

IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 165 OF 2007

BETWEEN:

THE STATE

AND:

**PATRICK NAYACALAGILAGI
TAIONE LUA
ULAIASI RADIKE
ETONIA NADURA
RATUNAISA TOUTOU
JOELI LESAVUA
JONA NAREKI
ILAISA KURIMAVUA
NAPOLIONI NAULIA**

Counsel: Mr. W. Kurisaqila & Ms. Lagilevu for the State

Mr. H.A. Shah & Mr. J. Boseiwaqa for all Accused

Date of Hearing & Sentence: Tuesday 17th March, 2009

SENTENCE

[1] Following trial you were found guilty of a lesser offence of manslaughter on a charge of murder, and five counts of assault occasioning actual bodily harm. You seek a discharge without conviction under section 44 of

the Penal Code, saying a conviction will result in loss of your employment and cause financial hardship to your family.

- [2] You rely on the case of **State v Kulavere** Case No.27 of 1992 in which the offender was given a conditional discharge after pleading guilty to manslaughter. However, the circumstances of offending in **Kulavere** are entirely different from yours. In that case, the offender who was a police officer navigated an outboard powered fiber-glass punt, in a manner so negligent that it caused death of the victim. In my respectful view, the case of **Kulavere** does not stand as an authority for a conditional discharge for an offence of manslaughter.
- [4] Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law (**State v Nand Kumar** [2001] HAA014/00L; **State v Kisun Sami Krishna** [2007] HAA040/07S; **Land Transport Authority v Isimeli Neneboto** [2002] HAA87/02). In **Commissioner of Inland Revenue v Atunaisa Bani Druavesi** [1997] 43 FLR 150 HAA 0012/97, Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations.
- [5] The offences committed by you cannot be classed as a technical breach of the law and thereby exonerating you from moral blame. The offences you committed are serious. The offences were deliberate conduct on your behalf as agents of the State on civilian victims. It is not in the public interest that you be exonerated from these offences by a discharge without conviction.

[6] Accordingly, you are convicted of the lesser offence of manslaughter of Sakiyasa Rabaka on count 1, and of assault occasioning actual bodily harm on the complainants as charged in counts 2 to 6.

[7] I take into account all that have been said on your behalf by your counsel and the two character witnesses. All of you have families who are depended on you. You will loose your employment and your spouse and children will suffer. Your employer has said you are dedicated, diligent and honest employee. You do not have a previous criminal record. None of you have been disciplined by your employer for disciplinary offences. You have served the nation by virtue of your employment either as a police or military officer. Finally you apologize to the Rabaka family for the pain that you have caused them. You realize that Sakiyasa Rabaka should not have died.

[8] On an objective assessment of the facts the offences are not the worst of its kind. You were involved in a joint operation after the political event of December 2006, to maintain law and order in the country. All of you were based at the Namaka centre and attended reports by members of the public about disturbing incidents in the community. The deceased and the complainants were apprehended as a result of a report.

[9] While I consider your motive to arrest the deceased and the complainants were to maintain law and order in the country, I cannot ignore that you breached your legal duty to protect them from any harm whatsoever whilst they were in your custody. Instead of being the custodian of law, you took the law into your own hands and became both the jury of guilt and executor of punishment. Every detainee in this country is entitled to the constitutional guarantees such due process of law and protection from degrading and inhumane treatment. By your conduct you denied the deceased and the complainants the due process of law that you enjoyed in this trial. The deceased and the complainants were not given an opportunity to be heard and to defend themselves. You punished them without a finding of guilt. They were

subjected to degrading and inhumane treatment as a form of punishment. They were made to strip and do military type physical exercises. During the exercises they were continuously kicked, punched and hit.

[10] The deceased and the complainants were injured. One complainant had a cut to his eyebrow while the others complained of severe body aches. After the deceased was released from custody, he suffered from severe head aches and vomiting. His body was bruised. He started having fits. According to medical evidence, the deceased had an increased pressure in the brain as a result of fluid such as blood occupying the space in the brain. A CT scan revealed that the deceased was slightly bleeding between the two hemispheres of the brain. Albeit the deceased was conscious and alert in the hospital, his symptoms increased. Headaches, vomiting and fits increased. A substantial amount of blood was drained out from the brain after a surgery. Subsequently, the victim died due to extensive blood clots inside and the outside surface of the brain. The medical evidence was that the injury was more likely to have been caused by forceful blunt trauma to the head.

[11] The offence of manslaughter is considered a serious offence. The gravity of this offence is reflected in the maximum sentence of life imprisonment prescribed by the legislature. However, the sentences for manslaughter range from a suspended sentence to 12 years imprisonment (**Kim Nam Bae v State** Criminal Appeal No.AU0015/1998S)). Sentences in the higher range are imposed in cases of unprovoked attack using a weapon such as a knife, resulting in serious injuries to the victim (**Navaitalai Rauve v State** Criminal Appeal No. 13/90, **Ram & Ors v State** Criminal Appeal No. AAU0017/04S). Sentences in the lower range are imposed in cases of extreme provocation with minimal violence. Examples of these cases are cited by your counsel in his written submissions. I do not consider the offending in this case to fall in the higher sentencing range, nor do I consider this case to fall in the lower range of sentences for manslaughter. I consider this case to fall in the medium range of sentences for manslaughter.

- [12] 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 assaults (**State v Anjula Devi** Criminal Case No.04/98Lab). In this case the complainants were not seriously injured. However, they complained of body aches. I rank the offending in the lower scale of the tariff.
- [13] The relevant mitigating factors are your previous good character, personal circumstances, loss of employment and the impact of that on your spouse and children, and your apology to the deceased's family. The aggravating factors are the group attack on the deceased and the complainants, the inhumane and degrading treatment of stripping and subjecting them to military kind of exercises, the multiple assaults on the deceased and the complainants, and your legal duty to ensure the deceased and the complainants were not harmed while they were in your custody.
- [14] The offences were committed in a joint enterprise. For this reason I will not apportion individual culpability. Under the doctrine of joint enterprise it does not matter who struck the fatal blow. You all acted with a common intention to take the deceased and the complainants to a military training site called Black Rock, to assault them. Sakiyasa Rabaka died of the assaults he sustained at the Black Rock.
- [15] Taking all these matters into account, I sentence you to 4 years imprisonment for manslaughter, and 4 months imprisonment for each count of assault occasioning actual bodily harm, to be served concurrently.
- [16] In summary the sentences are:

PATRICK NAYACALAGILAGI

1st Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

TAIONE LUA

2nd Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

ULAIASI RADIKE

3rd Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment

Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

ETONIA NADURA

4th Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

RATUNAI SA TOUTOU

5th Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

JOELI LESAVUA

6th Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

JONA NAREKI

7th Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment
Count 3 (AOABH)	–	4 months imprisonment
Count 4 (AOABH)	–	4 months imprisonment
Count 5 (AOABH)	–	4 months imprisonment
Count 6 (AOABH)	–	4 months imprisonment

All sentences are made concurrent.

ILAISA KURIMAVUA

8th Accused:

Count 1 (Manslaughter)	–	4 years imprisonment
Count 2 (AOABH)	–	4 months imprisonment

- Count 3 (AOABH) – 4 months imprisonment
- Count 4 (AOABH) – 4 months imprisonment
- Count 5 (AOABH) – 4 months imprisonment
- Count 6 (AOABH) – 4 months imprisonment

All sentences are made concurrent.

NAPOLIONI NAULIA

9th Accused:

- Count 1 (Manslaughter) – 4 years imprisonment
- Count 2 (AOABH) – 4 months imprisonment
- Count 3 (AOABH) – 4 months imprisonment
- Count 4 (AOABH) – 4 months imprisonment
- Count 5 (AOABH) – 4 months imprisonment
- Count 6 (AOABH) – 4 months imprisonment

All sentences are made concurrent.

SO ORDERED.

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Daniel Goundar

JUDGE

At Lautoka

Tuesday 17 March, 2009

Solicitors:

Office of the Director of Public Prosecutions, Lautoka for the State

Haroon Ali Shah Lawyers, Lautoka for all the Accused