

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION
CRIMINAL CASE NO.: HAC 90 OF 2011

STATE

-v-
AVNIT SINGH

Counsels : Ms. L. Latu for the State
Ms. L. Raisua for the accused

Date of Trial : 8 September - 12 September 2014

Date of Summing Up : 15 September 2014

Date of Judgment : 16 September 2014

JUDGMENT

1. The trial held for the last week. After deliberations for about three hours the three assessors in their unanimous verdict found the accused not guilty of the charge mentioned below.

COUNT 1

Statement of Offence

Murder: Contrary to Section 237 (a) (b) (c) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

AVNIT SINGH on the 3rd day of May 2011 at Tuvavatu in the **WESTERN DIVISION** murdered **BAL KRISHNA**.

2. I adjourned overnight to consider my judgment, I direct myself in accordance with the law contained in my summing up to the assessors.

3. I bear in mind that whilst the opinion of the assessors carries great weight, the verdict of the court is that of the judge and it is his duty to reach his own conclusion on the evidence. (**Joseph v the King [1948] AC 215**) in **Ram Dulare & others v R [1955] 5 FLR 1** the Court of Appeal referred to Joseph's case and held:

"... [the assessor's] duty is to offer opinions which might help the trial Judge. The responsibility for arriving at a decision and of giving judgment in a trial by the [High] Court sitting with the assessors is that of the trial Judge and the trial Judge alone and ...he is not bound to follow the opinion of the assessors."

4. More recently, in **Sakiusa Rokonabete v The State** Criminal Appeal No. AAU 0048/05, the Court of Appeal observed:

"In Fiji, the assessors are not the sole judges of fact. The Judge is the sole Judge of fact in respect of guilt and the assessors are there only to offer their opinions based on their views of the facts."

5. If the presiding trial Judge disagrees with the opinion of the assessors, he must give written reasons for differing from the opinion and those reasons must be pronounced in open court. (Section 237(4) of the Criminal Procedure Decree). The reasons for differing with the opinion of the assessors must be founded on the weight of the evidence and must reflect the presiding Judge's view as to the credibility of witnesses. (**Ram Bali v Reginam** (1960) 7 FLR 80 at 83, **Ram Bali v The Queen** Privy Council Appeal No. 18 of 1961), **Shiu Prasad v Reginam** (1972) 18 FLR 70 at 73. In **Setevano v State** [1991] FJA 3 at 5, the Court of Appeal stressed that the reasons of the presiding trial Judge:

"...must be cogent and they should be clearly stated. In our view they must also be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial."

6. I direct myself in accordance with the law and the evidence contained in my summing up.

7. I will now deal with the elements of the offence. The offence of murder is defined under Section 237 of the Crimes Decree "Murder", has three essential elements. For accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) That accused did an unlawful act;
- (ii) That the unlawful act caused the death of the deceased;
- (iii) That the accused person intended to cause, or reckless as to causing, the death of other person by the conduct.

8. I will now deal with the summary of evidence in this case.
9. The first witness for the prosecution was Sunita Devi. On 3rd May 2011 she was with her defacto partner working at a farm. The owner 'Dada' used to touch her when serving food. She had complained about this to her partner. On this day 'Dada' had asked him to chop some wood. He had gone and brought the axe. She was asked to go and sleep in her room. She had heard a loud sound like someone hitting someone. She had asked 'honey what are you doing?' When she came out 'Dada's eyes were popping out. She had run out. She had seen the accused standing at the door with an axe. Accused had brought her back. She was asked to bring the bag. She did not want to go. Then she had gone and packed all the clothes. The accused had washed the axe and thrown it to the woods. Then they have left the house.
10. On the way they have met an i-taukei guy who asked about 'Dada'. Accused had said he is not at home. The accused told him 'Dada' had said no one to come if he is not at home. Then they have come to the road. The accused washed his feet and changed his shoes. They got into a Pajero and went to Rakiraki town. They have gone to Lautoka and then to accused's parent's house in Nadi. There accused had told his parents that he killed 'Dada.' Her dad had called and she had spoken for few minutes. Then she called back and informed him that accused killed 'Dada' and he warned her not to tell anyone. At that time accused had gone to buy cigarettes. Later police came and took them to Police. The incident was at 9.00a.m. The accused had told her if someone touches his wife or do anything to his wife he doesn't like that. There were blood stains on the axe. She identified and tendered the axe marked P1. She was frightened that the accused might kill her as well. There were no houses close by. She identified the accused in Court. Their relationship with the deceased was good that morning. The accused looked upset as thinking of something. They have come to Rakiraki as accused's mother was fighting with her
11. Under cross examination she stated that she was in relationship with the accused for 8 months and they came to the deceased's house as accused's mother never liked her and was fighting with her and chasing her out of the house. Her brother had arranged them for work for the deceased. They have gone there on 20.4.2011 and stayed there till 3.5.2011 which was a Tuesday. She had told accused about the deceased touching her. She admitted that she was arrested by the police and also charged for this offence. Then she was granted immunity by prosecution. She denied that deceased was not at home that morning. She had not seen any blood stains on the wall. The deceased was eating Roti, dhal, fried fish and fish in gravy for breakfast. It was suggested that she did not tell police that deceased told the accused to chop wood and the accused went and brought an axe.

She said that she told that to police. It was put to her that deceased was not eating food and there was no food in front of him. It was further put that the deceased was dyeing his hair. She denied all this. She had seen the police officers assaulting the accused for 2-3 minutes at Namaka police station. She had told them to stop it. The police vehicle which took them to Lautoka was not stopped at Sabeto. At Lautoka police station she had told the accused to tell the truth so that they will not beat him.

12. I observed the demeanor of this witness when she gave evidence. In my mind there is no doubt that she gave truthful evidence in Court. She was prompt in answering the questions put to her by the prosecution as well as defence. She was not evasive in her answers. She had told her father about the incident few days after the incident. There were no contradictions in her evidence. Thus her evidence was consistent. Her evidence is confirmed by the evidence of the Ranjeet Singh who is an independent witness. He had seen the accused with a girl around 10.00 a.m. trying to get transport to Rakiraki town. The proved circumstances are only consistent with the accused having committed the crime. I am satisfied and sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the circumstances proved. That inference satisfies me beyond reasonable doubt that the accused assaulted the deceased with an axe and that inference is the irresistible and inescapable on the evidence.
13. She cannot be considered as an accomplice. There is no evidence that either she took any part of the crime or she aided or abetted the accused. Therefore there is no need to look for independent corroboration of her evidence. Sunita Devi was arrested, charged and then given immunity by the prosecution. That does not make her an accomplice. However she had failed to report to any person up to 8.5.2011. Considering the fact that she was with the accused and his family all this time and that she feared the accused will kill her as well this delay is explained.
14. The next lay witness for the prosecution was Ranjeet Singh. On 3.5.2011 around 10.00 a.m. when he was coming out of drive way to go to town a boy and a girl had stopped his van and wanted a lift to town. This is the first time he had seen them. He was told that they were coming from Bal Krishna's house. They wanted to get down before the town. But he had dropped them at the town. He identified the accused as the boy who got into his van that day. They had big black bag with them.
15. This witness was not cross examined by the defence. That means that defence is not disputing his evidence.
16. The third witness for the prosecution was Subramani Mudaliar. He is the father of the first witness. On 8.5.2011 he had called the daughter. After few minutes she cut the line saying I want to speak to you. Ten minutes later daughter had called back. She had told that at the place where they were staying in Rakiraki the accused had killed that man. Her husband

had told her not to tell anyone. She sound very frightened. Then she had switched off the phone saying accused was around. He had called the brother of the deceased and informed him this. Then police had called him from Rakiraki and he had told police everything.

17. Under cross examination he admitted that he called the daughter to ask where they are as the man with whom they are staying was dead. He admitted that he loves his daughter.
18. This witness had confirmed that when he called his daughter, she did not come out with the story immediately. I watched him giving evidence in Court. There is no doubt in my mind that he is telling the truth. He had immediately informed brother of the deceased and the police.
19. The fourth witness for the prosecution was Salvindra Reddy. He had gone to deceased house on 7.5.2011 to ask for transport to go for fishing. He had seen a body lying at the back door. Half was inside and other half outside. There were lots of flies. He had informed his dad. The dad had come and checked. Then dad had informed the police. Dad is Ashok Kumar.
20. He was not cross examined by the defence. His father's statement is part of the agreed facts. The prosecution established that the body of the deceased was found on 7.5.2011 from this evidence.
21. The next witness for the prosecution was Namrita Krishna Goundar. She is the daughter of the deceased. She had called the deceased on 2.5.2011. He had told her not to call him as phone will be off due to no charge as there is no power supply. There was a couple staying with the deceased at that time.
22. She too was not cross examined by the defence. Further her mother Kaliaamma Goundar's statement is part of agreed facts. Prosecution established that deceased last spoke to his family on 2.5.2011 from this evidence.
23. The doctor was called as the next witness for the prosecution. He gave evidence on the Autopsy report prepared by doctor Ponnu Swamy Goundar which was marked and tendered as P2. There was a large defect in the skull over the left parietal bone. The edges were rough. Adjoining that there was a large defect involving left temporal bone, maxillary bone. These defects were caused by a blunt weapon. Most body parts were putrefied. The cause of death was fracture of skull from blunt weapon. Something heavy was used in fast manner to cause high energy trauma. Back of the axe could be the possible weapon.

24. Under cross examination he stated that according to report the estimated time of death according to witnesses is 7.5.2011 at 10.00 a.m. The autopsy was done on 9.5.2011. The fracture noted could have been caused by a single blow. Answering Court he stated that it will take 48 hours at least for Maggots to be seen flying like this and could be few days to a week in Fiji conditions.
25. The doctor is an independent witness. He is not the doctor who conducted the post mortem examination. I believe the evidence of this witness that the cause of death was fracture in the skull caused by heavy blunt weapon and the weapon could be the back of an axe. Further the back of the axe was used in a manner to cause high energy trauma.
26. DC Hakim Khan was called as the next witness for the prosecution. On instructions received from Sgt. Anoop he had caution interviewed the accused at the crime office Rakiraki police station. Sgt. Anoop was the witnessing officer and JP Mr. Hydar Begg was also present. It was conducted in English language in question and answer format. The accused was given his rights. He had taken notes. He tendered the caution interview marked P3 and read the same to Court. There was no force or assault on the accused. The accused did not make a complaint before or after the interview. The accused did not have any visible injuries. The accused was normal and cooperative. He identified the accused in Court. At the reconstruction Sgt. Anoop and Mr. Begg were present.
27. Under cross examination he admitted that the interview commenced at 11.45 a.m. and concluded at 8.10 p.m. He denied that Cpl. Binesh was present interfering with the answers. He denied that Cpl. Binesh gave the answers for questions 107-135. He stated that there is a recent directive to caution the accused whenever the interview was suspended and recommenced. However, that is not in practice before. He admitted that the accused was not sent for medical examination as he did not make a complaint of assault. He had not done a full body check of the accused.
28. The next witness for the prosecution was Mr. Hydar Begg. He is a JP since 2004. Sgt. Anoop had called him to the Rakiraki police station to be an independent witness of an interview. He had gone to crime office of the Rakiraki police station. Hakim was interviewing officer. Anoop was also present as a witness. Hakim was taking notes. Accused was normal. There were no injuries on his face. Accused did not make any complaint. He was giving answers on his own freewill. He was sitting with confidence. He identified the accused in Court. He was present right throughout including the reconstruction.
29. Under cross examination he stated that reason for his presence was explained to the accused. He had not asked whether the accused was assaulted before. The accused was not forced to sign the interview. Whatever in the interview are questions put to him and answered by him.

30. The next witness for the prosecution was Sgt. Anoop Kumar. He is an officer with 24 years' experience. He was the investigating officer of this case. On 7.5.2011 he had received information about a body found at Tuvavatu. He had led a team of officers there. There were people gathered in this house. There was a body facing upwards near the kitchen door. The skull was cracked. He had briefed the DCO-West. The brother of the deceased identified the body.
31. On 8.5.2011 DCO-West arrived with a forensic team. Photographs were taken by them. He had received information that the suspect is at Votualevu, Nadi. He informed DCO. On 9.5.2011 the DCO had brought the suspects to the station. Both suspects were interviewed at the station. He was the witnessing officer for Avnit Singh, the accused in the dock. DC Hakim was the interviewing officer and Mr. Hydar Begg was called as this was a serious case and to witness the fairness of the interview. DC Hakim was asking questions and accused answered those. DC Hakim took notes. He identified his signature in P3. He was present throughout including the reconstruction. The accused was giving answers voluntarily. The accused was cooperative. The accused did not make any complaint about assault, threat or verbal assault. He identified the photographs as those taken at the scene. He identified the axe, P1 taken by him at the scene. His signature is on it.
32. Under cross examination he denied that answers to questions 97-100, 107-135, 161 & 162 were not given by the accused. He denied that the accused was forced to sign his caution interview. The accused was not sent for medical examination as he did not make a complaint of assault. The accused was explained about Mr. Begg's presence. He denied that Cpl. Binesh came to the interview room during the interview to intimidate the accused. He admitted that Sunita Devi was also caution interviewed and charged. The mobile phone of the deceased was not found from the crime scene. He had investigated the loss of the mobile phone but it could not be located. The van of the deceased was found parked in a house close to the road.
33. The above three witnesses gave evidence on the caution interview of the accused. I have already ruled that the caution interview of the accused was voluntary in my ruling dated 8th September 2014. I further hold that facts in this caution interview statement are truthful. It is important to consider the question and answer 132.
- "Question: You told that you struck dada with an axe. Was the blade facing up or down?
Answer: Opposite end of the blade not the side used to chop firewood."*
34. The caution interview statement alone is sufficient to establish all the elements of the charge.
35. The prosecution case was closed after some photographs of the scene were tendered with agreement of both parties. These photographs are consistent with the evidence given by

Sunita Devi. It was suggested by defence to Sunita Devi that deceased was dyeing his hair at the time of his death. However, photographs clearly indicate that he was having a meal at the time of death.

36. After the prosecution case was closed, I explained the accused his rights in defence. The accused gave evidence. He stated that he had a defacto relationship with Sunita Devi for about a year from 2010. They have lived at his house for 8-9 months. In April 2011 they have gone to Sunita's brother's house at Wairuku. This visit was for one week. The day they were to return to Nadi his money was stolen. He had no option but to look for a job. Sunita's brother had told them that there is a farm in which they can work. On the 2nd day money was lost, he met the owner of the farm Bal Krishana alias Dada.
37. When they met Dada he gave all conditions of work. First three months he will pay in form of wages. After planting vegetables and after everything starts running smoothly they will share the profit 50% each. He agreed to these conditions. They have gone to Dada's farm on 27th April. On the first night they had kava and then liquor. His wife cooked the dinner. They went for work in the farm from the following day. They have stayed there till 3.5.2011. Everything was fine with him and Dada. They left as Mother's day was on Sunday and they wanted get old clothes for work in the farm.
38. On 3rd they woke up, had breakfast, collected everything and went. Dada had gone to the hillside to grazing the horse. They had breakfast after 7.00 a.m. On the way they have met an i-Taukei man. He had asked 'where is Dada?' He was told he is not at home and gone to buy spare parts. They went to town in Red Pajero. They went to his parent's place at Nadi. Dada was aware that they were leaving that morning. Two i-Taukei police officers came on 8th May 2011 saying Sunita's father had lodged a complaint against him that he had done something wrong and he was asked to come to the station. He was taken to Namaka crime room.
39. He was asked to sit on a chair. He was told that 'where he was living, he killed that man.' He said that cannot happen. Next day he had to return to same place. They said 'You are lying. You killed the man.' Then they started beating him. First they slapped him. There were 4-6 i-Taukei officers. Then he was hit on the shoulder. He was beaten with a belt on the stomach while being seated. His hands and legs were tied. A jacket was put around his head and knife was put at his neck. This was from 4.00 p.m. to 6.00 p.m. Then he was taken to Lautoka in a van. On the way van was stopped at Sabeto. The officer who was sitting next to him poked his finger into his stomach.

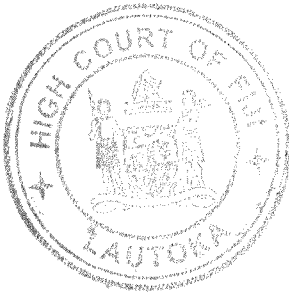
40. At Lautoka, Sunita told him that police officers told to say that he killed the man. If not they will beat him again. When he went to the bure he told two officers there that he killed the man. Then he was put into the cell. An Indian officer came and took all his clothes. He was hungry, without clothes and nothing to sleep on that night. Following morning he was given clothes and breakfast. Then he was taken to Rakiraki police station.
41. He was caution interviewed there. Hakim, Anoop and Mr. Begg were there. He was only told that Mr. Begg will be with them. Not all the answers in the caution interview were given by him. Some answers were given by police officer Binesh as what Sunita told Binesh. He was not shown an axe during the interview. The answer to question "how many times you strike Dada?" was given by Binesh. He did not do this. As far as he knows he was being trapped.
42. Under cross examination he stated that Dada gave money to him on 2nd night as his wage and fare. On 3rd they had breakfast collected the dishes and left those at a side and went. They were in a rush as they have to reach Nadi before dark. That is why they left the dishes. He was represented by a lawyer on 10.5.2011 when he was taken to Court. He had not told that he was assaulted by police and he has injuries. Before he went to Court he knew some answers in caution interview were not true. He had not told that also to the lawyer. He and Sunita had taken all their clothes when they left on 3rd. They were going to come back. Those were new clothes and they wanted to put those at home and bring old clothes. He had not told police that when they left Dada went to graze the horse. He denied having breakfast with Dada that morning and striking his head with an axe. There was no reason for Sunita to say something against him.
43. In re-examination he said that he did not tell his lawyer about injuries as he was not aware whom to complain about police assault. It was Sunita's duty to wash the dishes.
44. The position taken up by the accused in giving evidence in the court is different from his caution interview statement and the position taken up by him at the time of cross examination of prosecution witnesses. In other words his version is inconsistent. It was not suggested to Sunita Devi that they have made arrangements to leave on the morning of 3.5.2011. If there was arrangement like that there is no reason for them to leave in a hurry without even washing the dishes as told by the accused in his evidence. The explanation given by the accused to leave in a hurry is highly improbable.

45. The accused's took a defence of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi.
46. Present Criminal Procedure Decree in Section 125 provides that:
- 'On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.
- A notice under this section shall be given-
- (a) Within 21 days of an order being made for transfer of the matter to the High Court(if such order is made); or
 - (b) In writing to the prosecution, complainant and the court at least 21 days before the date set for trial of the matter, in any other case.
47. No notice was given of alibi in this case. Therefore it is clear that the accused had taken this defence at very late stage of his trial.
48. Considering above, I reject the version of the accused as untrue.
49. The father of the accused gave evidence for defence. He stated that on 8th May 3-4 police officers came as Sunita's father had made a complaint. Accused was taken to Namaka police station. He had followed with his wife and Sunita. Accused was in crime office. They were there till 6.30 p.m. They were told that he will be taken to Lautoka. He was not able to speak to his son while in police custody.
50. Under cross examination he said that he loves his son and he will do anything he can to save his son. Only reason for him to be in Court is to save his son.
51. I have already rejected the evidence of the accused as untrue. The father's evidence alone does not raise any reasonable doubt in the prosecution case.
52. Considering the evidence before the Court which I extensively discussed in my summing up to the assessors, I am convinced that there is evidence beyond reasonable doubt against the accused to prove that he had committed the offence of Murder as charged in the information. Evidence of the Sunita Devi establishes that the accused assaulted the deceased with an axe. The doctor's evidence confirms that cause of death is due to skull fracture. If a person uses a weapon like axe on the head of another person with fast manner to cause high energy trauma the only rational conclusion to be drawn is that it was

done with the intention to cause death. That inference satisfies me beyond reasonable doubt that the accused assaulted the deceased with the intention to cause his death. That inference is irresistible and inescapable on the evidence. The caution interview of the accused which was given voluntarily confirms the above position.

53. For the reasons given, I do not accept the opinion of not guilty unanimously given by the assessors in respect of the count of Murder. I am of the view that their verdict is perverse.

54. The learned DPP has satisfied me the guilt of the accused beyond reasonable doubt in respect of the count. Accordingly, I convict the accused for the count of Murder as charged.




Sudharshana De Silva
JUDGE

At Lautoka
16th September 2014

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