

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

CRIMINAL CASE NO: HAC 47 of 2010

STATE

V

NIKASIO TUPOU

Counsel : Ms. Juleen Fatiaki with Ms. Sujata Lodhia for the State
Mr. A. K. Singh for the Accused

Dates of Trial : 6, 8-9 & 12 November 2018

Summing Up : 13 November 2018

Judgment : 16 November 2018

JUDGMENT

- [1] According to the Information filed by the Director of Public Prosecutions (DPP), the accused Nikasio Tupou is charged with the following offence:

Statement of Offence

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

Particulars of Offence

NIKASIO TUPOU on the 4th day of February 2010, at Samabula, in the Central Division, murdered Esita Kele.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days.

- [3] At the conclusion of the evidence and after the directions given in the summing up, by a unanimous decision, the three Assessors found the accused guilty of the charge of Murder.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] Accordingly, I directed the Assessors that in order for the prosecution to prove the charge of Murder, they must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 4th day of February 2010);
 - (iii) at Samabula, in the Central Division;
 - (iv) engaged in a conduct; and
 - (v) the said conduct caused the death of Esita Kele (the deceased); and
 - (vi) the accused intended to cause the death of the deceased; or
the accused was reckless as to causing the death of the deceased by his conduct.
- [7] The above individual elements were further elaborated upon in my summing up.
- [8] In this case the accused is taking up the defence of provocation. The basis of taking up the defence of provocation is one of sexual infidelity on the part of the deceased.
- [9] Therefore, I explained to the Assessors the salient provisions of Section 242 of the Crimes Act. I directed the Assessors that in order for them to consider the defence of provocation they must be satisfied, from the evidence in the case, that all three elements of provocation as set out in Section 242 of the Crimes Act have been established. The three elements are:
- That the accused had caused the death of the person who gave him the provocation (the deceased):

- (i) in the heat of passion,
- (ii) caused by sudden provocation as defined in sub-section (2) of Section 242 and
- (iii) before there was time for his passion to cool.

[10] I further directed the Assessors that the prosecution always bears the legal burden of proving every element of the offence of Murder. However, an accused who wishes to deny criminal responsibility for Murder by relying on provocation, bears what is known as an evidential burden in relation to that matter. This is stated in Section 59 of the Crimes Act. I then went on to explain the salient provisions of Section 59 of the Crimes Act.

[11] The prosecution, in support of their case, led the evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola, Inspector Sakeasi Busele, a Medical Officer, Dr. James J.V. Kalougivaki and witness Elia Manoa. The prosecution also tendered the following production items as prosecution exhibits:

Prosecution Exhibit **PE1A** - The caution interview statement of the accused (in the Itaukei language).

Prosecution Exhibit **PE1B** - The English translation of the caution interview statement of the accused.

Prosecution Exhibit **PE2** - Kitchen Knife.

Prosecution Exhibit **PE3** - Cane Knife.

Prosecution Exhibit **PE4** - Post Mortem Examination Report of the deceased.

[12] The accused gave evidence in support of his case. He also called witness Livai Naqera Junior. The defence also tendered to Court the Medical Examination Report of the accused, dated 5 February 2010, as Defence Exhibit **DE1**.

[13] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Agreed Facts*" without placing necessary evidence to prove them:

1. Nikasio Tupou (hereinafter referred to as "Accused") at the material time was 40 years of age, and resided with his mother and de-facto partner

namely Esita Kele (hereinafter referred to as the 'Deceased') in their family home at 25 Mali Place, Samabula.

2. The Accused had been living in a de-factor relationship with the Deceased since October 2009.
3. The Deceased at the material time was pregnant.
4. The Accused stabbed the Deceased's stomach twice with a kitchen knife; and the said knife penetrated her stomach.
5. The Deceased fled from the Accused and he whilst in pursuit of her grabbed his cane knife and struck her with it a number of times.
6. The Deceased fled outside of the house and collapsed in the compound, a few meters away from their house.
7. The Accused's mother (Leba Laisa) having returned from picking up her grandson from school that afternoon found the Deceased's body lying outside the family home.
8. She entered the house and found the Accused lying on his bed with an electric chord coiled around his neck.
9. The Police arrived at the scene shortly after.
10. The Accused was arrested and escorted to the Samabula Police Station.

[14] Since the prosecution and the defence have consented to treat the above facts as "*Agreed Facts*", without placing necessary evidence to prove them, these facts are considered as proved beyond reasonable doubt.

[15] In this case the prosecution is primarily relying on the admissions made by the accused in his caution interview statement. The said statement had been recorded by ASP Eroni Ratavola, on 5 & 6 February 2010, at the Samabula Police Station. At the time, ASP Ratavola held the rank of Detective Sergeant (D/SGT 201). Inspector Sakeasi Busele, acted as the witnessing officer during the recording of the caution interview statement.

[16] The Defence states that the caution interview statement was fabricated. Their position is that the caution interview statement was not read back to the accused. The Police had

given the statement for the accused to sign and he had done so. He was not aware of what was written in the said statement.

- [17] The prosecution says that the caution interview statement was not obtained under pressure or inducement and that the statement was not fabricated. The two police officers testified that there were no threats or force or any form of intimidation of any kind by anyone on the accused and the statement was freely and voluntarily given by him and that they correctly recorded what the accused said.
- [18] Having carefully considered the aforesaid evidence, I am of the opinion that the caution interview statement of the accused was not fabricated by the police. In fact, there was absolutely no reason for the police to fabricate the said statement. Thus I am of the view that the caution interview statement was made voluntarily by the accused and that there was no general grounds of unfairness in the recording of the said statement. I am also of the view that the contents of the statement was true and accurate and that Court can rely and accept the statement as a true version of the incident which took place.
- [19] The prosecution also relies upon the evidence of the Medical Officer, Dr. James J.V. Kalougivaki. This witness was giving evidence on the post mortem examination conducted by Dr. Ramaswamy Ponnu Swamy Goundar, who is now said to be retired and overseas.
- [20] In terms of Sections 133 (1), (2) and (3) (a) of the Criminal Procedure Act, signed reports of a pathologist can be admitted into evidence in a trial if that report had been duly disclosed to the accused. Furthermore, Section 133 (5) of the Criminal Procedure Act permits another doctor to be called as a witness to refer and comment on the contents of any such report.
- [21] Doctor Kalougivaki explained in detail the external and internal injuries recorded on the body of the deceased. Based on the injuries recorded by Dr. Goundar in his report, Dr. Kalougivaki testified that the cause of death was due to severe multiple slash wounds or cut wounds to the head and neck of the deceased.
- [22] In this case several matters have been agreed by the prosecution and the defence. Therefore, those facts are considered proved beyond reasonable doubt. Accordingly, based on the said agreed facts, the identity of the accused, the date of offence and place

of offence are not disputed. The conduct of the accused is also not disputed as it is stated in the Agreed Facts that the accused stabbed the deceased's stomach twice with a kitchen knife and the said knife penetrated her stomach. It is also agreed that after the deceased fled from the accused, the accused whilst in pursuit of her grabbed his cane knife and struck her with it a number of times. The deceased had then fled outside of the house and collapsed in the compound, a few meters away from the house. The fact that the said conduct of the accused caused the death of the deceased is also not disputed. This is further established by way of the medical evidence that has been presented in Court.

[23] The Assessors have found the evidence of prosecution as truthful and reliable as they have by a unanimous decision found the accused guilty of the charge of Murder. Therefore, it is clear that they have rejected the version put forward by the accused.

[24] In my view, the Assessor's opinion was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of the charge of Murder.

[25] Considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved its case beyond reasonable doubt by adducing truthful and reliable evidence satisfying all elements of the offence of Murder with which the accused is charged.

[26] In the circumstances, I find the accused guilty of Murder.

[27] Accordingly, I convict the accused for the offence of Murder as charged.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 16th Day of November 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Messrs A. K. Singh Law, Nausori.