

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAC 5 OF 2016

BETWEEN : STATE

AND : MOHAMMED SAMIL SAHIB

Counsel : Ms. R. Uce for State
Ms. J. Singh for the Accused

Date of Hearing : 12th and 13th of June, 2019

Date of Closing Submissions : 13th of June, 2019

Date of Summing Up : 14th of June, 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. However, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public

opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until you form your own opinion that the accused guilty to the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words there is no burden on the accused to prove his innocence, as his innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused.

Information and elements of the offences

10. The accused is charged with one count of Murder, contrary to Section 237 of the Crimes Act. The particulars of the offence are before you, hence I do not wish to read it in my summing up.

11. The main elements of the murder as charged in the information are that;
 - i) The accused
 - ii) Engaged in a conduct,
 - iii) With the intention of causing the death of the deceased, or
 - iv) was reckless as to causing the death of the deceased,
 - v) That conduct caused the death of Maureen Yashmin Nisha, the deceased,

Admitted Facts

12. I now take your attention to the admitted fact, which are before you. They are the facts that the prosecution and the defence have agreed without dispute. Accordingly you are allowed to take the admitted facts into consideration as the fact proven by the prosecution beyond reasonable doubt.
13. The first element is concern about the identity of the accused. In this case the identity of the accused is not disputed.
14. To engage in a conduct is to do an act which is a product of the will of the accused. It is not disputed that the accused stabbed the deceased several times on her neck, chest, hands and legs with a kitchen knife.
15. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, in law, the act of the accused need not be the sole or principal cause, but the act should significantly contribute to the death.

Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct of stabbing the deceased on several times with a kitchen knife have significantly contributed to the death of the deceased, that is sufficient to satisfy the fifth element above.

16. With regard to the third and fourth elements which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove either 3rd or 4th elements only. In this case the prosecution alleges that the accused intended to cause the death of the deceased by stabbing her several times with a kitchen knife.
17. It is not possible to have direct evidence regarding a person's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
18. In order to conclude that the accused intended to cause the death of the deceased, you should be sure that he meant to bring about the death or that he was aware that death will occur in the ordinary course of events as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
19. In the event you find that the accused did not have the intention to kill the deceased or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. The accused was reckless with respect of causing the death of the deceased, if;

- i) He was aware of a substantial risk that the death will occur due to his conduct;
and
 - ii) Having regard to the circumstances known to him, it was unjustifiable for him
to take the risk.
20. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realize that death was a probable consequence or the likely result of his conduct; and yet he decided to go ahead and engage in the conduct regardless of that consequence. Accused must foresee that death was a probable consequence or the likely result of his conduct and after realizing that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
21. Once you took into consideration all necessary elements to murder, then you must take your attention to the defence of provocation. The accused claims that he stabbed the deceased several times as he was provoked by the deceased. If you find that the accused stabbed the deceased with the kitchen knife as a result of provocation or if you have a reasonable doubt that when the accused stabbed the deceased, accused may have been acting under provocation; then, even though you are satisfied that all the other elements of the offence of murder have been proved beyond reasonable doubt, you should find the accused not guilty of murder; but guilty of manslaughter.
22. You have to remember that the "provocation" is not a complete defence. It is a partial defence. It reduces the culpability of an accused from murder to the lesser offence of manslaughter.

23. Let me explain the main facts that you have to take into consideration when you consider the provocation, that;
- i) Any wrongful act or insult in a nature as to be likely when done to an ordinary person,
 - ii) Deprive such ordinary person of his power of self-control, and
 - iii) Induce him to commit an assault of the kind which the accused committed on the deceased,
24. The 'ordinary person' in this case means, an ordinary person of the accused's age who has ordinary powers of self-control expected from a person of that age.
25. Accordingly, provocation consists three main components, they are that;
- i) The act of provocation,
 - ii) The loss of self-control, both actual and reasonable, and
 - iii) The retaliation proportionate to the provocation,
26. The accused has no burden to prove beyond reasonable doubt that he was provoked by the deceased and he stabbed the deceased with the kitchen knife as he lost his self-control due to the said provocation. The accused is only required to adduce or point to evidence that suggest a reasonable possibility that the provocation was existed and he acted in that manner as he lost his self-control due to the provocation. It is the burden of the prosecution to prove beyond reasonable doubt that such provocation was not existed and the accused did not stabbed the deceased due to the loss of his

self-control. If there was a provocation, the prosecution is then required to prove that the retaliation of the accused is not proportionate to the said provocation.

Evidence of the Prosecution

27. Let me now take your attention to the evidence presented by the prosecution and the defence. This is a very short hearing. Therefore, I trust that evidence still fresh in your mind.
28. The prosecution alleges that the accused killed the deceased when he met her at the Waqadra garden, where he was working as a security officer on the late afternoon of 14th of December 2015. The prosecution presented the evidence of the investigating officer and Doctor James Kalounivaki. Moreover, the prosecution tendered the postmortem report of the deceased and the caution interview of the accused as the exhibits of the prosecution.
29. You heard the evidence of Doctor Kalounivaki, where he explained the injuries found in the body of the deceased. He further explained the dimensions of those injuries and the cause of the death.
30. I now take your attention to the contents of the caution interview. The accused has admitted in the caution interview that he stabbed the deceased several time and then left her in the garden and leave the place. He had explained in the caution interview about the event unfolded between him and the deceased that finally led to the stabbing of the deceased. The deceased had come to his workplace in order to take the children as the accused had arranged with the deceased in the morning. However, the accused had not brought the kids as he wanted the deceased to go home and get the children from there. He had not informed the deceased that he did

not bring the kids as he wanted to have a face to face conversation with the deceased. He had asked the deceased to come back home and think about the kids. The deceased had then refused it and said that she is happy with her present boyfriend and also her parents are arranging a man from overseas for her to get marry. She had shown to the accused the marks of "love bites" on her neck. Moreover, she had told him that if she properly lifts her legs, she could get anything and does not care about the talks going around in the community that she had been sleeping with many men. The conversation then led to an exchange of swearing words and then the accused took a kitchen knife which he carried in his back pocket of the trouser and then stabbed her. He had stabbed her several times on the marks of the love bites. He then took her wallet and the bank card and left the place.

31. The accused had stated in the caution interview that he wanted to kill the deceased since she left him and his kids in August 2015. He had been preparing a grave for the deceased at the Waqadra garden and shown it to his kids as the place that he will bury their mother. He had further said in the caution interview that he wanted to kill her as he does not want anyone to have her if he could not have her in his life. After stabbing the deceased the accused had hidden the hand bag of deceased in the said grave and took her wallet and the mobile phone. Moreover, the accused had stated that though he wanted to kill the deceased, he did not have the intention to kill her on the 14th of December 2015.

Evidence of the Defence

32. At the conclusion of the prosecution case, the accused was explained about his rights in defence. The accused decided to give evidence for the defence.
33. The accused in his evidence said that the deceased came to see him on that afternoon

in order to get his signature for some court documents pertaining to their divorce and custody of the kids. She had called him during the day time and made arrangement to come and see him. She had come with a man with whom she was staying at that time in a car. The man had dropped her and parked his car outside. The accused had asked her to come back and not to go for divorce. She had refused and laughed at him. She had shown the marks of "love bit" on her neck and also the gifts that her new boyfriend bought for her. The man with whom she came then came into the garden. The accused had told him that he is not allowed to enter into the place. They had an argument which led to an exchange of punches. The accused then ran and took a wooden stick and chase the man out. The deceased then started to swear at him. The accused then took a kitchen knife and started to stab her several times. The accused further said that he used the kitchen knife when he had lunch at 12 noon and then kept it in his back pocket. Moreover, the accused said that the answers recorded in the caution interview pertaining to questions 56, 57, 59, 62, 63, 64, 82, 131, 132 and 133, are the same answers that he gave to the police.

34. You have heard that the accused said that whatever he remember about the incident in 2014 he told in his evidence as he has forgotten many things about this incident.
35. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard the evidence of this hearing. What I did only was to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Directions

36. According to the evidence presented by the prosecution and the defence and the admitted facts, the main issue that you have to determine is whether the accused had

an intention to kill the deceased when he stabbed her with a kitchen knife or he was acting as he lost of self - control due to the provocation of the deceased. In order to determine that you have properly evaluate the evidence presented by the parties.

Evaluation of Evidence

37. I now take your attention to the directions of the evaluation of evidence.

Reliability of Evidence

38. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

39. The assessment of credibility of evidence is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his/her motivations, his/her relationship to and the reaction to the particular situation.

40. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to determine whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

41. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
42. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
43. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he or she may be accurate in saying one thing and not accurate in another thing.

Expert Evidence

44. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
45. In this case you have heard the evidence of Dr. James Kalounivaki. He is a medical doctor and works as a pathologist. He has conducted the postmortem of the deceased and made the report of the postmortem. He gave his professional opinion about the injuries that he found on the body of the deceased and the cause of the death. It is for you to decide whether the expert opinion given by Dr. Kalounivaki is relevant to the

matter that you have to determine. If you decide it is relevant, then you have to decide what is the weight you give to this expert evidence. If not you can disregard it.

The Caution Interview of the Accused

46. I now draw your attention to the statement made by the accused in his caution interview. The prosecution presented in evidence the record of the caution interview of the accused. The prosecution contends that the accused has made an admission that he had killed the deceased. The accused has not disputed the contents of the caution interview as per the admitted fact. Moreover, the accused admitted that he gave the same answers to the question 56, 57, 59, 62, 63, 64, 82, 131, 132 and 133 as recorded in the caution interview. You have to take in to consideration whole of the caution interview with other evidence presented in the hearing to determine whether the accused had made an admission in the caution interview that he murdered the deceased with the intention to kill her. If you are satisfied that the accused had made an admission that he murdered the deceased with the relevant intention, you then have to determine whether such admission made by the accused is reliable and credible and truthful. Moreover, it is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful, credible and reliable.

Inconsistencies

47. You have heard that the learned counsel for the prosecution cross examined the accused regarding the inconsistencies and omissions between the evidence given in the court, and the answers in the caution interview and the facts in the admitted facts. If you find there are such inconsistencies and omissions, you can take them into

consideration when you determine the credibility and reliability of the evidence of the accused.

Evidence of the Defence

48. I now kindly draw your attention to the evidence adduced by the defence. The accused elected to give evidence on oath. You have to take into consideration the evidence adduced by the accused when determining the issues of fact of this case.
49. Accordingly, It is for you to decide whether you believe the evidence given by the accused. If you consider that the account given by the accused is or may be true, then you must find the accused not guilty of murder but find him guilty of manslaughter.
50. If you neither believe nor disbelieve the version of the accused, yet, it creates a reasonable doubt in your mind about the prosecution case. You must then find the accused not guilty of murder but find him guilty of manslaughter.
51. Even if you reject the version of the accused that does not mean that the prosecution has established that the accused is guilty for this offence. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the accused has committed this offence as charged in the information. In doing that you are allowed to take into consideration the following facts which adduced as evidence during the hearing, that;
 - i) The accused kept the kitchen knife in his pocket since his lunch at 12 noon, as he claimed in his evidence, till the deceased arrived at around 5.30 p.m.
 - ii) If you accept either version of the accused in respect of the reasons of deceased's

- visit to his workplace, the accused knew that the deceased was coming to see him in advance on the 14th of December 2015,
- iii) Accused knew that the deceased was having a new boyfriend and she was living with him,
 - iv) According to the caution interview, the accused wanted to kill her and also planned it as he was digging a grave for her at Waqadra garden. However, he had no intention to kill the deceased on the 14th of December 2015. Moreover, the accused in his evidence said that he actually wanted to kill the deceased when she left him and his kids in August 2015, but six months later, he decided to let her be like that,
 - v) When the deceased came to meet the accused on that afternoon, the accused asked her to come back and think about the kids, which the deceased refused,
 - vi) The accused had stabbed the deceased with the kitchen knife 8 to 9 times. When she was fallen down and laying on the ground, he stabbed on her thigh as well,
 - vii) The accused had admitted in the caution interview that he took about 25 to 30 minutes to stab the deceased,
 - viii) After stabbing the deceased, the accused had hidden the handbag of the deceased and took her wallet and mobile phone,
 - ix) Whether the retaliation of stabbing the deceased was proportionate to the provocation, if there was such provocation caused by the deceased,

52. Finally, if you are satisfied beyond reasonable doubt that ;

- i) The accused had planned to kill the deceased and executed his plan when she came to see him on the afternoon of 14th of December 2015, or
 - ii) The accused got angry after the conversation he had with the deceased and then he wanted to kill her. He then stabbed the deceased with that intention of killing her,
53. Then you can find the accused guilty of murder as charged.
54. If you are satisfied or have doubts whether the accused adduced or pointed out evidence that suggest a reasonable possibility that ;
- i) The accused was provoked and then lost his self-control which induced him to stab the deceased, and
 - ii) He stabbed the deceased in the heat of the passions of the provocation, and before there was time for the passion to cool down, and
 - iii) His retaliation to the provocation is proportionate to the said provocation,
55. Then you must find him not guilty of murder, but guilty of manslaughter.

Conclusion

56. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

57. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

14th June, 2019

Solicitors : Office of Director of Public Prosecution
Office of the Legal Aid Commission