

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 200 OF 2014S

STATE

vs

JULIAN HEINRICH

Counsels : Ms. J. Fatiaki and Ms. U. Tamanikaiyaroi for State
Mr. S. Valenitabua for Accused

Hearings : 27 and 28 February, 1 and 2 March, 2017

Summing Up : 3 March, 2017

Judgment : 3 March, 2017

Written Reasons for
Judgment & Sentence : 6 March, 2017

WRITTEN REASONS FOR JUDGMENT AND SENTENCE

1. On 28 February 2017, in the presence of his counsel, the accused pleaded not guilty to the following information:

Statement of Offence

MANSLAUGHTER: Contrary to section 239 of the Crimes Decree
No. 44 of 2009.

Particulars of Offence

JULIAN HEINRICH with other persons unknown on the 21st of
June, 2014 at Suva in the Central Division, assaulted **SIONE**

TUFUI which caused the death of **SIONE TUFUI** and at the time of such assault was reckless as to causing serious harm to **SIONE TUFUI**.

2. The trial then went on before myself and three assessors for 3 days. The three assessors returned with a unanimous not guilty opinion on 3 March 2017.
3. The law at this stage of the trial is section 237 (1), (2), (4) and (5) of the Criminal Procedure Decree 2009, which reads as follows:

“...237 (1) When the case for the prosecution and the defence is closed, the judge shall sum up and shall then require each of the assessors to state their opinion orally, and shall record each opinion.

(2) The judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors...

(4) When the judge does not agree with the majority opinion of the assessors, the judge shall give reasons for differing with the majority opinion, which shall be –

(a) written down; and

(b) pronounced in open court.

(5) In every such case the judge’s summing up and the decision of the court together with (where appropriate) the judge’s reasons for differing with the majority opinion of the assessors, shall collectively be deemed to be the judgment of the court for... all purposes...”

4. In Ram Dulare, Chandar Bhan and Permal Naidu vs Reginam [1956 – 57], Fiji Law Report, Volume 5, pages 1 to 6, page 3, the Fiji Court of Appeal, said the following, on an equivalent section of the then Criminal Procedure Code:

“...In our opinion learned counsel for the appellants is confusing the functions of the assessors with those of a Jury in a trial. In the case of the King v. Joseph 1948, Appeal Case 215 the Privy Council pointed out that the assessors have no power to try or to convict and their 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 in the terms of the Criminal Procedure Code, section 308, he is not bound to follow the opinion of the assessors...”

5. In Sakiusa Rokonabete v The State, Criminal Appeal No. AAU 0048 of 2005, the Fiji Court of Appeal said as follows:

“...In Fiji, the assessors are not the sole judge of facts. 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...”

6. Prior to making my judgment on 3 March 2017, I had reviewed the evidence called in the trial, and I had directed myself in accordance with the Summing Up I gave the assessors on that day. The assessors opinion were not perverse. It was open to them to reach such conclusion on the evidence. However, I am not bound by their opinion. On my analysis of the case based on the evidence, and on my assessment of the credibility of the witnesses. I disagreed with the unanimous not guilty opinion of the three assessors.

7. My reasons are as follows.

8. I accept the evidence of Waqavesi Rokotuiniasau (PW1), Ravuama Vakaturaganiya (PW2) and Eremasi Nukusorowaqa (PW3). The sum total of PW1, PW2 and PW3's evidence were that there was a fight between Nauruans and Tongan young men on 21 June 2014 inside and outside the Dragons Nightclub after 3am. It was Saturday morning. PW1 and PW3 were working as bouncers at the Nightclub at the time and were responsible for taking the Nauruan and Tongan boys out of the Nightclub. According to PW1, he saw Sione Tufui (the deceased) punching the accused in the Nightclub. Thereafter there was a commotion between the Tongan and Nauruan boys. PW3 said, he saw the above boys fighting in the Nightclub and assisted PW1 take the boys out of the Nightclub. PW2 was guarding the Home Finance Company front glass wall and door at the time. He said, he saw 12 Nauruan boys repeatedly punching a Tongan boy, who fell down on the ground. PW2 said, he saw the Nauruan boys then repeatedly kicked and stomped on the Tongan boy's chest and face. He said, the Tongan boy became unconscious and his face was black and bleeding.

9. I also accept the accused's police caution interview statements, which were tendered in evidence, as Prosecution Exhibit No. 3. In my view, after considering all the evidence, I had

made the finding that the accused gave his caution interview statements to the police voluntarily and they were the truth. I accept that the commotion between the Nauruan and Tongan boys started when Sione Tufui, the deceased, attacked the accused and a friend in the Nightclub with a broken beer bottle. The accused and his friend were subsequently injured, and this started the fight between the Nauruan and Tongan boys, first inside the Nightclub and then outside the same. I accept the accused's statement, in his caution interview statements that, he later joined the other Nauruan boys repeatedly punched Sione Tufui while he was unconscious on the ground. Please, refer to questions and answers 74, 75, 77, 84, 85, 86, 92, 93 and 102 of Prosecution Exhibit No. 3. As to the nature of the accused's assault on the deceased while he was unconscious on the ground, I also accept Finau Leone's (PW4) evidence on the same. PW4 said, he saw the accused repeatedly punching and kicking Sione on the ground.

10. After assessing the above evidence and on the principle of "joint enterprise," as discussed in paragraphs 14 and 15 of my summing up on 3 March 2017, I found that the accused with the other Nauruan boys did form a common intention by conduct to violently assault Sione Tufui on 21 June 2014, and I find that they acted together, and in pursuance of this violent assault, Sione's manslaughter was a probable consequence of the violent assault. Sione Tufui's post mortem report, which was tendered as Prosecution Exhibit No. 2, showed that as a result of the assaults mentioned above, he died a few minutes later, as a result of his injuries. I accept Doctor James Kalougivaki's (PW5) evidence on the injuries suffered by Sione Tufui and the cause of his death.
11. On the evidence, I find the accused was reckless as to a risk that his continued assault on Sione Tufui on 21 June 2014 will cause him serious harm. In my view, he was aware of a substantial risk that Sione would be seriously harmed if he continued to assault him, at the material time. In my view, the accused knew Sione was unconscious, and as such, it was unjustifiable for him to continue to assault Sione repeatedly. In my view, he was extremely reckless.
12. Given the above, I find that the prosecution had proven beyond a reasonable doubt the three elements of manslaughter against the accused. I find that he with others unknown, on 21 June 2014 repeatedly assaulted Sione Tufui (engages in conduct) outside the Dragon Nightclub, and such conduct later caused Sione's death (conduct causes death), and at the time, he was

reckless as to a risk that his conduct will cause serious harm to Sione. For the above reasons, I found him guilty as charged on 3 March 2017.

13. For the purpose of sentencing, the brief facts of the case were as follows. The accused and his friends went to the Dragon Nightclub on 20 June 2014 at midnight to enjoy themselves. The accused was 19 years old at the time. He was a Form 5 student. Also in the Nightclub at time was the deceased and his friends. They were Tongan students studying at the University of the South Pacific. The accused was from Nauru. The accused, on his way to the dance floor to dance, was attacked by a broken beer bottle by Sione. Sione also later attacked the accused's friends. Both the accused and his friend were injured. As a result of the above, the Nauruan and Tongan boys fought each other inside and outside the Nightclub. Sione was later attacked by 12 Nauruan boys, who assaulted him to death. The accused was part of the group.

14. In **State v Viliame Ratoa**, Criminal Case No. HAC 173 of 2010S, High Court, Suva, I said the following:

“...”**Manslaughter**” is a serious offence, and carries a maximum sentence of 25 years imprisonment. The tariff for manslaughter in Fiji is a suspended prison sentence to a sentence of 12 years imprisonment. Sentences in the upper range were reserved for cases where the degree of violence was high, and the provocation minimal. Sentences in the lower range were reserved for cases where the violence used was minimal, while the provocation was extreme. The tariff covers a very wide set of varying circumstances which will attract different sentences, depending on its own set of facts: Kim Nam Bae v The State, Criminal Appeal No. AAU 0015 of 1998S, Fiji Court of Appeal; The State v Francis Bulewa Kean, Criminal Case No. HAC 037 of 2007S, High Court, Suva; The State v Tomasi Kubunavanua, Criminal Case No. HAC 021 of 2008, High Court, Suva. Of course, the actual sentence will depend on the aggravating and mitigating factors...”

15. The aggravating factors, in this case, were as follows:

(i) Use of Extreme Violence to Resolve a Problem. It was accepted that the deceased attacked you and your friend first at the Nightclub with a beer bottle that night. However, you should have reported the matter to the police and/or the bouncers, to see that the deceased was charged for the assault. However, you and your friends decided to take the law into your own hands by attacking and violently assaulting the deceased to death. This was unacceptable behaviour in any nightclub in Fiji. You must learn to resolve problems in a peaceful way.

(ii) As a result of your offending, you have caused heartache and sadness to the deceased's family and friends. They have lost a loved one.

16. The mitigating factors were as follows:
- (i) At the age of 21 years, this is your first offence;
 - (ii) You have been remanded in custody for 3 days since 3 March 2017;
 - (iii) The fight that erupted that night on 21 June 2014 was not started by you. According to the evidence, it was started by the deceased when he attacked you with a beer bottle. You were injured. You did not retaliate immediately. Nevertheless, you later join the others to attack him.
17. I start with a sentence of 5 years imprisonment. For the aggravating factors, I add 2 years, making a total of 7 years imprisonment. I deduct 1 week for the 3 days you have been remanded in custody, leaving a balance of 6 years 51 weeks. For being a first offender, I deduct 1 year 51 weeks, leaving a balance of 5 years imprisonment. For you not starting the fight that night and you being attacked by a beer bottle by the deceased leading to an injury to you, I deduct 2 years, leaving a balance of 3 years imprisonment.
18. Mr. Julian Heinrich, for the manslaughter of Sione Tufui on 21 June 2014 at about 3.45 am, I sentence you to 3 years imprisonment, effective immediately. I will not impose a non-parole period, which means you can be released after serving 2 years imprisonment.
19. Pursuant to section 4(1) of the Sentencing and Penalties Decree 2009, the above sentence is designed to punish you in a manner which is just in all the circumstances, to protect the community from violent offenders, to deter other would-be offenders, to establish pre-conditions for rehabilitation and to signify that the court and community denounce what you and the others did to Sione Tufui on 21 June 2014.
20. You have 30 days to appeal to the Court of Appeal.




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JUDGE

Solicitor for State : Office of the Director of Public Prosecution, Suva
Solicitor for Accused : S. Valenitabua, Barrister & Solicitor, Fiji and Nauru