

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO.HAC 269 of 2017

BETWEEN : **STATE**

AND : **1. KIRIATA NANGINTABUARIKI**
2. WILLIAM PETER PICKERING

Counsel : *Ms. W. Elo with Mr. S. Komaibaba for the State*
Ms. L. Ratidara for the 1st Accused
Mr. A. Chand with Ms. L. Chand for the 2nd Accused

Hearing on : *26th of February 2019 – 5th of March 2019*
Summing up on : *7th of March 2019*
Judgment on : *15th of March 2019*

JUDGEMENT

1. The accused, Kiriata Nangintabuariki and William Peter Pickering are charged with one count of Murder, Contrary to section 237 of the Crimes Act of 2009 alleged to have committed on Rebaio Mekieru.

2. That charge is;

Statement of Offence

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

Particulars of Offence

Kiriata Nangintabuariki and William Peter Pickering on the 1st day of September, 2017 at Navua in the Central Division, murdered Rebaio Mekieru by hitting him with a 4x2 piece of timber.

3. The accused pleaded not guilty to the charges and the ensuing trial lasted for 5 days. Two eye witnesses and 8 official witnesses gave evidence for the prosecution while the 1st accused and two of eye witnesses called on behalf of the defense.

4. Though the trial was commenced with 3 assessors as usual, in the middle of the trial, when 9 of the prosecution witnesses have given evidence, an assessor fell ill, and was hospitalized. Therefore we were compelled to proceed with two assessors.
5. At the conclusion of the evidence and after the directions given in the summing up, the two assessors unanimously found the 1st accused, not guilty to the offence of Murder, but guilty to the offence of Manslaughter and The 2nd accused, not guilty to the offence of Murder as well as for the offence of Manslaughter.
6. I will revisit the evidence. The following were recorded as admitted facts.
On behalf of the 1st accused;
 - i) That the 1st accused in this matter is KIRIATA NANGINTABUARIKI (“A1”).
 - ii) That the deceased in this matter is REBAIO MEKIERU (“Deceased”).
 - iii) That A1 and the deceased have known each other since childhood.
 - iv) That A1 was 29 years old at the time of the alleged incident.
 - v) That A1 is married to one Jokaveti Saraivai and they have a son together.
 - vi) That the answers given by him during the interview were given voluntarily and out of his own free will.
 - vii) That A1 was employed at Yarawa Timber and Hardware Limited (“YTHL”) at Vuninokonoko Road, Navua at the time of the alleged offence.
 - viii) That his co-accused and the deceased were also employed at YTHL at the said time.
 - ix) That on 31st day of August, 2017, A1 was doing overtime with the deceased at YTHL.
 - x) That they ended their overtime at around 10pm on the night of the 31st day of August, 2017.
 - xi) That later that night (31/08/17) A1, his co-accused and the deceased were drinking alcohol with their Manager namely Satend Kumar (“Manager”).
 - xii) That after they began drinking at the yard, they later headed to a nightclub before returning again to YTHL yard to drink more.
 - xiii) That A1 saw the deceased fall face downward on the ground.
 - xiv) The 4 x 2 piece of timber was shown to A1 whilst he was being interviewed by Police on the 1st September, 2017 and he confirmed that it was the same piece of timber used by him at the material time.

On behalf of the 2nd accused;

- i) That the accused William Peter Pickering is charged with 1 count of Murder contrary to section 237 of the Crimes Act 2009 ("A2").
- ii) That the deceased in this matter is REBAIO MEKIERU ("Deceased").
- iii) That A2 is married to Morin Nakibae.
- iv) That A2 was caution interviewed on the 1st day of September, 2017 by DC 3633 Ravin Naicker.
- v) That the admission he made during his caution interview were made voluntarily without force or prejudice.
- vi) That at the material time, A2 was employed as a labourer at Yarawa Timber and Hardware Limited ("YTHL").
- vii) That the deceased was also an employee at YTHL at the time of the offending.
- viii) That the Manager of YTHL is Satend Kumar ("Manager").
- ix) That late in the evening of the 31st day of August, 2017 the Manager invited A2, the deceased and others for drink after work.
- x) That A2 and the others began drinking at about 10.30pm on the 31st day of August, 2017.
- xi) That A2 and the others including the deceased drove to Suva and back by their Manager.
- xii) That about four (4) of them including A2 and the deceased began drinking at the back of the YTHL office when they returned from Suva on the morning of the 1st day of September 2017.
- xiii) That later during that drinking a verbal argument between A2 and the deceased arose.
- xiv) That the heated argument began to escalate where the deceased wanted to punch A2.
- xv) That the deceased began to approach A2 in an attempt to punch him but as he was doing so, punched his co-accused instead.
- xvi) That at the time, their Manager was inside the YTHL office.
- xvii) That a fist fight began between A2's co-accused and the deceased.
- xviii) That A2 later punched the deceased in his attempt to assist his co-accused as the deceased was causing trouble.
- xix) That A2 punched the deceased on the left side of his face where the deceased fell down as an impact of his punch.
- xx) That the deceased fell to the ground, facing downwards.
- xxi) That as the deceased was lying facing downward, his co-accused requested that A2 hand him a piece of stick.

- xxii) That A2 saw his co-accused hit the deceased twice on his head which he then noticed blood streaming from the deceased's head.
- xxiii) That during the time, A2's co-accused hit the deceased as he was lying on the ground, A2 was merely standing next to them.
- xxiv) That the weapon used to hit the deceased twice on the head was a piece of timber.
- xxv) That a scene reconstruction was conducted during A2's caution interview.

Summary of Evidence

- 7. The 1st witness for the prosecution or the PW1 is Satend Kumar, the manager of the Yarawa Timber Yard (YTY). His evidence is that;
 - i) Presently he has about 8 employees and their usual working hours are from 8.00am to 5.00pm.
 - ii) On the 31st of August 2017, at the request of the 4 workers and for their own benefit, he allowed them to work overtime from 5.00pm to 10.00pm.
 - iii) The witness has gone to his brother-in-law's place and having had a beer there came to the YTY at 10.00pm to pick his employees up. The 4 of his employees namely, Kiriata (the 1st accused), William (the 2nd accused), Rebaio (the deceased) and Peter, planned to drink beer, and accordingly he (the witness) bought a carton of beer and went with them back to his brother-in-law's place. Having had the beer there, the 4 employees and the witness decided to go to a night club in Suva.
 - iv) They were at the night club till early morning hours and having had about 4 jars of beer the witness and 3 of his employees, namely Kiriata, William and Rebaio, came back to Lami at about 7.00am on the 1st of September 2017. He had few Woodstock cans with him in the car, and having exchanged them for cool Woodstock cans they came back to the YTY and drank some.
 - v) While seated on the packet of timber and drinking Woodstock there happened to be an argument between Rebaio and William. The witness having separated them went into the shop. The witness has seen Kiriata and William walk out of the gate and then seen Rebaio yelling, shouting and going after the other two, challenging them to come for a fight.
 - vi) After a while he has seen Rebaio coming backwards, towards the gate while two sides exchanging punches. Rebaio was on one side and the William and Kiriata was on the other side. They came inside the yard fighting, and then Rebaio has fallen on the ground face downwards. Then, the witness has seen Kiriata, the 1st

accused picking up a 4 x 2 piece of timber and smacking Rebaio twice on his backside.

- vii) The witness says that Kiriata was so drunk then that when the police vehicle came, he was shouting and went straight inside the police van. Further the witness identified Kiriata as the 1st accused and William as the 2nd accused.
08. Answering the cross examination, PW1 says that;
- i) Physically, Rebaio, the deceased was much bigger and stronger than Kiriata, the 1st accused.
 - ii) The witness noted that Kiriata has suffered injuries from the fight with Rebaio.
 - iii) When they were seated on the packet of wood Kiriata tried to stop Rebaio from beating up William and the behavior of Rebaio was really bad at that time.
 - iv) The night previous to the incident has been a night of continuous drinking and none of them had any rest, and by the time this incident took place, all of them were so drunk.
09. In re-examination the witness;
While confirming that Rebaio was much bigger and stronger than the accused, stated that the accused were trying to avoid the fight and was also trying to go home.
10. The PW2 was Josefa Colanaudolu. His evidence was that;
- i) In 2017, he was working in the Kevin Agro, the ginger factory down the same road which goes passing the YTY.
 - ii) He has left home at about 6.30am and as he was approaching the YTY, about 25 meters away has heard the male voices shouting inside the yard.
 - iii) He has seen two men coming out of the gate of the YTY and walking towards the town. Few moments later another man has come out of the same gate, swearing and yelling at the other two.
 - iv) The two men who came out first have walked back to him and they started throwing punches and hitting each other, until they ended up back in the yard. Once inside the yard, the single guy sat down as he was tired. The other two went on kicking and punching him. They were all drunk. Then the single guy started to stand up again. At that point one of the two, finding a timber of 4x2, struck the single guy on the back of the neck. The one, who was struck, fell face down on the ground. Then, the one who struck called the other one to do the same. The other one then struck the fallen one on the back. Thereafter the one who struck first took the timber again and struck the fallen one again.

v) In cross examination, the witness affirms that the deceased was hit with a timber for the first time when he was sitting down and with the hit he has fell face down on the ground. However, the witness contradicts himself when he states later that the guy went in search of a timber when the deceased stood up. Further, this witness concedes that his evidence is different to what he stated to the police. Therefore, one should be extremely cautious in considering the evidence of this witness.

11. The next witness, PW3 was the Sargent 847 Ram Prasad.

His evidence is that when he was on duty at the Navua police station, on 01st of September 2017 at about 7.30am, he received a complain of a fight in progress at the Noor Ahmed Timber Yard. This timber yard is also known as YTY. He has arrived in the police van together with two officers at the YTY within a couple of minutes as that place is only about 1000 meters away from the Navua police station. He has seen the victim laying on the ground and rushed there and checked his pulse. He has felt the pulse and made arrangements to keep him on the tray of the van to take him to the hospital. He has met the Manager of the YTY Mr. Satend Kumar (PW1) and was shown the 1st accused whom he arrested. He was also informed of and shown the timber (PE1) which was said to have used for the assault and having uplifted that, later handed it over to the station. After hospitalizing the victim he was informed that the victim has passed away. Thereafter he has attended to the other necessities and on the information received has gone in search of the 2nd accused. The witness states that at the time of the arrest the 1st accused had been very co-operative but was very drunk.

In cross-examination the witness states that at the time of the arrest of the 1st accused, he noted already sustained injuries on his face.

12. PW4 was PC 3492 Ravind Prasad. He states that;

On the relevant day, he has visited the scene of the crime with Sargent Ram Prakash and assisted the said officer in numerous ways. This witness basically substantiates and corroborates the evidence of the PW3. In addition, having gone in search of the 2nd accused the witness has arrested him at the Navua town. At the time of the arrest the 2nd accused has been very drunk.

13. PW5 was Detective Sargent 2771, Aminand Prasad. He stated that;

This witness was attached to the Sigatoka police station at the time of the incident. He has been on leave at his home in Navua, on that particular day. He was asked by the crime officer of Navua police station to witness a caution interview, which was recorded by the officer Hassan. Accordingly, he has witnessed the recording of the caution

interview of the 1st accused, Kiriata. The handwritten copy of the interview was marked and produced as PE 2 (A) and the typed copy of the said caution interview was marked and produced as PE 2 (B). In addition the witness has taken the 1st accused to the hospital to obtain treatment for his injuries.

14. PW6 was PC Tevita Naiteqe.
He was the charging officer of the 1st accused, Kiriata. The said charge statement was marked and produced as PE 3.
15. The next witness for the prosecution or the PW7 was DC. 3633, Naicker.
He states that he was the interviewing officer of the 2nd accused, William Peter. The record of the said interview was marked and produced as PE 4.
16. PW8 was DC 4230, Lasarusa.
He was the charging officer of the 2nd accused, William. A true copy of the said charge statement was marked and produced as PE 5.
17. PW9 was Sargent 4485, Viliame Naupoto.
He was a crime scene investigator and has examined the crime scene for physical evidence and also photographed the crime scene and the post mortem examination. A photographic booklet containing 1 to 40 photos, which was compiled by him was marked and produced as PE 6.
18. The final witness called on behalf of the prosecution, the PW10 was Dr. James Kalougivaki.

His Curriculum Vitae showing his learning and experience was marked and produced as PE7. The post mortem examination report of the deceased Rebaio, was marked and produced as PE8. That report clearly indicates the cause of death of the deceased as “severe intra-cranial hemorrhage & base of skull fracture”. The witness confirms that blow by a 4 x 2 timber with a significant force has a high likelihood of causing the apparent injuries at the back of the head of the deceased. The injuries on the face of the deceased are highly unlikely to have caused by the same blows. The witness opines that there were signs of only two blows with a timber on the head of the deceased and on the rest of the body of the deceased there were no clear signs of any blow with a timber.

19. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining and giving the due rights of the accused.
20. The 1st accused elected to give evidence on his behalf. His evidence is that;
- i) He has studied at Rabi Primary school and his level of education is class 5.
 - ii) In 2017 he has been working as a concrete block maker at YTY and he had worked there for 15 years since the age of 15.
 - iii) On the 31st of August 2017, he has started work at 8.00am and worked till 10.00pm. Though usually they finish is at 5.00pm, on that day he and 3 other co-workers, namely William, Rebaio and peter had done overtime.
 - iv) At 10.00pm their boss Satend has come to pick them up. While in the vehicle, they decided to go and have a drink and gone to a place of Satend's friend. Satend bought a carton of beer, Fiji Bitter long necks, and went there and 4 of them, namely Kiriata, William, Rebaio and peter drank that while Satend drank elsewhere with his friends.
 - v) Having finished that, they have decided to go to a night club in Suva and having bought a half a bottle of Rum and a two liter bottle of Coke have consumed it on the way to Suva.
 - vi) While at the nightclub, Rebaio and Satend have sat at the counter and the witness, William and Peter have sat at the back. The three of them have drunk about 5 jugs of beer there.
 - vii) Thereafter Satend, Kiriata, William and Rebaio have come to Lami while Peter stayed at the night club with some of his friends. Satend has taken him home and when he is about to get down from the vehicle, Rebaio has asked him to join in to have two more cans of Woodstock.
 - viii) Then Satend went and bought some more Woodstock cans and they all went to the Yard to have it there. At the yard, they sat on a packet of timber and drank Woodstock. While drinking, Rebaio challenged William for a fight, and on the request of William, the witness has held Rebaio by his waist from the front and tried to stop Rebaio. Then Rebaio has punched him and said that "Today I will kill you and William". Then the witness has gone and joined William, who was already walking out of the yard.
 - ix) After a while, Rebaio came at them shouting and swearing and punched them. While exchanging punches, Rebaio fell down and as he was about to get up, the witness having found a 4 x 2 timber nearby, has struck Rebaio twice with it.

Though he aimed at Rebaio's body, as he was getting up, they struck on his head. It has happened so fast and all of them have been very drunk.

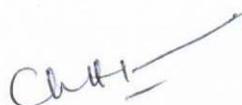
- x) Thereafter he has seen Rebaio bleeding heavily, and sat there and cried, as he has pleaded with Rebaio at the beginning to not to start a fight.
 - xi) The witness affirms that at the time he hit Rebaio with the timber, he wanted to injure him to prevent him from coming after them and not to kill him.
 - xii) In cross examination, the witness explains that he was not continuously working at the yard for 15 years. When queried whether the bigger physical build of the deceased did scare him, the witness states that it did not, because he intervened to stop the fight and never expected the deceased to hit him. The prosecution elicits a contradiction in the witness's evidence with his statement to the police in respect of the position deceased was in at the time of hitting him with the timber. The witness's explanation was that the caution interview was recorded in English and he spoke in i-Taukei, hence could not understand what was written by the officer.
21. With the said evidence the 1st accused has closed his case. The 2nd accused elected to remain silent exercising his constitutional right. Anyway, he has called two witnesses on his behalf.
22. The 1st witness called on behalf of the 2nd accused (DW2) was Mr. Wame Tuivuya. He states that;
- He is a driver residing at the adjoining land to the YTY and that the two lands are separated by a fence. In the morning of the 01st of September 2017, he heard his wife talking to those who were drinking Woodstock at the yard. She has asked them to move away as they were making a lot of noise. Thereafter he has come on to the road with his grandchild. Then the two accused have come on to the road and the witness has asked them to go home as they were drunk. Few moments later, the deceased also has come running towards them and started a fist fight. The witness has tried to stop that but he could not. The three, have gone back inside the yard fighting. The witness and his grandchild were watching at the gate. Then the bigger man has fallen on the ground and Kiriata the 1st accused, picked up a timber and hit the deceased. At the moment having seen this and being disturbed by it the grandchild of the witness has started crying and he has moved away. The witness states that the deceased fell on to the ground sideways while protecting his face with his hands. The witness has not seen where the timber hit on the deceased; he has heard only one blow.

23. The 2nd witness called on behalf of the 2nd accused (DW3) was Ms. Makirina Buatawa. Her evidence is that;
She was employed at the ginger factory in September 2017. On the 1st of September, while on her way to the factory at around 7.00am, she has seen people crowding in front of the YTY. When she moved closer, she has seen Kiriata, who was known to her before, picking up a piece of timber & hitting a man once. The witness has not noticed how the man who was hit, was laying on the ground, but after being hit he was laying face down on the ground. In answering to the cross examination on behalf of the 1st accused, the witness admits that she told to the police that the big man was trying to get up when he was hit with the timber. She further states that when she saw Kiriata hitting the man, the other man was walking out of the gate.
24. That is a summary of the evidence given by the witnesses. I have only referred to the evidence which I consider important to explain the case and the applicable legal principles. However, I have listened, taken down and carefully studied the evidence of all the witnesses in addition to observing their demeanor in court.
25. I direct myself in accordance with the law and the evidence led in this case, inclusive of which I have discussed in my summing up to the assessors.
26. When analyzing the above evidence I am mindful that there are 5 eye witnesses who have given evidence at this trial inclusive of the 1st accused. The only evidence of 2nd accused taking part with the assault by the timber comes only from the PW2. Though he said so in evidence, the witness has not stated that to the police in his statement. In addition, the rest of the evidence, inclusive of the medical evidence does not support such an allegation. Having considered carefully, I am of the view that it is highly unlikely that 2nd accused has taken part in the assault of the deceased, with timber. This creates a reasonable doubt in the case of the prosecution against the 2nd accused. Therefore, the only possibility of the 2nd accused being convicted of murder would be only in the case of;
- a) 1st accused being convicted of Murder and
 - b) The 2nd accused is proved to have acted with him in a joint enterprise.
27. The prosecution has neither adduced any evidence nor suggested from the witnesses, anything to indicate that the accused were acting in joint enterprise, in committing the murder of the deceased. The 2nd accused seeking the assistance of the 1st accused to save him from the deceased will not establish a joint enterprise to kill the deceased. In any event the act of assaulting the deceased with the timber by the 1st accused has

happened some time later and other than deceased threatening to kill the accused, there is nothing to indicate that the accused threatened or intended to kill the deceased. In the light of the above, I am of the view that prosecution fails to establish that there was a joint enterprise among the accused to cause the death of the deceased.

28. Though the 2nd accused has admitted through his caution interview and as for the evidence in this case that the 2nd accused was involved in punching the deceased, in absence of any evidence and an allegation that those punches caused or contributed to the death of the deceased, I hold that the 2nd accused should be acquitted from the charge of murder as well as the lesser charge of manslaughter.
29. The 1st accused admits that he has assaulted the deceased with the timber twice. Therefore, now, I will see whether the prosecution has proved all the elements of the offence of murder against the 1st accused. The needful elements in proof of the offence are;
 - i) The Accused,
 - ii) Engaged in a conduct,
 - iii) That conduct caused the death of Rebaio,
 - iv) Accused intended to cause the death of Rebaio **or** Accused was reckless as to causing the death of Rebaio by his conduct.
30. The defense concedes the first three elements above and contests only the final element. The 1st accused states in evidence that he intended only to injure the deceased and not to kill him. This statement is substantiated by the record of caution interview of the 1st accused which was marked and produces by the prosecution as PE2 (a) and (b). By admitting the said caution interview as a part of the evidence, the prosecution is deemed have conceded the 1st accused's lack of murderous intention. Without relying on that, even when considered the evidence against the 1st accused, there arises a question as to, in hitting the deceased with the timber did the 1st accused in fact aimed at his head or as stated aimed at the deceased's body but mistakenly hit the head. In addition to the other factors, the drunkenness of the 1st accused should also be considered and I am of the opinion the prosecution has not managed to prove beyond reasonable doubt that the 1st accused has in fact intended to hit the head of the deceased and thereby been reckless. Therefore, the prosecution fails to remove the doubt created as to the lack of murderous intention, knowledge or as to the recklessness. Therefore, the 1st accused could not be held liable for murder but for the manslaughter.

31. In my summing up I have discussed all these in detail and the two assessors having understood the said legal issues has decided unanimously and correctly in holding the 1st accused to be guilty of manslaughter and acquitting the 2nd accused. Therefore, I do not see any reason to deviate from the decision of the assessors and concurring with the decision of the assessors I convict the 1st accused for the offence of Manslaughter and acquit the 2nd accused.
32. This is the Judgment of the Court.


Chamath S. Morais
JUDGE



Solicitor for the Prosecution : *Office of the Director of Public Prosecution, Suva*
Solicitor for the Accused : *Jiten Reddy Lawyers*