

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 101 OF 2019

STATE

-v-

PENAIA DRIU NAWELULU

Counsel: Mr J. Nasa for Prosecution
Ms B. Muhammed with Ms D. Prasad for Defence

Dates of Hearing : 13,15,16,22 February 2024
Date of Judgment : 23 February 2024

JUDGMENT

1. The Accused is charged with one count of Manslaughter. He was arraigned on the following information filed by the Director of Public Prosecution:

Statement of Offence (a)

MANSLAUGHTER: Contrary to Section 239 of the Crimes Act 2009.

Particulars of Offence (b)

PENAIA DRIU NAWELULU on the 2nd day of May 2019, at Nadi in the Western Division, being reckless as to the risk that his conduct would cause serious harm, killed PAULIASI ROKOWAWAQA.

2. The Accused pleaded not guilty to the charge. At the ensuing trial, the Prosecution presented the evidence of 5 witnesses. At the close of the case for the Prosecution, the Court being satisfied that there was a case for the Defence to answer put the Accused to his defence. The Accused elected to give evidence under oath.
3. The Counsel made oral submissions at the closing and also filed written submissions. Having considered the evidence presented at the hearing and the respective submissions of the Counsel, I now proceed to pronounce the judgment as follows.
4. I bear in mind that the Accused is presumed innocent until he is proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial. That onus never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The Prosecution must prove the Accused's guilt beyond reasonable doubt. If there is a reasonable doubt, so that the Court is not sure of the Accused's guilt, the Accused must be found not guilty and acquitted.
5. To establish the offence of Manslaughter, the Prosecution must prove beyond reasonable doubt that the Accused engaged in a conduct that caused the death of deceased and that the Accused at the time of that conduct, either intended to cause serious harm or was reckless as to causing serious harm to the deceased [Section 239 of the Crimes Act]. In this case, the Prosecution was running the case on the basis that the Accused was reckless.
6. The first ingredient that must be proved is that the Accused engaged in a conduct. To engage in a conduct means to do an act of one's own free will. The Prosecution alleges that the Accused deliberately and repeatedly punched the deceased on his face, resulting in her death.
7. The second ingredient that must be proved is that the conduct of the Accused caused the death of the deceased. The law requires a link between the conduct and the death. The conduct may usually cause an injury which is the sole cause of death. But it is sufficient if it is an operating or substantial cause of death. Death does not have to occur immediately after the alleged conduct. The offender remains liable provided the death is caused by his or her conduct. In this case the Prosecution must prove that the Accused by punching the deceased on his face caused his death.

8. The third ingredient concerns recklessness. A person is reckless if he was aware of a substantial risk that serious harm will occur and having regard to the circumstances known to him, he was unjustified to take that risk. The first step is to decide if there was a risk and whether the risk was “substantial”. The risk is substantial if a reasonable person, under the circumstances as they were known to the accused, would have taken the risk to be substantial at the time it was taken. If I find a reasonable person would have taken the risk to be substantial at the time it was taken, then I must decide whether the Accused was aware of that substantial risk, that is, serious harm will occur. If I find that the Accused were aware of a substantial risk that serious harm will occur then I must proceed to consider whether having regard to the circumstances known to the Accused he was unjustified to take that risk. Whether taking the risk was unjustified is a question of fact for you to determine.
9. Bearing in mind the legal principles discussed above, I now proceed to summarise the evidence led in trial.

PW1- Mosese Kupuri

10. From 2019 to 2020, Kupuri was working at Sheraton Fiji Resort at Denarau. During that period, he was residing at Navakai with Penaia Nawelulu’s family. Penaia is his cousin brother. On the morning of 2 May 2019, after finishing the night shift, he drank 4 bottles of wine with Penaia, Inia and Jitoko near the service station in Nadi and then went to Bar One Night Club in Nadi at around 1 a.m.
11. At Bar One, they bought a few drinks and started smoking in the smoking lounge on the right side of the club. There was a group of people on the other side. One boy from that group came and bumped Penaia from the back. This boy (the deceased) appeared to be very drunk and wasted, compared to their level of drunkenness. Penaia wanted to punch him, but they just went inside the club and continued drinking.
12. When they went to the smoking lounge again, this boy wanted to instigate a fight with Penaia while they were just smoking on their own. He told Penaia for them to go back inside the

club. They were drinking in the club until the lights came on at 4 a.m. They came down the stairs, picked the bags and were waiting for the other two to come down.

13. Whilst waiting on the footpath beside the road near the bus stop, they saw the same boy coming down the steps. As soon as the boy arrived, he punched Penaia. Penaia gave him his bag and threw a punch once which landed on the boy's chin. The boy fell to the ground sideways, on to the tar-sealed concrete pitch road. In a short while, the people started gathering around that area while Penaia walked away from the crowd.
14. When this boy fell, he ran to the boy and tried to wake him up by pouring water on his face. The boy woke-up. Some of the people surrounding that area ran after Penaia to punch him. He called one girl who was also smoking with this boy in the club to come and help him. He then went after Penaia.
15. Under cross-examination, Kupuri agreed that it was the deceased person that was passing comments on Penaia and tried to instigate a fight while Penaia was enjoying with his friends. He did not see any injuries on Penaia. He did not see the friends of the deceased at the time the deceased was assaulted by Penaia. He agreed that he was with Penaia throughout this whole incident.

PW2: Poasa Ravea

16. Ravea is a Prison Warden. In 2019 he was based at the Natabua Correction Centre. On 1 May 2019, after knocking off at 5 p.m., he started drinking grog after 6 p.m. with his workmates. At around midnight, he received a call from Paula Rokowaqa (The deceased) and was informed to meet him at Washdown Bar, in Lautoka. He went to the night club and started drinking until the night club was closed at 1a.m. Then they went to Nadi and continued drinking at Bar One night club with Losana, Koroisave and Paula Rokowaqa at around 1.30 a.m.

17. They were drinking Fiji Gold (beer). Pauliasi Rokowaqa (Paula) got heavily drunk and would often go missing from where they were drinking. When he came back from smoking, he saw Penaia follow Paula and point at him on the forehead telling him, 'you watch out'. After that, he told Paula for them to leave because Paula was very drunk. He came down with Paula while the girls were still in the night club. When they were coming towards the bus stop, Paula wanted to return to the girls. While he was proceeding to the bus stop to catch a taxi, he could hear a scream from behind about 25 metres distance. Then he saw Penaia hit Paula on his face once. As a result, Paula fell to the ground hitting his head on the road. People crowded up that area. Losana and Koroisave who were present at the scene were trying to get Paula to stand up. After that they boarded a car and dropped Penaia at Natabua Prison barracks at around 4.30 a.m and slept. He did not see any injuries on Paula. Paula talked to him and was conscious. On the same evening, his workmate woke him up to tell him that Paula was lying down on the floor.
18. On 7 May 2019, they were taken to Namaka Police Station where an identification parade was held in which he pointed to the man who punched Paula whose name he later came to know as Penaia. He identified the Accused in Court as the one who punched the deceased on 2 May 2019 near the night club.
19. Under cross-examination, Ravea agreed that he was a close friend and a work mate of the deceased person. He does not remember if the deceased had passed cheeky comments on the Accused. He did not see the deceased also punching Penaia. After being punched, Paula couldn't walk because he was really drunk but he could speak. Paula was not immediately taken to the hospital because there was no such need. He saw Paula lying on the floor in Natabua at around 4.00 p.m. From 4.00 am to 4.00 pm on that day, the deceased person was with him in the same room beside each other.

PW-3 Losana Wasasala

20. Losana is a Prison Warden at Labasa. On 1 May 2019, she was based at the Lautoka Women's Correction Centre. After knocking off after 7 p.m., she was having grog at the

Engineers Barracks with Pauliasi and others. At around 11 p.m., they went to Washdown Bar in Lautokan with Pauliasi Korowaqa, Poasa Matavesi and four others and drank one carton of Fiji Gold long neck.

21. After the Wash-down Bar was closed, they went to Bar One in Nadi and continued drinking. After a while Pauliasi went missing. She was the only one amongst all of them who was sober. She started inquiring about the whereabouts of Paula because he was very drunk. When the bar was closing, they came down to catch a minivan. She could see Pauliasi running back, looking for others. When they were still waiting for a minivan, she saw Pauliasi lying down sideways on the concrete foot path where they later went to see him. When she was trying to tilt his head, she could see blood coming from Pauliasi's nose and running the blood to the footpath. She could not see any injuries on Pauliasi.
22. A big crowd of people had gathered. When she was still trying to get Pauliasi up, one tall and big man, wearing a blue t-shirt, came and ducked down and punched Pauliasi from below upwards. Pauliasi was still breathing but not conscious at that time. The punch landed on Pauliasi's face. She could recognize assailant's face. Nothing was blocking her view of his face. He was right in front of her. She screamed and asked the assailant why he punched Pauliasi who was already on the ground. She could not tell the Court what the assailant told her in Nadi dialect. The assailant boarded a yellow taxi and went away.
23. She then called Poasa and another man for them to come and help. Kitone helped them to transport Pauliasi. When they were loading Pauliasi in the car, he was unconscious. Three boys had to sit down at the back seat and Pauliasi was laying on them. She told Poasa to take Pauliasi to Medical Orderly at Natabua before being taken to the hospital.
24. She saw the assailant again when she was taken for police ID parade at the Namaka Police Station. He identified the man who had punched Pauliasi. He was wearing the same clothes that he was wearing the morning he had punched Pauliasi. He later came to know assailant's name as Driu from Kitone who had known Driu before. The witness identified the Accused in the dock.

25. Under cross-examination, Losana agreed that she was a close friend and a workmate of the deceased Pauliasi. She agreed that the deceased was present with her throughout, when they went to all these three places and that the deceased was quite drunk that night. She denied that the deceased was passing unnecessary comments to the Accused in Bar One.
26. She clearly recognized the person who had punched Pauliasi that night. When they were still trying to get Pauliasi up, the Accused ducked and punched Pauliasi right in front of her when Pauliasi was still on the ground. The witness demonstrated how the Accused punched the deceased. Pauliasi was a short and fat man. She did not see one Mosese Kupuki assisting the deceased person. After Pauliasi had already been punched, she called Duvaga and Poasa for them to help take Pauliasi up and put him in the car.

PW 4_Ilisapeci

27. In 2019, Acting Corporal Ilisapeci was based at the Lautoka Forensic Unit. After a briefing at the Namaka Police Station on 4 May 2019, she was instructed to visit the crime scene and take photographs of the scene at Martintar in Namaka. The crime scene was where the bus bay near Bar One nightclub. After taking photographs, she drew a rough sketch of the scene which she tendered in evidence as PE1.
28. On 7 May 2019, she was instructed to attend to the postmortem of the deceased and take photographs of the deceased during postmortem held at the Lautoka mortuary. She downloaded both photos from the crime scene and the postmortem onto a computer in the office. She later prepared a booklet which was handed over to the Investigating Officer. She tendered the photograph booklet marked as PE-2.

PW5 – Pathologist – Dr. James Kalougivaki

29. Dr. James is the Head of the Forensic Pathology Unit in the Fiji Police Force since 2014. His qualifications and experiences as a pathologist were not disputed by the Defence. I accept him as an expert in the field of pathology.

30. He performed the postmortem on the deceased, Pauliasi Rokowaqa, at Lautoka hospital on the 7 May 2019. He tendered the postmortem report in evidence marked as PE2. The estimated time of death was 4.45 p.m. on 2 May 2019.
31. During the external examination, the doctor observed on the head of the deceased a swelling of the eye and a black eye, bruised areas on the right and the left side of the forehead and a tear over the scalp. There was a small bruise noted on the left side of the neck, the right elbow, and on the right hip.
32. Upon internal examination, Dr James had positive findings over the scalp. There was subgaleal hematoma or hemorrhage under the coverings of the brain over the front left aspect and right aspect. There was bleeding under dura (the first covering of the brain), over the left side of the head. Under the 2nd covering of the brain, which is called arachnoid, also had bleeding on the left side of the head (subarachnoid hemorrhage), extending deep and down into the spinal cord. There was also presence of bleeding within the lungs.
33. The cause of death is basically extensive intracranial hemorrhage due to the severe multiple traumatic head injuries (Blunt Force Head Trauma). Subgaleal hematoma is an indication of severe head trauma. There was severe amount of force had been applied to that portion of the head by a blunt force trauma, by a blunt object like a fist, a kick of a leg. It is possible that a fist punch on the face of the deceased could have caused those injuries.
34. A subdural hematoma generally occurs in the area opposite to where the impact had occurred, that is the first thing, and secondly it generally occurs because of sudden deceleration. It also occurs when someone is falling when there is acceleration and then sudden deceleration.
35. A sub-arachnoid hemorrhage is the bleeding under the 2nd covering of the brain, which is caused more often due to sudden acceleration, when the deceased in a very static position or a least mobile state and then suddenly decelerated. Generally, it requires the deceased to move his head in sudden acceleration in a vigorously movements.

36. The blood alcohol level that was found was 52.5 milligram per deciliter. It's a level where someone can be drowsy, too drunk or in an altered state of mood, however, the blood alcohol levels do not stay the same or static. This blood level was as at point of the person's death and not when he was hit. It takes a short time for the blood alcohol to rise and go down.
37. Dr James explained subgaleal hematoma referring to photograph No.5 and the subdural hemorrhage referring to photographs No. 6 and 7.
38. Considering the presence of the subgaleal hematoma extending from both the left and right, the doctor opined that the deceased should have received more than one blow. It is hard to determine the specific place the punch would have landed. However, very non-specific presence of hemorrhage suggests that it's over the face.
39. The antecedent cause of death comprised severe traumatic head injuries and multiple head injuries, due to the force applied especially to the head, because of a severe blunt force trauma to the head.
40. Under cross-examination the doctor said that it's impossible to express an opinion whether a single punch to the chin could cause the death because it involves uncountable variables that will exist from the one who has given the punch to the one who is actually receiving the punch the type of punch, the swing, the force, the speed and also the state of the one who is actually receiving the punch, not forgetting the environmental factors.
41. If a person who may be drunk and then hang over woke up from a nap and accidentally slipped, falling from the bed and hit the head on concrete floor, it would be less likely that those injuries to have been sustained, if the injured person was a keenly fit, and ideal male. The doctor agreed that it is possible that the deceased would have survived had he be taken to the hospital earlier. Supportive therapy would either aid in the survival period increasing or would even aid in the longevity of the person, even the injuries were fatal or severe.
42. That was the case for Prosecution.

Case for Defence

DW 1_Penaia Driu Naweilulu (The Accused)

43. On 1 May 2019, Penaia knocked off from work at West Inn Resort at Denarau at around midnight and went to Nadi town with some of his colleagues Mosese (PW1), Inia and Jitoko. They had a few bottles of wine in town before heading to Bar One nightclub. They were at the Bar One nightclub at round 1 a.m. and went to the far corner of the nightclub to drink. When he and Mosese went to the smoking room, he bumped into somebody who was drunk and from that moment he held his hand up and wanted to fight with him. He told the drunkard, hey wait! Don't do that. Because he was not that drunk, they finished the smoke and went back inside the night club where they were drinking and enjoying themselves.
44. He later came to know that the drunkard's name was Pauliasi. Pauliasi was totally drunk and wasted. Pauliasi was throwing himself around and was very prideful that he was a prison officer. Pauliasi was just staring at them, mumbling words and swearing at them a couple of times when they went pass him to buy the drinks. He didn't react to anything and kept on drinking.
45. When the lights came on at 4 a.m. signaling the closure of the Club, they came down to pick their bags from the security and started walking to Lale's service station. On their way to the service station, he could see Pauliasi standing near the building. Pauliasi started swearing at him and follow him. He gave his bag to Mosese and kept on walking until they came very close (30 c.m.) to each other. Mosese was behind him. Pauliasi then wanted to swing his hand and tried to punch him. When Pauliasi swung his hand at him, he gave Pauliasi a punch with his left hand. The punch landed on Pauliasi's chin which made him swing and lay down sideways on his hand. Pauliasi didn't punch him but only attempted to punch. He quickly turned and punched Pauliasi in self-defence. After that he started to walk towards Lale's service station. Mosese was pouring water on Pauliasi. He could see Pauliasi standing- up from where he was lying down.

46. He hit Pauliasi just once. He did not assault the deceased person when he was lying down. What Losana told Court was a lie. There was no other way he could avoid that incident because Pauliasi was so close to him.
47. Under cross-examination, Penaia said he was not that drunk and was able to control his actions when Pauliasi bumped into him at around 2 a.m. He knew that the deceased was so drunk that he could not control his actions. He agreed that the deceased was shorter than him. He agreed that his reaction was not proportionate to Pauliasi's attempted act. It wasn't his intention to harm Pauliasi. He agreed that his punch caused harm to his face made him fall on the ground.

Evaluation /Analysis

48. There is no dispute that the Accused had punched the deceased with his left hand and that that punch landed on deceased's chin making the deceased swing and fall on the concrete pavement beside the road. It was also admitted by the Accused that the deceased had not punched him but swung his hand and tried to punch him. There is also no dispute that the deceased was so drunk that he had become a nuisance to the others in the Night Club including the Accused.
49. The most crucial issue in dispute as far as the offence of Manslaughter is concerned is whether the Accused had thrown a second punch when the deceased was lying down unconscious with bleeding nose as described by Losana Wasasala (PW3). There was no suggestion by the Defence that the alleged second punch was thrown by a person other than the Accused himself. Therefore, there is no dispute as to the identity of the Accused as confirmed by the Defence Counsel. Let me analyse the evidence in this regard.
50. Three eyewitnesses who testified for the Prosecution were not consistent on the issue of whether a second punch was thrown at all. Having admitted the first punch in self-defense, the Accused completely denied having delt the second punch.

51. Let me first analyse the evidence of Kupuri (PW1). According to him, the first punch was thrown by the deceased. He said that the deceased punched the Accused as soon as he approached the Accused. Having given his bag to PW1, the Accused had thrown a punch in return which had landed on the deceased's chin, making the deceased fall to the ground sideways, on to the tar-sealed concrete pitch road. Kupuri had seen no injuries on the deceased who had woken up responding to the water poured on his face. He had not seen any of the deceased's friends at the time the deceased was assaulted, but the lady had come to assist him later.
52. I would look at PW-1's evidence with a degree of skepticism for four reasons. First he had a tendency to give evidence favourable to the Defence given his close connection to the Accused. He is the cousin of the Accused and his drinking partner. He had been living in the Accused's house at that time. Second, his evidence is not consistent with the admission made by the Accused himself that the deceased didn't punch him but only attempted to punch. This inconsistency is a clear manifestation of PW1's bias towards the Defence. Third, PW1 had walked away when the people gathered around after the first punch which made the deceased fall to the ground. Therefore, he could not have had the opportunity to observe what transpired after the lady, whom he described as the friend of the deceased, had come to assist the deceased. [I have little doubt that the lady friend PW1 referred to was Losana (PW3)]. Fourth, PW 1 had been drinking four bottles of wine with the Accused in town and then beer, rum and cola at the club from midnight to 4 a.m. His drunkenness must have weakened his ability to observe the things as they happened that morning.
53. I am not inclined to place much reliance either on what PW-2 said in Court as to what he saw on that fateful morning. According to PW2, while he was proceeding to the bus stop to catch a taxi, the deceased had returned to the girls who were still at the night club. He had witnessed what he saw only after what he heard- the scream. He heard a scream from behind about 25 metres distance when he turned around to see what he saw. It is reasonable for the Court to assume that the scream was produced by the deceased when he (deceased) received the first blow. He had seen the Accused punching the deceased when he turned around.

Therefore, it was reasonable for PW2 to say that the Accused had punched the deceased only once based on what he saw.

54. PW 2 could not have been much different from PW1 in terms of drunkenness and ability to grasp what was taking place that morning. He had started drinking kava at 6 p.m., then beer at Washdown Bar till 1 a.m. and finally at Bar One till 4 a.m. The way PW2 had conducted himself bears ample testimony to his level of intoxication. Despite being advised by Losana to present the deceased to the Medical Orderly at the Natabua Correction Centre and hospital, he had taken the deceased to the prison barrack where he had slept with the deceased till 4 p.m. when he was woken up by a workmate to inform that the deceased was lying (dead) on the floor.
55. Under the influence of liquor, PW 2 appears to have decided that there was no urgency to take the deceased to the hospital. He had not seen the bleeding from the nose as opposed to what PW3 had seen. His observations that the deceased was conscious, had no injuries on the deceased's body and the deceased could even talk could also be attributed to having been made under the influence of liquor. Therefore, it is not prudent to rely on PW 2's evidence in deciding this crucial issue.
56. Losana Wasasala (PW-3) on the other hand gave convincing evidence. She was straightforward and confident in her evidence. She had joined the drinking group much later at around 11 p.m. at Washdown Bar and had proceeded to Bar One at 1 a.m. In her own words, she was the most sober person amongst her drinking group at the club. She was vigilant over the movements of the deceased who was heavily drunk, making inquiries of his whereabouts.
57. Her evidence was that when she was waiting for a minivan, she had seen the deceased lying down sideways on the concrete foot path. Upon seeing this, she had rushed to the deceased and tried to tilt his head when she saw blood coming from the deceased's nose and running to the footpath. A big crowd of people had gathered. When she was still trying to get the deceased up, the Accused had come, ducked down and punched the deceased from below

upwards. The deceased was still breathing but not conscious at that time. The punch landed on the deceased's face. She had screamed and asked the Accused why he punched the deceased who was already on the ground. She positively identified the Accused as the assailant at a police identification parade five days after the incident and during her testimony in Court.

58. The evidence of the pathologist is consistent with what PW 3 said in Court. Dr James had observed a hematoma or hemorrhage in two layers of the deceased's brain caused by a blunt force trauma suggesting that the deceased had received several punches.
59. The Accused's denial that he did not punch the deceased when he (the deceased) was already lying on the ground is not appealing to me. Being charged with a serious offence the Accused appears to have been just trying to save his skin. There is no explanation from the Defence as to how the serious damage to the brain which the pathologist found on the deceased was caused. There is no evidence that the Accused had fallen from the bed when he was sleeping in the prison barrack or even a suggestion to that effect from the Defence Counsel during her cross-examination. Even if evidence were available to that effect, the pathologist ruled out the possibility of death being caused from such a fall. Even if the expert opinion was in their favour on this point, the Court is not bound to accept the expert opinion unless it is supported by other evidence.
60. For the aforesaid reasons, I accept the evidence of PW 3 that the Accused punched the deceased while lying on the pavement unconscious and bleeding from his nose. It is established that the Accused had punched the deceased once on his face causing him to fall on the concrete pavement and again when the deceased was lying on the pavement unconscious. The element of unlawful conduct on the part of the Accused is established beyond reasonable doubt.

Did the conduct of the Accused cause the death of the deceased?

61. According to the pathologist, the primary cause of death was extensive intracranial hemorrhage due to the severe multiple traumatic head injuries (Blunt Force Head Trauma).

To cause such hemorrhage, severe amount of force had been applied to that portion of the head by a blunt force trauma, by a blunt object like a fist, a kick of a leg. It is possible that a fist punch on the face of the deceased could have caused those injuries. The hemorrhage in the brain was a direct result of a blunt force trauma. He opined that the blunt force trauma should have been caused by several punches.

62. The deceased succumbed to his injuries on the day he was punched. In the absence of any visible external injuries on the nose, it is reasonable to assume that the bleeding seen by PW 3 on the deceased's nose soon after the punch was a direct result of the hemorrhage in the brain. There is no evidence of any intervening cause occurring between the punching incident and the death. Dr James opined that if the deceased was admitted to the hospital soon after the trauma, his life could have been prolonged. However, the conduct of the Accused is directly linked to the death of the deceased. The Prosecution established that the conduct of the deceased substantially contributed to the death of the deceased. The third element of Manslaughter is established beyond reasonable doubt.

Was the Accused reckless as to causing serious harm to the deceased?

63. A person is reckless if he was aware of a substantial risk that serious harm will occur and having regard to the circumstances known to him, he was unjustified to take that risk. It is common knowledge that the head and the face are the most vulnerable parts of human body. The deceased was heavily drunk. The Accused is a well- built strong person compared to the deceased as was revealed in evidence and the photographs. A strong punch of the Accused on the face of the deceased would carry a substantial risk of causing serious harm to the deceased which a reasonable prudent man in the shoes of the Accused would not have taken.
64. I have no doubt that the Accused was aware of the substantial risk that serious harm would occur to the deceased if he punched the deceased on his face. The evidence suggests that the Accused was sober enough to foresee and comprehend the consequences of his actions. He had gone to collect his bag before leaving the night club. Before punching the deceased, he had given his bag to his cousin (PW1) in preparation for his act. He knew the deceased was heavily drunk and not stable. The first punch was good enough for the deceased to fall on to

the concrete surface. When the deceased was lying unconscious, he proceeded to punch the deceased again on his face. Having regard to the circumstances known to the Accused, he was not justified in taking the risk he took. The recklessness on the part of the Accused is established beyond reasonable doubt.

Does the defence of self-defence available to the Accused?

65. The defence of self-defence is available to an accused person as a statutory defence in Fiji. Section 42 of the Crimes Act provides for the defence as follows:

42 (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence

(2) A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person, or

(b) - (e) _ _ _

and the conduct is a reasonable response in the circumstances as he or she perceives them.

66. In Aziz v State¹ the Court of Appeal took the view that there is no inconsistency between the common law principles of self-defence and Section 42 of the Crimes Act.

The defence of self-defence at common law has two limbs. In summary, the first is whether the defendant genuinely believed that it was necessary to use force to defend himself. The second is whether the nature and degree of force used was reasonable in the circumstances. It is also elementary that once self-defence has been raised as an issue it is for the prosecution to disprove it to the criminal standard- beyond reasonable doubt.

Leaving aside cases of self-induced intoxication, it has long been established that the first limb of the defence involves assessment of subjective considerations. The state of mind and belief of the defendant is in issue; objective considerations of reasonableness in this context are only relevant as potentially casting light on what the state of mind of the defendant in truth really was. It thus follows that even if the belief is based upon a mistake or a delusion still, if genuinely held, it can operate to satisfy the first limb of the defence.

¹ [2015] FJCA 91; AAU112.2011 (13 July 2015), at [32]

The second limb, however, unquestionably incorporates (by its requirement of reasonableness) objective considerations. There was considerable debate over the decades as to whether the test for the second limb was solely objective. But latterly it had been clearly decided that is not solely objective: see, for example, *Palmer v R* [1970] UKPC 2; [1971] AC 814, [1971] 1 All ER 1077, [1971] 2 WLR 831. It is, for example, therefore conventional to direct juries, on the issue of the reasonableness of the force used, not only as to the circumstances in which the Defendant found himself in responding by the use of force (for example a “heat of the moment” situation) but also, in an appropriate case, as to the circumstances in which the Defendant genuinely, albeit mistakenly, believed them to be. See: *Oye v R* [2013] EWCA Crim 1725.

67. This defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self-defence will negate criminal responsibility for an offence².
68. The Accused in his evidence admitted that his response was disproportionate to the risk posed by the deceased when he (the deceased) swung his hand. That means the Accused knew that his reaction was not really necessary to ward off the threat posed by the attempted act of the deceased. The deceased was unarmed, weak and not stable due to heavy intoxication thus more vulnerable to a fall.
69. I am unable to accept that there was no other way that he could have avoided that incident because the deceased was so close to him. Being a well-built man he is, the Accused could have easily neutralized the drunk deceased’s act without punching the deceased on his face even in the proximity in which he was at that time. Punching the deceased for the second time when he was already lying on the ground unconscious is certainly a disproportionate reaction on the part of the Accused.
70. The Accused admitted that he was not that drunk and was able to control his actions. He agreed that the deceased was shorter than him. He knew how strong he was. He knew the

² *Aziz v State* [2015] FJCA 91; AAU112.2011 (13 July 2015)

deceased was so drunk that he could not control himself. It was not reasonable for the Accused to act in the manner he acted in the circumstances known to him. The Accused's reaction, objectively viewed too, is not how a reasonable and prudent man would have resorted to.

71. The Prosecution rebutted the defence of self-defence taken up by the Accused beyond reasonable doubt.
72. The Accused said it wasn't his intention to harm the deceased. Whatever his intention may have been, the circumstances under which the incident happened proved that the Accused was reckless in causing serious harm to the deceased. That is quite sufficient for the Court to find the Accused guilty of Manslaughter as charged in the information where the fault element is based on recklessness and not on intention.
73. I find the Accused guilty of Manslaughter as charged. The Accused is convicted accordingly.



A handwritten signature in black ink, appearing to read "Aruna Aluthge".

Aruna Aluthge

Judge

At Lautoka

23 February 2024

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Defence