

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 95 of 2016

STATE

V

ALIPATE NAIMOSO

SAIMONE TUCILA SNR

EPELI TUCILA

SAIMONE TUCILA JNR

Counsel : Mr. Meli Vosawale with Ms. Moira Konrote for the State
Ms. Shantel Hazelman for the 1st Accused
Ms. Vani Filipe for the 2nd Accused
Ms. Talei Kean for the 3rd Accused
Ms. Namrata Mishra for the 4th Accused

Dates of Trial : 5-9, 12-16, 19-23, 26-29 March and 3-6, 9 and 11 April 2018

Summing Up : 17 April 2018

Judgment : 19 April 2018

Sentence : 27 April 2018

SENTENCE

[1] Alipate Naimoso, Saimone Tucila Snr, Epeli Tucila and Saimone Tucila Jnr; the four of you were charged with the following offence:

COUNT ONE

Statement of Offence

MURDER : Contrary to Section 237 of the Crimes Act No. 44 of 2009.

Particulars of the Offence

ALIPATE NAIMOSO, SAIMONE TUCILA SNR, EPELI TUCILA, SAIMONE TUCILA JNR on the 17th day of February 2016 at Nasinu, in the Central Division, murdered **SITIVENI JAMIE QALI**.

- [2] The four of you pleaded not guilty to the above mentioned charge and the ensuing trial was held over 25 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the three Assessors unanimously found you not guilty of the charge of Murder. However, by a unanimous decision, the three Assessors found the four of you guilty of the alternative charge of Manslaughter.
- [4] Having reviewed the evidence, this Court decided to accept the unanimous opinion of the Assessors in respect of Saimone Tucila Snr (2nd Accused), Epeli Tucila (3rd Accused) and Saimone Tucila Jnr (4th Accused) and found you guilty for Manslaughter, in terms of Section 239 of the Crimes Act No. 44 of 2009 (Crimes Act). Alipate Naimoso (1st Accused) you were found guilty for Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act. You were convicted accordingly.
- [5] The case for the prosecution was that the four of you assaulted the deceased and thereby caused his death. The prosecution case was that the offence was committed jointly by the four of you in prosecution of a common purpose.
- [6] In this case the prosecution is relying on eye witness evidence, police evidence and medical evidence. The prosecution is also relying on the CCTV footage taken from the scene of the incident. Each of you gave evidence in support of your case.
- [7] The prosecution also tendered to Court Exhibits which were marked as **PE 1, PE 2A, PE 2B, PE 3A, PE 3B, PE 5A, PE 5B, PE 6A, PE 6B, PE 6C, PE 6D, PE 7A, PE 7B, PE 8, PE 9 and PE 10**.
- [8] Dr. James Kalougivaki, conducted the post mortem examination on the deceased and issued the Post Mortem Report. The Post Mortem Report was tendered to Court as Prosecution Exhibit **PE8**. The Doctor explained in detail the external and internal injuries suffered by the deceased.
- [9] In his opinion Dr. Kalougivaki concluded that the cause of death was due to:
 - (a) Severe Traumatic Brain Injury and Extensive Sub-arachnoid Haemorrhage;
 - (b) Severe Traumatic Head Injury;
 - (c) Multiple Traumatic Injuries;
 - (d) Blunt Force Trauma;

(e) History of Assault.

[10] Saimone Tucila Snr (2nd Accused), Epeli Tucila (3rd Accused) and Saimone Tucila Jnr (4th Accused), I will first deal with the sentence to be imposed on the three of you.

[11] Section 4 of the Sentencing and Penalties Act No. 42 of 2009 (Sentencing and Penalties Act) stipulates the factors that a Court should take into account during the sentencing process. Section 4 (1) and 4 (2) of the Sentencing and Penalties Act is reproduced below.

"4. — (1) The only purposes for which sentencing may be imposed by a court are —

(a) to punish offenders to an extent and in a manner which is just in all the circumstances;

(b) to protect the community from offenders;

(c) to deter offenders or other persons from committing offences of the same or similar nature;

(d) to establish conditions so that rehabilitation of offenders may be promoted or facilitated;

(e) to signify that the court and the community denounce the commission of such offences; or

(f) any combination of these purposes.

(2) In sentencing offenders a court must have regard to —

(a) the maximum penalty prescribed for the offence;

(b) current sentencing practice and the terms of any applicable guideline judgment;

(c) the nature and gravity of the particular offence;

(d) the offender's culpability and degree of responsibility for the offence;

(e) the impact of the offence on any victim of the offence and the injury, loss or damage resulting from the offence;

(f) whether the offender pleaded guilty to the offence, and if so, the stage in the proceedings at which the offender did so or indicated an intention to do so;

(g) the conduct of the offender during the trial as an indication of remorse or the lack of remorse;

(h) any action taken by the offender to make restitution for the injury, loss or damage arising from the offence, including his or her willingness to comply with any order for restitution that a court may consider under this Decree;

(i) the offender's previous character;

(j) the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence; and

(k) any matter stated in this Decree as being grounds for applying a particular sentencing option."

[12] According to Section 239 of the Crimes Act the maximum penalty for the offence of Manslaughter is an imprisonment for 25 years. The offence of Manslaughter involves the loss of a human life. As a result of your conduct you have taken away the life of another human being. Though the degree of culpability of Manslaughter is lesser in comparison to Murder, still the offence of Manslaughter involves the death of another human being. Causing another person's death for whatever reason or under whatever circumstances is indeed a serious offence.

[13] The deceased was only 21 years of age at the time of death. His mother Dorotea Davele testified in Court that the deceased was her "heart".

[14] In the case of *Kim Nam Bae v. The State* [1999] FJCA 21; AAU 0015 of 1998S (26 February 1999), the Fiji Court of Appeal held as follows;

"The cases demonstrate that the penalty imposed for manslaughter ranges from a suspended sentence where there may have been grave provocation to 12 years imprisonment where the degree of violence is high and provocation is minimal. It is important to bear in mind that this range covers a very wide set of varying circumstances which attract different sentences in different manslaughter cases. Each case will attract the appropriate sentence within the range depending on its own facts."

- [15] It can be noted from the above case, that the Court of Appeal had observed that the penalty imposed for Manslaughter ranges from a suspended sentence to 12 years for different Manslaughter cases. Thus, the case of *Kim Nam Bae* (supra) seems to be only making an observation on the range of sentences which were pronounced by the courts in Manslaughter cases, rather than establishing a tariff for the offence.
- [16] In the case of *State v. Dumukoro* [2016] FJHC 199 (23 March 2016), His Lordship Justice Vincent S. Perera having considered and analysed 21 sentencing decisions in Manslaughter cases stated "From the above decisions I have perused, it is evident that this court has been inclined towards selecting a starting sentence of 5 years imprisonment or above for the offence of Manslaughter. In majority of the cases, the court has taken 5 years as the starting point."
- [17] Accordingly, Justice Perera held ".....since this court has been more favourable towards selecting 5 years as the starting point, I am inclined to form the view that the tariff for the offence of Manslaughter under Section 239 of the Crimes Decree (Act) should be 5 years to 12 years imprisonment."
- [18] I am inclined to agree with the above tariff of 5 years to 12 years imprisonment proposed by Justice Perera for the offence of Manslaughter. In *State v. Seniceva* [2017] FJHC 479; HAC 26 of 2016 (26 June 2017), I followed the same tariff.
- [19] In determining the starting point within the said tariff, the Court of Appeal, in *Laisiasa Koroivuki v State* (Criminal Appeal AAU 0018 of 2010) has formulated the following guiding principles:

"In selecting a starting point, the court must have regard to an objective seriousness of the offence. No reference should be made to the mitigating and aggravating factors at this time. As a matter of good practice, the starting point should be picked from the lower or middle range of the tariff. After adjusting for the mitigating and aggravating factors, the final term should fall within the tariff. If the final term falls either below or higher than the tariff, then the sentencing court should provide reasons why the sentence is outside the range."

- [20] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 5 years imprisonment for the offence of Manslaughter.
- [21] The aggravating factors are as follows:
- (i) Taking away the life of another human.
 - (ii) The offence was committed by three of you, where the deceased was overpowered.
 - (iii) The use of extreme force on the deceased, which is confirmed by the serious injuries sustained by him.

(iv) There was minimal provocation involved at the time you caused the assault on the deceased.

- [22] Accordingly, I add a further 3 years imprisonment to your sentence for aggravating circumstances. Your sentence is now 8 years imprisonment.
- [23] In mitigation Saimone Tucila Snr, you have submitted that you are 55 years of age and that you are married with 10 children. You have been married since 1986. Two of your children are said to be less than 18 years of age, who are still under your care. You are working as a farmer, and the crops and vegetables you plant feeds your family.
- [24] You are said to be involved in community work. You are the President of the Rugby League in the community of Nakasi. This rugby league consists of young youth who are unemployed and is for the purpose of deterring them from criminal activities.
- [25] It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [26] Epeli Tucila, you have submitted that you are 29 years of age, married with 2 children aged, 7 years and 9 months respectively. You are the sole breadwinner of your family. You have been working on a ship earning \$700 - \$800 per month. You have completed various courses of study, in proof of which you have tendered the relevant certificates to Court. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [27] Saimone Tucila Jnr, you have submitted that you are 23 years of age, married with 2 children (twins), aged 1 year and 2 months. You have been working on a ship earning \$700 - \$800 per month. You have completed various courses of study, in proof of which you have tendered the relevant certificates to Court. It is the opinion of this Court that these are personal circumstances and cannot be considered as mitigating circumstances.
- [28] The State has confirmed that Epeli Tucila and Saimone Tucila Jnr have no previous convictions. As for you Saimone Tucila Snr, there is one previous conviction against your name for the offence of Assault Causing Actual Bodily Harm, for which you were sentenced to 6 months imprisonment suspended for 12 months, by the Magistrate's Court of Nasinu, on 27 January 2011.
- [29] Epeli Tucila and Saimone Tucila Jnr considering your previous good character I deduct 2 years each from your sentences. Your sentences would now be 6 years imprisonment.
- [30] As for you Saimone Tucila Snr, I am not in a position to offer you any concession in this regard, due to the active previous conviction recorded against you. Therefore, your sentence would remain at 8 years imprisonment.

- [31] Accordingly, I sentence you Saimone Tucila Snr to a term of 8 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that you are not eligible to be released on parole until you serve 5 years of that sentence.
- [32] Epeli Tucila and Saimone Tucila Jnr, I sentence you to 6 years imprisonment. Pursuant to the provisions of Section 18 of the Sentencing and Penalties Act, I order that each of you are not eligible to be released on parole until you serve 4 years of that sentence.
- [33] Alipate Naimoso (1st Accused), I will now deal with your sentence.
- [34] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an Assault Causing Actual Bodily Harm." The prescribed penalty for this offence is a term of imprisonment for 5 years.
- [35] In **State v. Tugalala** [2008] FJHC 78; HAC 25S of 2008S (29 April 2008); Her Ladyship Madam Justice N. Shameem said:

*"The tariff for this offence appears to range from an absolute or conditional discharge to 12 months imprisonment. The High Court said in **Elizabeth Joseph v. The State** [2004] HAA 030/04S and **State v. Tevita Alafi** [2004] HAA073/04S, that it is the extent of the injury which determines sentence. The use of a pen knife for instance, justifies a higher starting point. Where there has been a deliberate assault, causing hospitalization and with no reconciliation, a discharge is not appropriate. In domestic violence cases, sentences of 18 months imprisonment have been upheld (**Amasai Korovata v. The State** [2006] HAA 115/06S)."*

- [36] In **Jonetani Sereka v. The State** [2008] FJHC 88; HAA 27 of 2008 (25 April 2008); His Lordship Justice Daniel Gounder held:

*"The tariff for assault occasioning actual bodily harm ranges from a suspended sentence where there is a degree of provocation and no weapon used, to 9 months imprisonment for the more serious cases of assault (**State v Anjula Devi**, Criminal Case No. 04 of 1998 Lab.)."*

- [37] His Lordship Justice Vincent Perera in **Anaiasa Naqialawa v. State** [2017] FJHC 484; HAA 15 of 2017 (29 June 2017); stated thus:

"It is pertinent to note that 12 months is only a one fifth of a 5 year imprisonment which is the maximum sentence for the offence of assault causing actual bodily harm under section 275 of the Crimes Act. All in all, I am of the view that it is appropriate to have 12 months imprisonment as the higher end of the tariff for the said offence."

Needless to say, the selecting of a starting point is not that difficult where the relevant sentencing tariff indicates the lower end of the imprisonment term applicable to a particular offence as opposed to other sentencing options that may be considered.

If the sentencer decides that an imprisonment term is the appropriate punishment for an offender who is convicted of the offence of assault causing actual bodily harm under section 275 of the Crimes Act and not to opt for an absolute or conditional discharge, it is important for the sentencer to have a clear opinion on the minimum imprisonment term the offence should attract considering its objective seriousness. In my view, an imprisonment term of 3 months would appropriately reflect the objective seriousness of the offence of assault causing actual bodily harm under section 275 of the Crimes Act."

- [38] Considering the above authorities, I consider the tariff for the instant case to range from 3 months to 12 months imprisonment. This tariff was also adopted by me in the case of *State v. McPherson* [2017] FJHC 890; HAC 42 of 2016 (22 November 2017).
- [39] In the light of the above guiding principles, and taking into consideration the objective seriousness of the offence, I commence your sentence at 6 months imprisonment.
- [40] The aggravating factor is that you dealt several blows on the deceased. This part of the incident has been captured in the CCTV footage (tendered by the prosecution as PE 1 and PE 10) from approximately 8.03.40 to 8.05.50 on Camera 4. The deceased and you fought each other twice – firstly from 8.03.40 to 8.04.05 at which point the two of you went out of frame and secondly from 8.05.26 to 8.05.50. Later, at 8.07.05, you are seen punching the deceased (this footage is captured in Camera 5).
- [41] In mitigation you have submitted that you are 26 years of age, married with 1 daughter who is 3 years of age. You are said to be a stay at home father, looking after your little daughter whilst your wife is away at work. While at home, you do farming, planting dalo, cassava and vegetables which is utilised for the daily consumption of your family.
- [42] It is clear from the evidence led in this case that on the day of the incident the deceased came and confronted you, while you were carrying out your work at the Mobil Service Station. He approached you on more than one occasion. During the trial you took up the defence of provocation.
- [43] The State has confirmed that there are no previous convictions recorded in your name.
- [44] Considering the totality of the aforementioned aggravating factors and the mitigating factors, I sentence you to a term of 12 months imprisonment.

[45] You have submitted that you should be imposed a suspended sentence, in terms of Section 26 of the Sentencing and Penalties Act.

[46] Section 26 of the Sentencing and Penalties Act provides as follows:

(1) *On sentencing an offender to a term of imprisonment a court may make an order suspending, for a period specified by the court, the whole or part of the sentence, if it is satisfied that it is appropriate to do so in the circumstances.*

(2) *A court may only make an order suspending a sentence of imprisonment if the period of imprisonment imposed, or the aggregate period of imprisonment where the offender is sentenced in the proceeding for more than one offence,—*

(a) does not exceed 3 years in the case of the High Court; or

(b) does not exceed 2 years in the case of the Magistrate's Court.

[47] Considering all the facts and circumstances of this case, I am of the view that this is an appropriate case for a suspended sentence to be imposed on you. Accordingly, I suspend the 12 months term of imprisonment for a period of 3 years.

[48] Section 24 of the Sentencing and Penalties Act reads thus:

"If an offender is sentenced to a term of imprisonment, any period of time during which the offender was held in custody prior to the trial of the matter or matters shall, unless a court otherwise orders, be regarded by the court as a period of imprisonment already served by the offender."

[49] Saimone Tucila Snr, you have been in remand for this case from 18 February 2016 up to the time you were enlarged on bail on 27 April 2016. Epeli Tucila, you have been in remand for this case from 18 February 2016 up to the time you were enlarged on bail on 27 April 2016. Saimone Tucila Jnr, you have been in remand for this case from 18 February 2016 up to the time you were enlarged on bail on 26 April 2016. Thereafter, the three of you have been in remand custody since 19 April 2018, the day on which I delivered the judgment in this case.

[50] Accordingly, you have been in remand custody for a total period of approximately 3 months. The period you were in custody shall be regarded as period of imprisonment already served by you. I hold that the period of 3 months should be considered as served in terms of the provisions of Section 24 of the Sentencing and Penalties Act.

[51] In the result, **Alipate Naimoso**, you are sentenced to a term of 12 months imprisonment which term of imprisonment is suspended for a period of 3 years.

[52] Saimone Tucila Snr, you are sentenced to a term of imprisonment of 8 years with a non-parole period of 5 years. Epli Tucila, you are sentenced to a term of imprisonment of 6 years with a non-parole period of 4 years. Saimone Tucila Jnr, you are sentenced to a term of imprisonment of 6 years with a non-parole period of 4 years. Considering the time you have spent in remand, the time remaining to be served is as follows:

Saimone Tucila Snr

Head Sentence - 7 years and 9 months.
Non-parole period - 4 year and 9 months.

Epli Tucila

Head Sentence - 5 years and 9 months.
Non-parole period - 3 year and 9 months.

Saimoni Tucila Jnr

Head Sentence - 5 years and 9 months.
Non-parole period - 3 year and 9 months.

[53] You have 30 days to appeal to the Court of Appeal if you so wish.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 27th Day of April 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.