

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 163 OF 2014LTK

STATE

vs

MOHAMMED YASIN

Counsels : Ms. L. Latu and Ms. S. Naibe for State
Ms. V. Narara and Mr. S. Kumar for Accused
Hearings : 9, 11, 12, 13 and 16 October, 2017
Summing Up : 17 October, 2017

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this

trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:

"... [read from the information]..."

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
 - (i) Did the accused, on 16 November 2014, at Wailailai, Ba, in the Western Division, murder Maimum Nisha?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with "murder", contrary to section 237 of the Crime Act 2009. For the accused to be found guilty of "murder", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) that the accused did a wilful act; and
 - (ii) that wilful act caused the death of the deceased; and
 - (iii) at the time of the wilful act, the accused either;
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.
10. On the first element of murder, a "wilful act" is a voluntary act by accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, A wanted to shoot B with a gun. A picks up a gun and shoots B in the heart. A did a "wilful act". Likewise, if A assaults B. When A assaults B, A did a "wilful act" to B.
11. On the second element of murder, "the wilful act must cause the death of the deceased". This simply meant that the accused's wilful act, substantially contributed to the death of the deceased. The accused's wilful act must be a substantial contributor to the death of the deceased. In other words, the accused's wilful act was a substantial cause of the deceased's death. Continuing from the above examples when A shot B in the heart, with a gun, B later died as a result of the injuries to his heart. A's shooting B in the heart (wilful act) was a substantial cause of B's death. A's assaulting B, set in motion a chain of events that led to B's death, and as such, was a substantial cause to B's death.
12. The third element of murder concerned it's fault element. There are two fault elements for murder, as described in paragraphs 9(iii) (a) and 9(iii) (b). It would appear that the prosecution is running its case on both fault elements. It need only satisfy one fault element, to prove the charge of murder. We will therefore begin by discussing the first fault element, and then move on to the second fault element.
13. On the first fault element, the prosecution must make you sure that when the accused did "the wilful act", he "intended to cause the death of the deceased". You cannot cut open the accused's head, to find out what his intentions were, at the time he allegedly assaulted the

deceased to death. But you can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted him. If you find that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.

14. As to the second fault element of murder, the prosecution, must make you sure that when the accused did "the wilful act", he "was reckless as to causing the death of the deceased". A person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk was unjustifiable is one of fact for you. Was the accused aware of a substantial risk that the victim would die if he stabbed her in the neck? And having regard to the circumstances known to him, was it justifiable to take the risk of stabbing her neck, at the material time? If you think, he was not justified in taking the risk, then he was reckless in causing her death. If you think he was not reckless, then he is not guilty of murder.
15. If you find all the elements of murder, as described above, proved beyond reasonable doubt by the prosecution, then you must find the accused guilty as charged.
16. If you find one of the above elements of murder not proved beyond reasonable doubt, then you must find the accused not guilty as charged. At this stage, you are entitled to look at the lesser offence of "manslaughter", although he was not formally charged with the same. Manslaughter consisted of three elements:
 - (i) That the accused did a wilful act; and
 - (ii) That wilful act caused the death of the deceased; and
 - (iii) At the time of the wilful act, the accused either:
 - (a) Intended to cause serious harm to the deceased; or
 - (b) Is reckless as to causing serious harm to the deceased.

The first and second element of manslaughter are similar to the first and second element of murder. The difference is the fault element. For manslaughter, the accused must have intended serious harm, not death; alternatively, he was reckless as to causing serious harm, not death, to the deceased. If you find the above elements of "manslaughter" proved beyond

reasonable doubt by the prosecution, you may find him guilty of the same. If otherwise, you will find him not guilty of the same.

17. In their closing submission, the defence submitted the accused was not guilty of either murder or manslaughter, on the ground of self-defence. Section 42(1) and (2) of the Crime Act 2009 reads as follows:

".... A person is not criminally responsible for an offence if he carries out the conduct constituting the offence in self-defence. A person carries out conduct in self-defence if and only if he believes the conduct is necessary: (a) to defend himself or another person..."

If you find on the facts that the accused was acting in self-defence when he stabbed his wife in the left neck and you are sure of the same, then he was not guilty of either murder or manslaughter. However, if it was otherwise, then he was guilty of either murder, or manslaughter.

F. THE PROSECUTION'S CASE

18. The prosecution's case were as follows. On 16 November 2014, the accused was 54 years old, married with two daughters and a son. His children were all married and had families on their own. The deceased was the accused's wife. She was 47 years old at the time. The couple had been married for 27 years. At the time, the couple were experiencing matrimonial difficulties. They were living separately. The accused lived in Mead Road, Nabua, Suva, while the wife lived in Nadi.
19. According to the prosecution, the wife had matrimonial affairs with other men while separated. This made the accused sad and angry. The disagreement between the two reached the point where the wife took out a "Domestic Violence Restraining Order" (DVRO) against the accused in March 2014. On 16 November 2014, the accused's family gathered at his sister's (PW2) house at Wailailai, Ba. Their mother had returned from Australia. At about 9 am, Ms J. Nisha (PW2), her mum and son, Mohammed Iqbal (PW3), were having tea in the house. The accused was also there. At about 11 am, the accused went to a nearby Mosque to pray. After 12 midday, the accused's wife arrived to visit her mother in law. She hugged PW2 and went to talk to her mother in law, who was in the back porch.

20. According to the prosecution, the accused later returned from the mosque. He entered the house through the front door, and went past the sitting room. He saw his wife in the kitchen. He recalled her infidelities against him. He grabbed a kitchen knife from the edge of the kitchen sink. He then stabbed his wife in her lower left neck. He also injured her in her arm and stomach. He later ran out of the house. Neighbours later rushed the wife to the Ba Mission Hospital. She died enroute to hospital for excessive loss of blood due to the stab injuries.
21. The matter was reported to police. An investigation was carried out. The accused was interviewed by police on 16, 17 and 18 November 2014. He admitted stabbing his wife in the neck on 16 November 2014. He was charged with her murder and taken to Ba Magistrate Court on 19 November 2014. According to the prosecution, the accused stabbed his wife in the neck on 16 November 2014 and that caused her serious injuries leading to her death, and he intended to cause her death and/or was reckless in causing her death. As a result of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

22. On 11 October 2017, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the murder allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called no witness, in his defence. That was his right.
23. The accused's case was simple. On oath, he admitted he was at the crime scene, at the material time. He admitted he met his wife, the deceased, in his sister's (PW2) house at Wailailai, Ba, at the material time. He admitted, he was with his wife, in PW2's kitchen, at the material time. He said, his wife attacked him with a kitchen knife, in PW2's kitchen, at the material time. He said, he and his wife struggled in the kitchen, and they struggle to control the knife. He appeared to say that, in self-defence, he stabbed his wife in the neck to defend himself. He appeared to say that he did not intent to kill his wife, but only to defend himself. He said, because of the above, he was not guilty as charged.

24. As to his police caution interview and charge statements, he asks you to disregard the same, because the police forced the same out of him. He said, the police repeatedly assaulted him while he was in their custody, and his above statements were not given voluntarily and they were not true. As a result of the above, he asks you as assessors and judges of fact, to find him not guilty as charged. That was the case for the accused.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

25. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of facts, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the Agreed Facts and Agreed Bundle of Documents, then the State's case against the accused. Then, we will discuss the Accused's case. Then we will consider the need to look at all the evidence.

(c) The Agreed Facts and Agreed Bundle of Documents:

26. The parties had submitted an "Amended Agreed Facts" and "Agreed Facts – Bundle of Documents". Copies of the same are with you, and please read them carefully. There are five paragraphs of "Agreed Facts", and there are six documents, marked "A, B, C, D, E and F". All the above are agreed to by the parties, and they do not dispute the contents thereof. Because they are undisputed facts and documents, you may treat the same as established facts, and that the prosecution had proven those facts beyond a reasonable doubt. The admissibility of the documents as evidence are not disputed, and the contents of the same are also not disputed.

(d) The State Case Against the Accused:

27. The state's case against the accused was based on his alleged confessions in his police caution interview and charge statements. It was also based on the direct evidence of witnesses present at the crime scene. As to the accused's action causing his wife's death, the state relied on the wife's post-mortem examination report and Doctor Kalougivaki's (PW12)

evidence. As to the state of their marriage, the state relied on Rehana Khatoon's (PW7) evidence. We will now discuss the above evidence as it relates to the elements of murder, as described in paragraph 9 hereof.

(i) **First Element of Murder: The Accused Did a Wilful Act (Paragraph 9(i) and 10 hereof):**

28. It was the prosecution's case that, at the material time, the accused stabbed his wife in the lower left neck with a kitchen knife. None of the state witnesses present at the Crime Scene at the material time saw the accused stab his wife in the lower left neck. This was obviously a difficulty for the prosecution. To overcome this difficulty, the prosecution relied on the accused's alleged confessions in his police caution interview and charge statements. His interview statements were tendered in evidence as Prosecution Exhibit No. 1(A), the Hindi version, and 1(B), the English translation. His charge statement were tendered in evidence as Prosecution Exhibit 5(A), the Hindi version and 5(B), the English translation
29. In questions and answers 18, 26, 29, 33, 37 and 40 of his police caution interview statements [Prosecution Exhibit No. 1(B)], the accused admitted taking a kitchen knife and stabbing his wife's lower left neck, at the material time. If you accept this piece of evidence, that in itself, is enough to satisfy the first element of murder, that is, the "accused did a wilful act" by stabbing his wife in the lower left neck with a kitchen knife. Further support for this position, can be obtained when looking at question and answer 25 of the accused's charge statement [Prosecution Exhibit 5(B)]. In question and answer 25 of Prosecution's Exhibit 5(B), the accused admitted picking up a knife and stabbing his wife with the same. If you accept this piece of evidence, it further supports the State's case in proving the first element of murder beyond reasonable doubt.
30. However, in approaching the above alleged confessions, I must direct you as follows; A confession, if accepted by the trier of fact – in this case, you as assessors and judges of fact is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements as alleged by the police above. If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the

circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.

31. In this case, the police witnesses said, they arrested the accused on 16 November 2014, at the Crime Scene. They said they took him to Ba Police Station on the same day, and caution interviewed him at 6.35 pm in the Hindi language. The interview continued on 17 and 18 November 2014. The police asked him a total of 57 question and he gave 57 answers. According to the police, he was given his right to counsel, formally cautioned, was given his standard rest and meal breaks. The police said he gave his statements voluntarily and they were the truth.
32. The accused, on the other hand said, the police repeatedly assaulted him while he was in their custody. He appear to say that they threatened him and forced him to make the above statements. You have heard the details of the State's and the accused's evidence on the above matter, and how you treat the accused's alleged confession is entirely a matter for you. If you accept the accused's alleged confession on the first element of murder, that is, he stabbed his wife in the lower left neck at the material time, then you can go on to consider the second element of murder, as discussed in paragraph 9(ii) and 11 hereof. If you reject the accused's alleged confession, as described above, then you will have to find the accused not guilty as charged. It is a matter entirely for you.

(ii) **Second Element of Murder: The Accused's Wilful Act Caused the Deceased's death [Paragraph 9(ii) and 11 hereof]:**

33. It was the prosecution's case that the accused stabbing his wife in the lower left neck, at the material time, lead to serious internal injuries that caused her death. The prosecution relied on the victim's post mortem report, which was tendered as Prosecution Exhibit No. 2. The prosecution also relied on the evidence of Doctor James Kalougivaki (PW12), who conducted the post mortem on the deceased. PW12 said the accused's wife died as a result of excessive loss of blood due to the fatal stab wound she received on the neck on 16 November 2014. PW12 said the knife penetrated the deceased's neck, cut the large neck vein, cut the wind pipe and cut the top of her right lung. The above injuries caused massive bleeding leading to her

death. In their closing submission, the defence did not oppose the above position. Thus, it could be safely taken that the prosecution had proven the second element of murder beyond a reasonable doubt. In any event, how you treat the above evidence, is entirely a matter for you.

(iii) Third Element of Murder: The Accused, when stabbing the wife in the neck, intended to cause her death, or was reckless in causing the same [paragraph 9(iii) (a) or (b), 12, 13 and 14 hereof.]

34. It was the prosecution's case that when the accused stabbed his wife's neck, at the material time, he intended to cause her death and/or in the alternative, he was reckless in causing her death. In analysing this element, and the evidence, you will have to take on board the directions I gave you in paragraphs 9(iii)(a) or (b), 12, 13 and 14 hereof. You will first have to look at what the accused said in his caution interview and charge statements. In questions and answers 18, 26, 29, 33, 37 and 40 of Prosecution Exhibit 1(B), the accused admitted stabbing his wife in lower left neck. He said, he recalled the stories of his wife having affairs with other males and this made him angry. He picked up the kitchen knife and stabbed her neck. The knife penetrated the neck, cut the large neck vein, cut the wind pipe and cut the tip of the right lung. It was obvious that if one stabs a person in the neck, knowing that all the essential organs surround the neck, it could reasonably be inferred that that person intended the victim to die.
35. Alternatively, was the accused aware of a substantial risk that his wife would die if he stabbed her on the neck? And having regard to the circumstances known to him, was it justifiable to take the risk of stabbing her neck, at the material time? In my view, he was not justified in taking the risk. Stabbing the neck would obviously cause fatal injuries leading to death.
36. Furthermore, consider the evidence of Mohammed Iqbal (PW3) and Manasa Ratu (PW4). Both witnesses were at the Crime Scene at the material time. Both PW3 and PW4 said they assisted in carrying the wounded victim to a car to be taken to Ba Mission Hospital. Both PW3 and PW4 said, the accused was still armed with the kitchen knife and trying to stab his wife, who was lying seriously injured in the car. PW4 said, he and others had to push the accused to the ground, to prevent him from further stabbing his wife. What do these actions tell you? Did he really intend to kill his wife, while she laid fatally injured in the car, which was to take her to

hospital? Was he reckless in causing his wife's death? How you answer the above questions is entirely a matter for you.

37. If you find all the elements of murder proven by the prosecution beyond reasonable doubt, you may find the accused guilty as charged. If otherwise, you may find him not guilty as charged.

(d) **The Accused's Case:**

38. You have heard the accused's sworn evidence. He admitted he was at the crime scene at the material time. He said, he went into the kitchen, and his wife attacked him with a kitchen knife. He said they struggled. He appeared to say that, in defending himself, he stabbed his wife in the neck. I will not bore you with the details of his evidence, which he gave you yesterday. I am sure they are still fresh in your mind. However, in considering his evidence of self-defence, I will direct you as follows:
39. If you think that the accused was or may have been acting in lawful self-defence, he is entitled to be found not guilty. Because the prosecution must prove the accused's guilt, it is for the prosecution to prove that the accused was not acting in lawful self-defence, not for the accused to establish that he was; and you must consider the matter of self-defence in the light of the situation which the accused honestly believed he faced. You must first ask whether the accused honestly believe that it was necessary to use force to defend himself at all. This would not be the case if the accused [was the aggressor], [acted in revenge], [knew that he did not need to resort to violence]. If you are sure that he did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence, and you need consider this matter no further. But what if you think that the accused did honestly believe or may honestly have believed that it was necessary to use force to defend himself? You must then decide whether the type and amount of force the accused used was reasonable. Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself. On the other hand, if he goes over the top and uses force out of all proportion of the [anticipated] attack on him or more force than is really necessary to defend himself, the force used would not be reasonable. So you must take into account both the nature of the attack on the accused and what he then did. If you are sure that the force the accused used was

unreasonable, then the accused cannot have been acting in lawful self-defence; but if you think that the force the accused used was or may have been reasonable, he is entitled to be acquitted.

(e) **The Need to Consider All the Evidence**

40. The prosecution called 15 witnesses; 6 civilians, 2 doctors and 6 policemen. The parties submitted an Agreed Facts and Agreed Bundle of Documents. Five Exhibits were tendered by prosecution. Prosecution Exhibit No. 1(A) and 1(B) are the accused's caution interview statements. Prosecution Exhibit No. 2 and 3 are Documents A and B in the Agreed Bundle of Documents. Prosecution Exhibit No. 4 is the kitchen knife used in the alleged murder. Prosecution Exhibit No. 5(A) and 5(B) are the accused's charge statement. The accused also gave sworn evidence.
41. Please, consider all the evidence together. If I didn't mention any evidence you consider important, please take it on board. As assessors and judges of fact, you are entitled to accept any evidence you regard as credible, and reject any evidence you consider not credible.

I **SUMMARY**

42. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.
43. Your possible opinions are as follows:
- | | | | | | |
|------|---------------|---|---------|---|----------------------|
| (i) | Murder | : | Accused | : | Guilty or Not Guilty |
| (ii) | If not guilty | | | | |

44. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



A handwritten signature in blue ink, appearing to be "Salesi Temo".

Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Suva**
Solicitor for Accused : **Legal Aid Commission, Suva**