IN THE HIGH COURT OF TUVALU 2023

CRIMINAL CASE NO.1/22

	SIOLILO FALENI	APPLICANT
BETWEEN AND		
	REGINA	RESPONDENT

Before Hon Judge Sir John Muria

Hearing 25th April, 2023

Judgment 5th May 2023

Ms L Kofe for Applicant
Ms E Saamu for Respondent

JUDGEMENT

Muria J: At the end of the prosecution case, the defence submits that the accused has no case to answer on the two charges brought against him. The accused has been charged with the crime of murder, contrary to section 193 of the *Penal Code* and in the alternative; with manslaughter, contrary to section 192 of the *Penal Code*. The accused pleaded not guilty to both charges.

2. It was alleged that at about midnight on 14th July 2020, the accused, the deceased (Iosua Lupi) Tauloto Kamuta Latasi (PWI) and another person (Etiata) were all having drinks together. According to PWI they drank three (3) Cooler Bars of wine. The drinking session started sometime after 7:00 pm (according to the accused's Caution Statement).

3. The evidence of PWI is that the group were enjoying their drink, telling stories and jokes, all sitting close to each other at arms-length. The deceased became very noisy and they tried to quieten him down because the Pastor's house was nearby and they did not want to disturb him and his family. The deceased did not listen. The accused then punched the deceased, hitting his jaw. The accused threw another two punches. The deceased covered his face. The accused then kicked the deceased three times. The first kick was to the deceased's buttocks; the second kick was to the deceased backside. PWI could not see where the third kick landed. According to PWI, the accused stopped kicking the deceased as soon as his other drinking friends stopped him.

4. The evidence of PWI is that after the accused stopped kicking the deceased he sat down and they all continued drinking. The deceased was lying down sleeping and snoring while the rest continued drinking. The group then moved to a different location to continue their drinking session, leaving the deceased sleeping and snoring where he was lying down. It was at their new drinking location, in the morning, that PWI, the accused and the others were told by a woman that the deceased died. PWI's evidence is that they were shocked to hear of the deceased's death because when they left him, he was sleeping and snoring.

5. The second prosecution witness was constable Graig Tonise (PW2). His evidence is that he was the witnessing officer during the Interview of the accused and recording of his Caution Statement. The Interviewing Officer was Corporal Tetapo who was not called as a witness because he is presently out of the country. The evidence of PW2 basically confirms the procedure conducted at the interview of the accused as complying with the Judge's Rules and affording the accused his rights.

6. There was no medical evidence called and the medical report was not tendered in evidence. The defence did not agree to the medical report being tendered by consent. They insisted that the witness who prepared the Medical Report to be called so that he or she could be cross-examined. The prosecution decided not to call the witness and so the Medical report was not tendered. The witness said to have prepared the Medical report was in the other Islands.

7. The prosecution did not seek to call any further witnesses and closed the case for the prosecution. Thus the only evidence from the prosecution comes from PWI, PW2 and the accused's Caution Statement, which was admitted into evidence.

8. It is convenient to set out the test, which the Court should apply in a no case to answer submission. In Tuvalu the test is set out in section 195 of the *Criminal Procedure Code (CPC),* which provides as follows:

> *"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him to make a defence, the court shall dismiss the case and shall forthwith acquit the accused."*

9. The test under section 195 of the CPC requires the Court at the conclusion of the prosecution case to determine whether on the evidence adduced by the prosecution a case is made out against the accused person sufficiently to require him to make a defence. In *Republic –v- Iotebwa [2019] KIHC 4* cited by Ms Kofe, the Court pointed out that for a case to be made out sufficiently to require the accused to make a defence, the prosecution must demonstrate that there is evidence pointing to each of the elements of the offence with which the accused is charged. Consequently, if there is no evidence on each of the elements of the offence shown, then it must

follow that a case is not made out sufficiently to require the accused to make a defence to the case brought against him.

10. The case of the *Republic –v- Narayan and Loo* [2012] KICA 11, a decision of a Kiribati Court of Appeal, is authority for the proposition that in a trial by Judge alone, the trial Judge who is the trier of fact as well as the arbitrator in law is entitled to consider the sufficiency of the evidence at the end of the prosecution case and if the case against the accused is not made out, the Court shall dismiss the case and shall forthwith acquit the accused.

11. The Kiribati Court of Appeal stated as follows in paragraphs 27 and 28 of its judgment:

> *"27. The Chief Justice considered that in a judge-alone criminal trial in Kiribati – unlike in those jurisdictions where criminal trials were decided by a jury, as finder of fact, he was entitled to consider the sufficiency of the evidence at the end of the prosecution case. This is a slightly different test from the usual one in jury cases exemplified by R – v- Galbraith [1981] 2 All ER 1060: that is, that if at the end of the prosecution case, there is some evidence possibly implicating the accused, the reliability of what should be left to a jury. The judge must not in those circumstances stop the case whatever view the judge had formed of that evidence. The Chief Justice here held that the difference of approach which he took lay in the fact that the judge plays the role of the jury as well as that of the judge in this jurisdiction.*
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> *28. Despite the submission of Counsel for the appellant that the Galbraith approach should be followed, we conclude that the Chief Justice was entirely correct in taking the approach he did in circumstances where the trial judge is the trier of fact as well as the arbitrator in law. As the Chief Justice pointed out, section 195 provides that if the case against as accused is not made out "the court shall dismiss the case and shall forthwith acquit the accused".*

12. The Court of Appeal of Solomon Island in *R-v-Somae* [2005] SBCA 18; [2005] 2 LRC 431 also considered the question of no case to answer and said;

> *"It is important to note that the evidence that is to be considered for the purposes of a no case submission must be capable of proof beyond reasonable doubt of the accused's guilt. It is not enough if it is merely capable of proving the possibility of guilt. It must be capable, if accepted, of proving guilt beyond a reasonable doubt."*

13. The Court of Appeal went on to state:

> *"It follows that it must be such as to permit proof of guilt without inappropriate speculation. Whether it is right to take the evidence at its highest or most favourable to the Crown is, of course, ultimately a matter for the tribunal of fact. But, in order to establish a case to answer, there must be some evidence capable of*

establishing, whether directly or inferentially, every element of the offence charged beyond reasonable doubt."

14. The Court of Appeal noted the remarks made by the High Court of Australia in *Doney –v- R [1990] HCA 51*; [1990] LRC (Crim) 416 at 423:

> *'[T] o put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.'*

15. I feel that I need only add the remarks made by Lamer CJ in *R-v-P* [1994] 1 SCR 555, cited by Ms Kofe, where his Lordship said:

> *"Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. This means in effect, that an accused is under no obligation to respond until the State has succeeded in making out a prima facie case against him or her. In other words, until the crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegation against him or her."*

16. The accused in the present case is charged with murder contrary to section 193 of the *Penal Code*, which provides:

> *"Any person who of malice aforethought causes the death of another person by an unlawful act or omission is guilty of murder and shall be liable to a sentence of imprisonment for not less 15 years and not more than imprisonment for life."*

17. The elements of murder that the prosecution must prove are that the intention to cause the death of the deceased *(malice aforethought)* and that the death of the deceased was caused by the unlawful act or omission of the accused. It is necessary for the prosecution to establish that the accused has a case to answer by showing that there is evidence capable of proving each of the elements of the offence charged beyond reasonable doubt.

18. The evidence of PW1 is that the deceased, in the state of drunkenness was making too much noise which was likely to cause disturbance to the neighbour in particular, the Pastor. After trying unsuccessfully to persuade the deceased to cut down his loud noise, the accused punched him three times and kicked him also three times while he was lying down. The accused then sat down with the group and they continued drinking. The deceased was lying down, asleep and was snoring. They were told of the news about the deceased's death in the morning.

19. The accused did not deny that he hit and kicked the deceased. He admitted doing so, in his caution statement, which was tendered as part of the prosecution evidence. The evidence of PW1 is that as soon as he

and his other drinking friends shouted to the accused to stop assaulting the deceased, the accused stopped and came to join his friends drinking again. On those evidence, can it be said with some conviction that *malice aforethought*, that is, intention to kill the deceased or to cause him grievous bodily harm has been established? In my judgment, PW1's evidence, even if taken together with the accused's Caution Statement, can hardly be sufficient to establish the element of intention to cause death or serious bodily harm to the deceased. Taken at its highest, the prosecution evidence goes to demonstrate a case of assault on the deceased rather than one of murder.

20. Even if a case can be made out that the accused intended to cause serious bodily harm to the deceased when he delivered the three punches and three kicks to the body of the deceased, the prosecution still faces the hurdle of establishing the cause of death. There is no evidence at all to establish, that the cause of death was a direct result of the punches and kicks delivered by the accused. In fact there is no evidence as to the cause of death. PW1's evidence that after the accused assaulted the deceased, he (deceased) felt asleep and soundly snoring. He was still asleep and snoring when they left him and moved to a new location, to continue their drinking. Without the medical report, we would only be guessing as to the cause of death. To, say that the actions of the accused caused the death of the deceased would be conjecture and mere speculation.

21. The evidence for the prosecution in this case, taken at its highest, is so deficient as to be incapable of establishing each of the elements of the crime of murder. Consequently, there is no case for the accused to answer on the charge of murder.

22. For the same reasons, in the absence of evidence linking the cause of death to the actions of the accused, it would be a matter of speculation to say that the accused has a case to answer on the alternative charge of Manslaughter. Consequently, I find that the accused has no case to answer on the alternative charge of Manslaughter.

23. Pursuant to section 195 of the *Criminal Procedure Code* I find that the accused has no case to answer on both the charge of murder and the alternative charge of manslaughter. The charges are dismissed and the accused is acquitted on both counts.

Dated on the 5th day of May 2023.

Sir John Muria
Judge
11/5/23