 14 of 2022

BETWEEN : **THE STATE**

A N D : **JEKOPE CADRA DUANASALI**

Counsel : Ms. W. T. Elo for the State.
Ms. L. Volau and Ms. K. Vulimainadave for the
Accused.

Dates of Hearing : 02 and 03 November, 2023.

Closing Submissions : 28 November, 2023

Date of Judgment : 28 November, 2023

JUDGMENT – SPECIAL VERDICT

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

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

Particulars of offence

JEKOPE CADRA DUANASALI on the 16th day of December, 2021 at Nadi in the Western Division murdered RAM KRISHNA.

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the offence of murder as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. To prove the above count the prosecution must prove the following elements of the offence of murder beyond reasonable doubt:
 - (a) The accused
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of the deceased; and
 - (d) the accused intended to cause the death; or
 - (e) was reckless as to causing the death of the deceased by his conduct.

The accused is reckless with respect to causing the death of the deceased if;

 - (i) he was aware of a substantial risk that death will occur due to his conduct; and
 - (ii) having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
5. What this court will have to consider with regard to this particular state of mind is whether the accused was aware of a substantial risk that death will occur due to his conduct and having regard to the circumstances known to him, it was unjustifiable for him to take that risk.

6. The first element is concerned with the identity of the person who committed the offence. This element of the offence is not in dispute.
7. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is a voluntary act by the accused or is a result of the will of the accused.
8. The third element is the conduct of the accused that caused the death of the deceased. Conduct means an act done by the accused it can be anything such as punching, kicking, stomping, strangling etc. The law requires a link between the conduct of the accused and death of the deceased. This court must be sure that the conduct of the accused caused the death of the deceased.
9. In other words whether striking the deceased with a knife several times in and around the neck caused the death of the deceased. It is also kept in mind that the act need not be the sole cause but should substantially contribute to the death of the deceased. The above two elements are not in dispute as well.
10. With regards to the final two elements of the offence which concerns the state of mind of the accused the prosecution must prove beyond reasonable doubt either that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased by his conduct.
11. The prosecution has to prove only one of the two limbs of this element. In this case the prosecution is alleging that the accused intended to cause the death of the deceased.
12. It is for the prosecution to prove beyond reasonable doubt that it was the accused who was engaged in a conduct and the conduct caused the death of the deceased and the accused intended to cause the death of the

deceased by his conduct. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

13. The prosecution says that it was the accused who had struck the deceased with a knife multiple times on his face, mouth and around his neck which resulted in the death of the deceased.
14. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then this court must find the accused guilty of murder.
15. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of murder.

ADMITTED FACTS

16. In this trial the prosecution and the defence have agreed to certain facts titled as final admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
17. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

18. The eye witness Pauliasi Masibana informed the court that in the afternoon of 16th December, 2021 after he came back from school he went

to clean his cassava patch. It started to rain so he decided to go and play with his friends at a nearby playground.

19. Upon reaching the railway track the witness saw the accused who he knows from his childhood walking behind the deceased. At this time he saw the accused stabbing the neck of the deceased with a small knife. The witness also knew the deceased as Babba. The accused, the deceased and the witness were from the same settlement. When the witness went closer, he saw the accused turn the deceased to face him thereafter he held the deceased and started stabbing the deceased neck.
20. After this, the accused dragged the deceased towards the spot where the witness was standing. The deceased was in between the accused legs and the accused was continuously stabbing the deceased with the knife. The accused dumped the deceased on the left side of the railway track in some grasses. According to the witness when the accused saw him he was smiling at the witness.
21. The witness was shocked and he kept walking when he went past the accused he said the accused was still stabbing the deceased. The witness did not stop because he was really scared since this was the first time he had seen such an incident. He was about 7 meters away when he saw the accused stab the deceased for about 2 minutes.
22. When questioned why he did not stop to help the deceased since he knew the accused the witness said *"I wanted to stop him but I was scared since he was holding a knife."* The witness was able to recognize the knife blade which the accused had used to stab the deceased (prosecution exhibit no. 6).
23. Shortly after the accused ran past the witness to a small water clog to wash his hands and here the accused removed his t-shirt, the witness saw

the accused wash blood off his hands and then the accused went towards his house. At the playground the witness met Suliasi, Matavesi and Tomasi, he told them what he had seen. They all went to the crime scene and then the police were notified. The witness recognized the accused in court.

24. In cross examination the witness stated that he did not hang out with the accused because he has an anger problem when the accused gets angry he starts punching. The witness agreed that he found it strange that the accused was smiling at him after doing something brutal.
25. The witness has seen the accused wrapping his fist with a cloth and punching the coconut trees and also when someone makes the accused angry or furious the accused would want to assault or cause harm to that person.
26. In re-examination the witness stated that he found it strange that the accused would smile at him after what he had done to the deceased.
27. Sgt 3049 Josateki Seuseu informed the court that on 16th December, 2021 he came to know that there was an alleged murder at Waimalika settlement, Nadi. The witness got his team organized namely DC Lemeki and DC Aca Bibi. The witness was in charge of the crime scene.
28. At the crime scene the witness instructed DC Bibi to be the crime scene photographer and DC Lemeki to be the crime scene sketcher. The crime scene was photographed and exhibits uplifted such as blood samples, deceased purse with cash, murder weapon stainless steel kitchen knife blade, orange handle of the knife from the ground and so on. The knife blade was found stuck near the deceased neck which was pulled out by the witness. The handle of the knife was found separately from the knife blade on the grass beside the deceased. All the exhibits were numbered

and kept safely. From the crime scene the witness and the team went to the house of the accused and uplifted a cane knife and the clothes the accused was wearing at the time.

29. According to the witness from his observation of the deceased he saw there were multiple stab wounds around the neck area of the deceased and there was a defensive cut on one of the deceased hands.
30. The deceased body was removed after the crime scene investigation was complete and taken to the Nadi Hospital. The police force pathologist was informed and Dr James Kalougivaki conducted the post mortem examination. Photographs were taken at the post mortem examination and a sketch plan was also drawn by DC Lemeki.
31. The following documents were marked and tendered as part of the prosecution case:
 - a) Sketch plan dated 16th December 2021, prosecution exhibit no. 1;
 - b) Search list dated 16th December 2021, prosecution exhibit no. 2;
 - c) Sketch booklet of the crime scene and the post mortem report, prosecution exhibit no. 3;
 - d) CD containing photocopies of the crime scene and the post mortem photographs, prosecution exhibit no. 4;
 - e) CD (video) containing the caution interview of the accused was as prosecution exhibit no. 5(a) and scene reconstruction, as prosecution exhibit no. 5(b);
 - f) Stainless steel blade, as prosecution exhibit no. 6;

- g) Orange knife handle, as prosecution exhibit no. 7;
 - h) Cash uplifted from the pocket of the deceased being 1 x \$20.00 and 2 x \$10.00, as prosecution exhibit no. 8;
 - i) Black mobile phone of the deceased, as prosecution exhibit no. 9;
 - j) One flip flop with black sole, as prosecution exhibit no. 10;
 - k) Cane knife, as prosecution exhibit no. 11;
 - l) DNA and blood report dated 12th October, 2023, as prosecution exhibit no. 12.
32. The final witness Dr. James Kalougivaki, informed the court that he is the head of the Forensic Pathology in the Fiji Police Force. He graduated with MBBS degree in 2007 thereafter in 2013 he graduated with Post Graduate Diploma in Pathology and in 2019 with Masters in Pathology from the Fiji National University.
33. On 18th December, 2021 the witness conducted a post-mortem examination on the deceased Ram Krishna. The post mortem report was marked and tendered as prosecution exhibit no.13. The witness stated that he saw multiple stabs and slash wounds of different shapes and sizes over the face, mouth and under the neck of the deceased with incised wound over the upper rib, front and both sides of the neck. There was also a defence wound on the right hand palm of the deceased.
34. According to the witness, the cause of death was due to excess loss of blood from severe multiple stab wounds to the neck by sharp force trauma. There was a possibility that the injuries were caused by the stainless steel blade and the cane knife when the prosecution exhibits were shown to the witness.

35. This was the prosecution case.

DEFENCE CASE

36. At the end of the prosecution case the accused was given his options. He chose to remain silent but he called two witnesses that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent. This court must consider the evidence of the defence witnesses and give such weight as is appropriate.
37. The accused father, Semi Duanasali informed the court that the accused is his eldest son. The accused is educated up to Year 10 and then studied at the Fiji National University at the Maritime School for 1 month. After this the accused started work at one of the Shipping Companies. The accused was in this employment for about 3 to 4 months.
38. It was after the accused left work and was staying at home that the witness noticed changes in the behaviour of the accused. The accused started to boast that he has plenty money, big house, he can enter any supermarket and take whatever he wanted. On two occasions the witness paid the supermarket after the accused took some items from the supermarket without paying.
39. The other change he had seen in the accused was that the accused would laugh and talk to himself and then run to the main road and come back home. The witness could not take the accused to the hospital due to lockdown and the COVID-19 pandemic.
40. Upon questioning by the court, the witness said the accused only got aggressive when he is not given what he asks for. The accused also showed his anger by yelling and swearing and on one occasion the accused had

punched the witness. The witness did not punch back because he knows the mentality of his son.

41. The final defence witness, Dr. Kiran Gaikwad, the Principal Medical Officer at the St. Giles Hospital informed the court that he has an MBBS degree, he has completed his Post Graduate Diploma in Mental Health Human Rights and Law. He has over 20 years of experience as a medical professional.
42. The witness had prepared a Psychiatric Evaluation Report dated 17th January, 2022 upon referral of the Magistrate's Court, Nadi. This report was marked and tendered as defence exhibit no.1. According to the witness, the accused showed symptoms of psychosis and paranoid delusions and hallucinations.
43. In the hospital, the accused was seen to be talking to himself and he was diagnosed with mental illness namely schizophrenia paranoid. The witness stated that this was a chronic mental illness which affected a patient's thinking, perception of surroundings and unreal thoughts that people are trying to kill him.
44. There was another psychiatric evaluation report dated 26th September, 2022 prepared by the St. Giles Hospital namely Dr. Balram and Dr. Kumar. According to the witness there were some improvements seen since the accused was being treated at the hospital but the diagnosis between both the reports remained the same.
45. The witness stated that the accused would need treatment and continuous medications. The psychiatric evaluation report dated 26th September, 2022 was marked and tendered defence exhibit no.2.
46. In cross examination the witness stated that there was no definite ideology about schizophrenia it can be genetic causes or as a result of substance

abuse. The initial symptoms may be mild but if not treated people get worse they become aggressive and violent.

47. This was the defence case.

DIRECTION ON EXPERT EVIDENCE

48. This court has heard the evidence of Dr. Kalougivaki and Dr. Gaikwad who had been called as an expert on behalf of the prosecution and the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the post mortem report of the deceased and the psychiatric evaluation reports of the accused are before this court and what the doctors said in their evidence as a whole is to assist this court.

49. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the experts I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctors.

50. I have also kept in mind that the evidence of the doctors relates only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.

ANALYSIS

51. The prosecution alleges that in the afternoon of 16th December, 2021 the accused without any provocation by the deceased callously stabbed the deceased multiple times on his face, mouth and neck.
52. The attack on the deceased was so severe that the deceased died at the scene of the crime. As a result of the accused actions the post mortem report of the deceased revealed multiple stabs and slash wounds of different shapes and sizes over the face, mouth and under the neck of the deceased with incised wound over the upper rib, front and both sides of the neck. There was also a defence wound on the right hand palm of the deceased which showed that at one time the deceased had tried to defend himself.
53. The cause of death was due to excess loss of blood from severe multiple stab wounds to the neck by sharp force trauma. The prosecution further stated that there was a high likelihood that the injuries were caused by the stainless steel blade and the cane knife used on the deceased. The prosecution submits that the stabbing was so forceful that the handle of the small knife came out and was lying on the ground beside the deceased.
54. Finally the prosecution submits that the accused intended to kill the deceased by his conduct. There was no provocation by the deceased what the accused did was so forceful that death was imminent which only points to his intention to kill the deceased and nothing else.
55. On the other hand, the defence accepts that it was the accused who had struck the deceased multiple times with a knife that afternoon. However, at the time of his actions he was not aware of what he was doing since he was suffering from a mental sickness namely substance induced psychosis and schizophrenia.

56. As a result of this mental impairment the accused did not have the requisite mental element or *mens rea* to be legally responsible for his action. The accused at the time of the offending was suffering from schizophrenia paranoid which affected his cognitive process to such an extent that he was incapable of knowing the nature and quality of his action at the time and/or was incapable of knowing that his action was wrong.

DETERMINATION

57. I would like to remind myself that a person is presumed not to be suffering from a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities by the defence that the accused was suffering from a mental impairment at the time of the allegation.
58. There is no dispute that the accused has admitted the *actus reus* or the physical elements of the offence of murder. What is in dispute is the mental element?
59. The defence is arguing that the accused is not criminally responsible since he was suffering from a mental disease or impairment at the time of the allegation. The effect of this illness was that the accused did not know the nature and quality of his conduct and he did not know that his conduct was wrong.

LAW

60. Section 28 of the Crimes Act states:

Mental impairment

28.-(1) *A person is not criminally responsible for an offence if, at the*

time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that-

*(a) the person did not know the nature and quality of the conduct;
or*

(b) the person did not know that the conduct was wrong (that is, the person could not reason with moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or

(c) the person was unable to control the conduct.

- (2) The question whether the person was suffering from a mental impairment is one of fact.*
- (3) A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.*
- (4) The prosecution can only rely on this section if the court gives leave.*
- (5) The court must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.*
- (6) A person cannot rely on a mental impairment to deny voluntariness or
the existence of a fault element but may rely on this section to deny criminal responsibility.*
- (7) If the court is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.*
- (8) In this section-
“mental impairment” includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.*
- (9) The reference in sub-section (8) to mental illness is a reference to an underlying pathological infirmity of the mind (whether of long or*

short duration and whether permanent or temporary), but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli.


(10) A condition that results from the reaction of a healthy mind to extraordinary external stimuli may be evidence of a mental illness if it involves some abnormality and is prone to recur.

61. In reliance of the above the accused called Dr. Gaikwad. The prosecution did not dispute the evidence of Dr. Gaikwad in respect of the mental impairment of the accused and the effect of schizophrenia that the accused was not able to control his conduct due to the disease of the mind.
62. When an accused person relies on the common law defence of insanity the evidential burden is on the accused on the balance of probabilities that it is more likely than not that on 16th December, 2021, the accused was suffering from a mental illness namely schizophrenia. As a result he was not able to control his conduct when he struck the deceased multiple times with a knife.
63. There is no doubt that due to the act of the accused he had caused the death of Ram Krishna, however, it cannot be ignored that at the time of the alleged act the accused was suffering from a mental illness which renders the accused not criminally responsible for his action. I have no reason to disregard the opinion of Dr. Gaikwad, the accused was suffering from a mental illness known as schizophrenia paranoid at the time he stabbed the deceased. The psychiatrist gave a detailed account of the illness and how it had affected the accused at the material time.
64. After considering all the evidence adduced, this court is satisfied that the accused has established and discharged his burden of proof required of him in relation to the defence of mental impairment. This court is also satisfied that it was more likely than not that on 16th December, 2021 the accused was suffering from a chronic mental illness known as

schizophrenia paranoid and as a result he was not able to control his conduct and was incapable of knowing that what he was doing was wrong when he struck Ram Krishna multiple times with a knife causing his death.

SPECIAL VERDICT

65. For the above reasons, the accused is found not guilty by reason of mental impairment for one count of murder as per section 237 of the Crimes Act 2009.
66. This is the judgment of the court. Counsel will be heard as to the appropriate orders that should be issued in accordance with the Mental Health Act.


Sunil Sharma
Judge



At Lautoka

28 November, 2023

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.