

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 341 of 2018

[CRIMINAL JURISDICTION]

STATE

V

SAULA TEMO

Counsel : Ms. S. Tivao for the State
Mr. J. Koroitini for the Accused

Hearing on : 17 - 25 February 2020

Summing up on : 27 February 2020

Judgment on : 02 March 2020

JUDGMENT

1. The accused is charged with the following offence;

Statement of Offence

Murder: contrary to Section 237 of the Crimes Act, 2009.

Particulars of Offence

SAULA TEMO on the 17th day of May, 2018 at Suva in the Central Division murdered **AKUILA SALAVUKI**.

2. In my summing up, the assessors were directed to consider the lesser offence of manslaughter in the event they find the accused not guilty of the above offence.

3. The assessors returned with the unanimous opinion that the accused is not guilty of murder as charged but guilty of the offence of manslaughter.
4. I direct myself in accordance with the summing up delivered to the assessors on 27/02/20 and the evidence adduced during the trial.
5. The prosecution called twelve witnesses. However, the main if not the only evidence against the accused to prove the charge of murder was the accused's cautioned interview. The accused challenged the admissibility of the cautioned interview and also raised fabrication when he gave evidence during the *voir dire* held to determine the admissibility of the cautioned interview. The accused opted to remain silent during the trial.
6. PW1 said that he saw the accused leaving the night club with the deceased on the night in question. But he did not mention the time he saw them leaving. He said in his evidence that he spoke to the deceased after he left the night club, but he had told the police that he was unable to speak to the deceased. In his evidence PW1 also said that he went looking for the deceased outside the nightclub after about 5 minutes. However, he said that he was unaware of the death of the deceased until he was informed by the police the following Monday. Given these circumstances I find PW1's evidence to be unreliable.
7. However, as far as this case is concerned what is relevant is the evidence that PW1 saw the accused and the deceased leaving the nightclub together. Since he does not mention the time he saw the two leaving, even if the said evidence is accepted as true, it does not contribute much to the prosecution's case. It would have been different if PW1's evidence had revealed the time the two of them were seen leaving the nightclub and the deceased was found lying down near the FDB building soon after that.
8. PW2 said that he was working at the FDB building with 5 others and that he heard the sound of timber two times. First it was a 'tuk' sound, like timber falling

down, and next it was a 'tuk tuk' sound, like timber hitting scaffolding. Then he shouted. After he shouted he heard a person falling and heavy breathing. With that he got up and saw the deceased. Then he ran to the place which was 7m to 8m from where he was sitting when he heard the sounds. Accordingly, he appears to have approached the deceased soon after the deceased fell onto the ground and he does not see anyone else around. PW2 also does not mention the time he heard the above sounds and the time he first saw the deceased lying on the ground. However, PW3, a police officer who was on patrol duty on the night in question said that he was informed about a man lying down near the FDB building around 11.05pm.

9. PW4 who is a nurse at the CWM hospital said that the police brought in an iTaukei male who had multiple facial injuries, to the hospital.
10. PW5, PW6, PW7, PW8 and PW9 were police officers. PW5 was from the Crime Scene Investigation Unit and she took photographs of the crime scene. She also witnessed the uplifting of the exhibits PE-2 and PE-3 which were pieces of timber, from the crime scene. PW6 was the relieving exhibit writer who received PE-2 and PE-3 from PW7 on 27/08/18. PW7 was the arresting officer of the accused, the interviewing officer and the investigating officer of the case. PW8 was the witnessing officer of the cautioned interview and she also witnessed the identification parade. PW9 was the police officer who recorded the charge statement of the accused.
11. PW10 was the doctor who conducted the post mortem of the deceased. PW11 was the doctor who medically examined the accused before the cautioned interview commenced and PW12 conducted a medical examination on the accused after the cautioned interview was recorded.
12. Based on the evidence presented before me and considering the submissions of the counsel for the prosecution and the counsel for the defence during the *voir dire*, I ruled the cautioned interview admissible.

13. The admissibility of the cautioned interview was challenged during the *voir dire* essentially on the basis that the accused was assaulted and threatened by the police officers before and during the cautioned interview. However, when the accused gave evidence during the *voir dire* the accused said that he did not commit the offence, but he admitted everything because he was afraid to say 'no' due to the threats he received.
14. PE-5 and PE-6 though tendered in evidence during the *voir dire*, were not played. After I noticed the manner in which the accused was giving the answers to the questions and the manner in which certain questions were framed when PE-5 and PE-6 were played and PE-8 was read during the trial, I was compelled to revisit the issue of voluntariness of the cautioned interview.
15. Following a careful examination of the cautioned interview, I have noted the following;
 - a) The accused was asked according to PE-8 whether he is suffering from any condition that may hinder his ability to answer the questions during the interview [Page 7; Time - 0:18:02.6] and the answer was 'yes'. The accused had said that the hindrance was due to his ear. The questions and answers following this question indicates that the interviewing officer had simply directed the accused towards agreeing to continue with the interview. Moreover, PW11 said that the accused complained of pain in his left ear for three months and there was a pus discharge from the left ear which indicated that there was an infection. Though PW11 prescribed a certain medication, there was no evidence that the said medicine was provided to the accused before the interview;
 - b) When the prosecutor asked PW7, why he had put a lot of leading questions to the accused in the session recorded on the 3rd video of PE-5, he said that it was because the accused was keeping quiet when he asked questions;
 - c) At page 25 of PE-08, the accused was shown a t-shirt and then asked whether he was wearing that on the night in question and the accused says 'yes'. The next question is "When you killed Akuila" and the answer is 'yes'. By this time, according to the records (PE-8) the accused had already said that he did not intend to kill the deceased and there is no material to indicate that the accused believed that the deceased died at the scene;

- d) According to PE-8, the accused initially says that that the timber he hit the deceased was 'okay' when he was asked whether it broke [Page 20; Time - 0:21:13.4]. However, later, the accused was shown the two pieces of timber [PE-2 and PE-3] separately and is asked whether it is the exact piece he used to hit the deceased in relation to each piece and the answer the accused had given is, 'yes' [PE-8; Page 30].
- e) Having observed the accused's reaction when he was shown PE-2 during the interview, I find that the accused was surprised to an extent or confused though he admitted that it was used to hit the deceased;
- f) In PE-8, [Page 19; time - 0:18:40.0] the accused was told that 4 individuals saw the accused walking with the deceased. These individuals were not called as witnesses. According to PW1's evidence, even he did not know the accused by his name. However, before PW1 identified the accused during the identification parade, PW7 had asked questions [PE-8; Page 17 - 18] which suggests that PW1 had identified the accused. This is in relation to PW1's version that the accused wanted him to bite the accused's neck and that the accused was dancing with the deceased. Then again the accused was told that a security guard had seen him walking with the deceased towards Dolphin Plaza. According to PW8, only one witness [PW1] identified the accused during the identification parade conducted after the above questions were asked. Therefore, these assertions put to the accused during the cautioned interview by PW7 to the effect that the accused was identified by several individuals, were untrue. The relevant statements have the potential of making the accused believe that he had been identified by a number of individuals and that false belief may have led him to make the purported confession;
- g) According to PE-8 [Page 19] the accused was asked whether the accused was wearing something on his head, and was he wearing a hat and there was no answer. The accused was then asked can he recall, and then he says 'no'. This question whether the accused was wearing something on his head appear to have surfaced from whatever those four individuals have informed the police. PW7, does not allow the accused to give a clear answer to the question on whether he was covering his head and encourages the accused to say that he cannot recall;
- h) It is PW7 who suggests to the accused first that he hit the deceased's head;
- i) Thereafter, upon the accused being asked how many times he hit the deceased and where, the accused had stated that he hit the deceased three times and at the back of the deceased's head. He does not mention about hitting the deceased on the face. But there were injuries noted on the deceased's face and according to PW10, the injuries on the face may have

been caused by the same blunt object. PW4 who had made the first observation on the deceased had said that the deceased had multiple facial injuries. So the answers in the cautioned interview does not explain the injuries on the deceased's face; and

j) In PE-8 [Page 28; Time - 0:04:38:4], the accused had been asked whether he can confirm that the injuries found on the deceased after the post-mortem was conducted, were injuries sustained by the deceased due to him hitting the deceased and the accused had answered 'yes'. There is no way for the accused to confirm such a fact.

16. I have noted the following inconsistencies between the evidence of PW2 and the answers in the cautioned interview;

a) According to the cautioned interview, the accused had said that he went with the deceased to the guard room and he had apparently hit the accused at that place. However, the evidence of PW2 or the photographs of the scene that were tendered do not indicate that there was a guard room where the deceased was found;

b) The accused had also said that the timber he hit the deceased did not break. However, PW2 saw PE-2 and PE-3 which were broken pieces near the deceased; and

c) The accused had stated that he took the deceased's phone after the deceased fell down and also he picked up the coins that fell from the bag the deceased was carrying. However, according to PW2, he saw the deceased soon after he heard the deceased fell down and he did not see anyone else. Therefore, if the accused spent time near the deceased taking his phone and picking up the coins that fell, PW2 should see the accused.

17. Further, though PW11 and PW12 gave evidence to the effect that they did not find any other injury on the accused apart from the injury on the left ear, I note that a police officer was present during both examinations and that both the doctors have not examined any other part of the accused's body apart from the head.

18. It is pertinent to note that, according to the cautioned interview, the accused was asked by PW7 whether he would give permission to have an identification parade without the accused being explained what an identification parade is. The accused had straight away answered 'yes'. When PW7 was questioned during


cross-examination he said that the accused was explained after the interview was suspended. During re-examination he again said that the accused was explained about the identification parade before the interview and also after the interview was suspended for the parade.

19. It is also noted that when PW7 had asked the accused's permission to have his 'DNA to be taken' without the accused being explained what is going to happen, the accused had simply agreed.
20. This indicates that either the accused for some reason was compelled to say 'yes' to questions which he did not properly understand or that there were discussions which are not reflected in the cautioned interview that had taken place between the accused and PW7 which had a bearing on the answers given by the accused during the interview.
21. All in all, I find it difficult to rule out the possibility of oppression at the time the cautioned interview of the accused was conducted and I also find that the accused had been misled by the statements made by the interviewing officer to the effect that he had been identified by several individuals where in fact, according to the evidence led before the court, no one had identified the accused by the time those questions were asked.
22. I also noted that the accused had said that he cannot recall because he was drunk, when he was asked to describe the clothes the deceased was wearing [PE-8; Page 18; Time - 0:16:03:6]. According to PW10, the deceased had an alcohol content of 322mg per 100ml of blood and he said that it is a very high level of alcohol. Given that the two of them had been drinking for a similar period of time according to PW1 and given the above finding of PW10, it is possible that the accused was also heavily intoxicated to the extent that he could not remember what happened on the night in question clearly. This would explain the reason for the accused to

simply say 'yes' in relation to certain questions which I have highlighted above, where it does not appear to be the appropriate answer.

23. The above deduction also raises the doubt whether the admissions made by the accused as recorded in his cautioned interview are true.
24. On the other hand, given the inconsistencies between the evidence of PW2 and the answers in the cautioned interview of the accused, there is also a reasonable doubt whether the deceased was assaulted by the accused or by another person at the place where the deceased was found by PW2.
25. In the light of the above, though I agree with the unanimous opinion of the assessors that the accused is not guilty of murder as charged, I am unable to agree with their opinion that the accused is guilty of the offence of manslaughter.
26. I find the accused not guilty for the offence of murder and not guilty for the offence of manslaughter.
27. The accused is hereby acquitted accordingly.




Vinsent S. Perera
JUDGE

Solicitors;

**Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused**