



IN THE SUPREME COURT OF NAURU
AT YAREN (CRIMINAL JURISDICTION)

Criminal Case No 3 of 2017

BETWEEN

The Republic

PROSECUTION

AND

Samaranch Engar

ACCUSED

Before: Khan J

Date of Hearing: 16, 17, 20, 21, 22 November 2017
17, 18 and 19 April 2018

Date of Submissions: 27 April 2018

Date of Judgement: 1 May 2018

Case may be cited as: *Republic v Engar*

CATCHWORDS: Criminal law – Murder – Neck Compression – Criminal liability – The accused was with his ex-girlfriend the deceased when she was found to be dead – Accused denied causing her death – Circumstantial evidence – Onus on the prosecution to exclude hypotheses consistent with innocence of the accused.

Circumstantial evidence – Whether this court as judge of fact is entitled to be satisfied that the accused intended to cause or was reckless about causing the death of the deceased.

APPEARANCES:

Counsel for the Prosecution: L Tabuakuro

Counsel for the Accused: S Valenitabua, R Tagavakatani and K Talenoa

JUDGEMENT

INTRODUCTION

1. The accused is charged with murder. The charge reads as follows:

Statement of Offence

Murder contrary to section 55(a)(b), (c) of the Crimes Act 2016.

Particulars of Offence

Samaranch Engar on 10 December 2016 at Nauru, intentionally engaged in a conduct that caused the death of Unique Lee Dick, and he was reckless about causing the death of Unique Lee Dick by that conduct.

TRANSFER OF CHARGE FROM THE DISTRICT COURT TO THE SUPREME COURT

2. Before I deal with the charge and the evidence, I wish to discuss the issues of transfer of charges from the District Court to the Supreme Court. The Criminal Procedure Act 1972 (1972 Act) contained provisions for the District Court to conduct preliminary inquiry/committal proceedings before an accused was committed to the Supreme Court to stand trial. The procedures relating to the conduct of the preliminary inquiry were contained in sections 162 -179 of the 1972 Act.
3. The 1972 Act was amended by the Criminal Procedure (Amendment) Act 2016 (2016 Act) which came into effect on 12 May 2016. It repealed the preliminary inquiry procedure and instead provided for records to be transmitted to the Supreme Court and the Director of Public Prosecutions by section 179 (new section 179) which reads as follows:

Section 179 – Transmission of Records to Supreme Court and Director of Public Prosecutions

In the event of a transfer for trial or sentencing in the Supreme Court the charge, the depositions, the statement of the accused person, the recognisance of bail, if any, and any documents, matters or things which would assist the trial or sentencing in the Supreme Court, shall be transmitted without delay by the Clerk to the Registrar and a copy of the depositions and statements certified by the Registrar shall be supplied to the Director of Public Prosecutions by the Registrar.

4. Section 179 (old section 179) of the 1972 Act stated as follows:

Section 179 – Transmission of records to Supreme Court and the Director of Public Prosecutions

In the event of a committal for trial the charge, the depositions, the evidence or statement of the accused person, the recognisance of bail, if any, and any documents or things which have been put in evidence, shall be transmitted without delay by the Clerk to the Registrar and a copy of the depositions and

statements certified by the Registrar shall be supplied to the Director of Public Prosecutions by the Registrar.

5. As can be seen there are a lot of similarities between the old section 179 and the new section 179; in that both sections it is provided that the record is to be transmitted by the Clerk ('Clerk' means Clerk of the District Court as defined in section 2 of the 1972 Act).
6. Subsequent to the amendment of the 2016 Act there was a further amendment by Criminal Procedure (Amendment) No. 2 Act 2016 (No. 2 Act) which came into effect on 9 June 2016. Section 162 of No. 2 Act provides:

Section 162 – District Court will transfer charges in proceedings to the Supreme Court

- i) Where any charge has been brought against any person of an offence not triable by the District Court or as to which the District Court is of the opinion that it ought to be tried by the Supreme Court, the District court may transfer the charge and proceedings to the Supreme Court.
 - ii) An accused person may not be subject to a preliminary enquiry or committal proceedings prior to the transfer of that person's case and proceedings to the Supreme Court.
7. After the enactment of the No. 2 Act, the District Court commenced the practice of transferring all matters beyond its jurisdiction by way of a direct transfer, without transmitting the records as provided for in section 179 of the 2016 Act.
 8. The amendment to the 1972 Act by the 2016 Act and No. 2 Act 2016 has created some confusion and whilst the District Court is perhaps in compliance of section 162 when it transfers the charges and proceedings to the Supreme Court, section 179 of the 2016 Act has not been repealed. In my respectful opinion, the District Court is still required to comply with the provisions of section 179 of the 2016 Act. When section 162 of the No. 2 Act is read with section 179 of the 2016 Act, then at the time of the transfer the District Court Clerk should transmit the charge, the depositions and the statements of the accused person amongst other things.
 9. I note that the word 'deposition' is used in section 179 of the 2016 Act and deposition is a 'statement taken on oath' (as defined in section 164 of the 1972 Act).
 10. I therefore direct that before a matter is transferred to this Court under section 162 of the No. 2 Act, the District Court is to comply with the section 179 of the 2016 Act.
 11. As a result of the confusion surrounding the transfer as discussed above, section 179 was not complied with and consequently this Court did not have any documents before it.

RELEVANT LAW

MURDER

12. The offence of murder is defined in s.55 of the Crimes Act 2016 (the Act) as follows:

A person commits the offence of murder if:

- a) The person intentionally engages in conduct; and
- b) The conduct causes the death of another person; and
- c) The person intends to cause, or is reckless about causing, the death of that or any other person by the conduct.

ELEMENTS OF THE OFFENCE

13. In s.17 of the Act under the heading 'intention' it is stated as follows:

- 1) A person has an '*intention*' with respect to conduct if a person means to engage in the conduct.
- 2) A person has '*intention*' with respect to a circumstance if the person believes that it exists or will exist.
- 3) A person has '*intention*' with respect to a result if the person means to bring it about or is aware that it will occur in the ordinary course of events.

14. In s.18 'knowledge' is stated as follows:

- 1) A person has '*knowledge*' of something if the person is aware that the thing does or does not exist or will or will not exist in the ordinary course of events.
- 2) If knowledge is specified as the fault element required to prove an offence, proof of intention or knowledge will satisfy the fault element for the offence.

15. In s.19 of the Act under the heading 'recklessness' it is stated:

- 1) A person is '*reckless*' about a matter if:
 - a) The person is aware of a substantial risk that:
 - i) In the case of a circumstance – the circumstance exists or will exist; and
 - ii) In the case of a result – the result will occur; and
 - b) Having regard to the circumstances known to the person, it is unjustifiable to take the risk.
- 2) The question whether taking a risk is unjustifiable is one of fact.
- 3) If recklessness is specified as the fault element required to prove an offence, proof of intention, knowledge or recklessness will satisfy that element for the offence.

BURDEN OF PROOF

16. In this case being a criminal trial, the burden of proof is on the prosecution to prove its case beyond all reasonable doubt. In the case of circumstantial evidence, this onus remains on the prosecution and extends to requiring the prosecution to exclude all reasonable hypotheses consistent with the innocence of the accused. This is addressed more comprehensively at [70] under the heading 'Circumstantial Evidence'.

BACKGROUND

17. 1) Unique Lee Dick (the deceased) was born on 20 March 1997. In 2016 she was a Form 7 student at Adi Cakobau School (ACS) in Fiji. She was a former Miss Nauru pageant contestant.
- 2) Samaranch Engar (the accused) was born on 30 April 1998 and he was a Form 6 student at Nasinu Secondary School in Fiji in 2016.
- 3) The accused and deceased were in a relationship of boyfriend and girlfriend. Their relationship commenced in Fiji on or about January 2016 but they knew each other from Nauru as they both lived in the Meneng District.
- 4) The deceased died on 10 December 2016 and the prosecution's case is that the accused caused her death.

PROSECUTION'S CASE OPENING ADDRESS

18. In the opening address the prosecution stated:
- a) The prosecution referred to the relationship of the accused and the deceased as being one of boyfriend and girlfriend. This was shortly later contradicted by Ms. Ursula Amwano (Ursula) who stated that the relationship between the deceased and the accused had ended on 9 December 2016. It was thereafter put by the prosecution, that at the time of the deceased's death, she was the ex-girlfriend of the accused.
- b) That the accused manually strangled the deceased which lead to her death.
- c) The deceased was a very intelligent, free spirited and extremely popular and beautiful person.
- d) Their relationship was very rocky as the accused felt insecure, jealous and was a very possessive boyfriend.
- e) On 10 December 2016 at around midday the accused was with the deceased in a car belonging to Bureka Kakiouea (Bureka). At the time the accused entered the car, the deceased was alive and he manually strangled her to death inside the car.

Later both were driven to Jayma Bop's (Jayma) house where the accused was living at that time.

- f) That at the time of the death the accused was not drunk.
- g) That the medical evidence would show that the cause of death was neck compression.

EVENTS OF 9 DECEMBER 2016 AS OUTLINED BY THE PROSECUTION WITNESSES

- 19. On 9 December 2016 the deceased made plans with Ursula to go to the Reef Bar for drinks. Ursula contacted Bureka who was her brother-in-law (being married to her first cousin) to pick them up in his car.
- 20. Bureka picked them up at around 11pm and drove them to the Reef Bar where they met Belson Hubert (Belson), Nason Hubert (Nason), Joshua Agege (Agege) and Aksid. They were seated in the VIP Lounge of Reef Bar and a few minutes later the accused entered the VIP Lounge and approached the deceased. The accused was seen grabbing the deceased by her neck to force her to look at him. He grabbed her under the chin and also grabbed her hair.
- 21. The deceased tried to push the accused but was unable to do so, so the deceased, Ursula and the accused went outside of the Reef Bar near the ocean. When they were outside the accused punched the deceased and she fell down, the accused then held her by her neck. The bystanders made attempts for him to release her, however he persisted and continued to hold her by the neck. According to oral evidence given by Ursula the accused said he will 'snap her neck'.
- 22. The accused only released the deceased when he was poked in the eye by David Deireragea (David). David was a bystander and intervened when he saw the accused strangling her neck.
- 23. After that incident the deceased and Ursula drove to the accused parent's house and complained to his parents about his behaviour at the Reef Bar.
- 24. As Ursula and the deceased were departing the accused's parent's house after having spoken to them, the accused arrived. The accused had an argument with his father who told him to stop drinking. He did not listen to his father and they ended up having a fist fight. The father called the police and the accused was arrested and taken into police custody.
- 25. The deceased and Ursula went back to the Reef Bar to join Bureka and others and had some drinks until the bar closed at midnight.

DRINKING CONTINUED FOR THE REST OF THE NIGHT UNTIL THE NEXT DAY

26. After the Reef Bar closed the deceased, Ursula, Bureka, Nason and Belson continued drinking. They were drinking Vodka AK47 mixed with water. They drove to various locations where they met numerous people. Eventually they moved to a place called the Hut near Menen Hotel. At this time it was only the deceased, Ursula, Bureka and Justice.
27. Unique was drunk and went to lie down in the car in the front seat whilst Justice went to sleep in the back seat.

MORNING OF 10 DECEMBER 2016

28. After drinking at the Hut they went cruising around the island until it was daybreak and getting hot. They drove to the Tower to have more drinks and the deceased was lying in the car with someone. They stayed at Tower for approximately 10 minutes, although the timeline is not clear. Around 6-6.30am they drove to a Chinese restaurant and bought some food. As the deceased was very drunk at this stage and she did not eat anything. After 7-8am they drove to Akibwib's residence as they were previously invited to come there for drinks by Agege.
29. At Akibwib's house everyone was drinking except the deceased. Bureka went to get some food from his residence and brought it back to the Akibwib's residence where both the deceased and Ursula ate the food.
30. After some time Agege had an argument with Bureka. As a result of that argument, Bureka, the deceased, Ursula, Joseph and Nason left Akibwib's house and went to a place called Foundation. By this stage they had consumed some 3-4 bottles of Vodka (AK47).
31. After the Foundation, Ursula was dropped at her house in Nibok District by Bureka and the deceased in Bureka's car at around 10-11am. Ursula was seated in the front passenger's seat and the deceased was lying down in the back seat. According to Ursula the deceased wanted to go home as well and she asked Bureka to take her home. When Ursula left the Akibwib's house for the last time that day she did not see the accused present there.
32. According to Bureka when he dropped off Ursula she tried to pull the deceased out of the car but she refused to get out and said that she wanted to go with him as she wanted to have more drinks. After dropping off Ursula, Bureka drove away with the deceased to Akibwib's house. The deceased confided in Bureka that she was embarrassed about the incident at the Reef Bar and she was crying and told him that she and the accused were always fighting.
33. On the way to the Akibwib's house the deceased told him that she wanted to use the toilet and he offered to drop her home so that she could use the toilet; but she refused to go home. The deceased went to the toilet in a bush at Anabar District next to the piggery farm. The deceased and Bureka had sex in the back of his car. Thereafter Bureka again offered to drop her home but she insisted in going to Akibwib's house as she wanted to have more drinks.

34. When they reached Akibwib's house Bureka parked the car. Bureka said that the deceased got out of the front passenger's seat and went to lie in the back seat as she wanted to sleep so he left the air conditioning on. The car was parked in front of the people who were drinking some 4-5 metres away from Akibwib's house.
35. According to Bureka there were many people at Akibwib's house and he saw his cousin Folein Kakiouea (Folein) but he did not see the accused. From where he was seated he had a clear view of the car although the car windows were tinted.
36. Bureka saw Agege get into the front passenger's seat to sleep and later on he saw Nason get into the back seat with the deceased to sleep. However, he was unable to give an exact time of when they got into the car and for how long they were in the car for.
37. Bureka's account of Agege and Nason getting into the car to sleep and getting out of the car is in conflict with the evidence of Agege and Nason. Agege said that he as he approached the car, he saw Nason getting out of the car. Nason's evidence is that he only went to get water from the car and as he was doing so, the deceased spoke to him and asked him to turn on the air conditioning. Nason says that he did not go into the car to sleep. Agege said that he got into the car to sleep and when he went to do so, he saw the deceased and the accused in the car. The accused then asked him to get out of the car as he wanted time to talk with the deceased. Agege observed that at that time the deceased was sleeping in the car.
38. After the accused told Agege to get out of the car, Agege went and sat with Bureka. After 10 minutes or so the accused came out of the car and asked Bureka if they (the deceased and him) could be dropped home.
39. Subsequently, Agege and Joshua Jeremiah went to drop off the accused and the deceased in Bureka's car at Jayma's house. The car was driven by Joshua Jeremiah and Agege was seated in the front passenger seat whilst the deceased was lying in the backseat with the accused. The accused was seated in the middle of the backseat in front of the deceased. Their estimate at the time they were dropped off was around 11am. The timeline is in conflict with Jayma's evidence which estimated they arrived at the house between 12 noon and 1pm in the afternoon.
40. Having reached Jayma's house Agege assisted the accused in getting the deceased out of the car. The accused put his hands under her armpits and pulled her out. According to Agege, he held her legs and they carried her into Jayma's house in her presence. However, his version is in conflict with Jayma who said that Edison also assisted.
41. Agege said the deceased's arms were hanging down and the body was quite slack. He said he did not notice any injuries on her face or neck and neither did he hear her make any noise or groan or move. After putting the deceased on the bed on her back, he got back into the car and they drove back to Akibwib's residence.
42. Jayma is married to JayJay Bop (Jayjay) who is the accused's uncle. The accused used to stay at their house from time to time and was staying with them at the material time. Jayma saw the accused arrive with the deceased and she saw her being carried out of the car by the accused, Agege and Edison into the bedroom which was

occupied by the accused. The deceased was put on the bed on her back. She noticed that the deceased was not responding or moving. According to her they arrived at her house at around 12 noon to 1pm.

43. Jayma stated that shortly after the accused arrived with the deceased, he left the house at around 1pm and came back after a short while. Whilst the accused was away she did not see anyone enter the bedroom or come into the house. After the accused returned he went back into the bedroom where the deceased was and came out and asked for JayJay and had a drink in the kitchen. Jayma was cooking lunch. The accused did not see JayJay and went back into the bedroom and closed the door.
44. The accused came out of the bedroom and asked Jayma for a fan as the air conditioner was not working and she went into the room and noticed that the deceased was in a different position. She saw the deceased as lying on her side facing the wall. The accused came out again and asked for JayJay but did not speak to him. He went back into the bedroom and came out again and asked for a laptop and told Jayma that the deceased wanted to use it. The accused asked for food and she told him that she was cooking it and when she told him that the food was ready he told her that they already ate at a Chinese restaurant before coming to the house.
45. Jayma never saw the deceased leave the bedroom for a drink or to visit the toilet. Neither did the accused tell her that anything was wrong with the deceased at any time.
46. At around 9pm or later, Raeko Finch (Raeko), the deceased's sister, came to look for her. Jayma knocked on the bedroom door and told the accused that Raeko was outside the front of the house and the accused came out and he spoke to her. Thereafter, Raeko drove away and returned later with her mother, Ronay Dick (Ronay).
47. When Raeko and Ronay arrived, Ronay was yelling for the deceased to get out of the house. The accused was in the bedroom and Jayma started knocking and banging on the door and the accused opened the door slightly. Ronay pushed open the door and got into the bedroom, she then started beating the deceased. The assault continued for a while. Jayma then realised that something was wrong so she touched the deceased. Raeko went to get her father, Germaine Dick.

ARRIVAL OF PARAMEDICS

48. When it was discovered that the deceased was unresponsive and potentially dead, someone contacted the hospital and an ambulance was sent to the house.
49. The paramedics arrived shortly after the call was made. After the paramedics arrived they performed CPR on the deceased but she was already dead. The paramedics then took the body to the RON Hospital.

FAILURE TO INFORM POLICE

50. Whilst crimes of this nature on Nauru are rare, and will hopefully remain so, that does not diminish the need for establishing a proper protocol between the different stakeholders that can become part of a death investigation.
51. As soon as a death appears to be remotely suspicious, it is recommended that upon arriving at the scene, paramedics or medical staff contact the Nauru Police immediately to also attend the scene. In the meantime it is most important that all reasonably practicable efforts should be made to preserve the scene until police arrive. This will enable the police to take proper photographs of the crime scene, as well as assist the police in gathering any pertinent and relevant evidence that may be at the scene.

RON HOSPITAL

52. When paramedics arrived at the RON Hospital, the deceased was examined by Dr. Leona. He carried out an X-ray of the deceased's face, mandible, chest and body and also performed an ultrasound scan.
53. Dr. Leona's findings were that the death was suspicious and he recommended an urgent post-mortem to determine the cause of death.
54. Dr. Leona performed an external examination of the deceased, but did not perform an autopsy of the body.

INVOLVEMENT OF FORENSIC PATHOLOGIST DR. YELENA BABER

55. There was no pathologist available in Nauru so arrangements were made with the assistance of the Australian Federal Police (AFP) and the Victorian Institute of Forensic Medicine (VIFM) in Victoria for a pathologist to be sent over.
56. Dr. Yelena Baber came to Nauru and on 15 December 2016 she carried out an autopsy on the body of the deceased. Her findings essentially were that the deceased died of 'neck compression' and amongst other findings she noted that there was a hairline fracture of the mandible and the "*...internal examination revealed a fractured hyoid bone with associated haemorrhage, bilateral haemorrhage with the strep muscles, bilateral masseter muscle haemorrhage with a hairline fracture of the right side of the mandible and bilateral scalp haemorrhages*".
57. Dr. Baber also carried out a toxicology report which showed that the deceased had a blood alcohol level of 0.16g/100ml.

ARREST

58. The accused was arrested by the police on 11 December 2016 and taken into custody. The accused was interviewed by Sergeant Iyo Adams on 20 December 2016 in the presence of Sergeant Dan Batelenga. Prior to the record of interview the accused was allowed access to a lawyer. After speaking to his lawyer, he participated in the record

of interview. During the course of the interview he effectively did not make any comments to the questions put to him.

TRIAL

59. During the course of the trial the prosecution was informed that Dr Baber was not able to attend Court because of ill health. The prosecution made an application for them to be allowed to call a substitute pathologist to give evidence. That request was refused as there was no provision in the Criminal Procedure Act 1972, that would allow a substitute pathologist to give evidence on Dr. Baber's report. However, the autopsy report was accepted as part of the business record of RON Hospital under the provisions of the Criminal Evidence Act 1965 (UK).
60. Subsequently, the prosecution made a further application for Professor David Ranson to be allowed to give evidence as an expert to comment on Dr. Baber's autopsy report. This application was allowed and Professor Ranson was called as an expert witness on behalf of the prosecution.
61. Professor Ranson's written opinion was admitted by the consent of the defence. He gave evidence on his own opinion and on the findings made by Dr Baber. He agreed with Dr. Baber that the cause of death was 'neck compression'.
62. In his evidence he stated as follows:

- 1) When questioned by the prosecution as to the injuries seen on the deceased, Professor Ranson stated that:

"The injuries are both to the upper lip on the right side and also to the lower lip on the right side. So it could be one application of force to the lower part of the face on that side, could drive the lips into the underlying teeth and that would be sufficient to cause the laceration. So although we have two described injuries in two parts of the body, they could still be caused by one application of force".¹

Ms. Tabuakuro then questioned Professor Ranson if he would be able to identify the place to which force would have been applied to cause those injuries. Professor Ranson stated that force would have been applied to "the outer area of the lip"² as that would be the normal way a laceration underneath the lip would have occurred. Professor Ranson further expanded that:

"...where you have forces applied to a lower part of the face, then obviously you're going to get lacerations to the soft tissues of the inside of the lip and the surrounding tissues, but you may also get to other local bruising. And in this particular case there was also a fracture to the lower jaw on that side, and that could also all be associated with a significant single application of force to that

¹ Master Transcript, page 310.

² Ibid.

area, but of course there could also have been more than one application of force".³

Professor Ranson then discussed his observations from comment 11 of his report. He explained that Dr. Baber's autopsy looked at the tissues beneath the skin which demonstrated haemorrhage, bleeding and bruising in the deep tissues beneath the skin in the area around the neck.⁴

- 2) The prosecution further referred Professor Ranson to photographs taken during Dr. Baber's autopsy of the deceased. The prosecution drew specific reference to the fracture that was found on her right mandible (lower jawbone). He noted that there was local haemorrhage around the fracture. He further observed that there was haemorrhage in the areas of the temples on each side in the subcutaneous tissue, indicating that some blunt force had been applied to that area. Professor Ranson concluded that taking all of those things together, there is evidence of a lower facial blunt force injury, as well as some higher injuries on both sides.⁵
- 3) In relation to comment 19 of his report, Professor Ranson explained that the injuries found on the deceased were consistent with her having been alive, or having blood pressure, at the time the injuries were inflicted. He explained:

"When you have haemorrhage around the fracture, it suggests that there was blood pressure present, allowing blood to be forced out of the broken blood vessels at the time the injury occurred".⁶

He further noted that whilst it was not impossible to get bruising after death, the pattern of bruising on the deceased, when considered in the totality of the picture in the neck tissues, indicated that:

"...there is sufficient bleeding and bruising to indicate that the trauma to the neck occurred while the person was alive, or had circulation".⁷

- 4) The prosecution questioned the Professor about whether the injuries found on the deceased including the injuries within her mouth and to the right mandible, would have been caused while she was still alive. Professor Ranson answered:

"Yes, there is sufficient haemorrhage around those areas to suggest that she had a blood pressure, and was able to bleed in association with damage to those structures of the neck and the face".⁸

³ Master Transcript, page 310 – 311.

⁴ Master Transcript, page 311.

⁵ Master Transcript, page 314.

⁶ Master Transcript, page 317.

⁷ Ibid.

⁸ Master Transcript, page 318.

He further clarified that the deep haemorrhage that was found on the deceased, would not have been found if the injuries were inflicted after death.

- 5) In relation to the time it would take for a person to die if their neck was to be compressed, Professor Ranson stated that it could be a spectrum of minutes. Specifically, he noted that:

"There can be situations where a person can have their neck squeezed and they have a cardiac arrest very rapidly. They may still get some bleeding, because they still have residual blood pressure, there are situations where the obstruction needs to be present in restricting blood flow to the brain for a period of time, a few minutes...It can be many minutes before a person actually dies. Again it also depends on what you call the point of death. There is really no point of death in these situations, it is a spectrum of time leading to irreversible damage to the brain as such that you die and your heart stops and you stop breathing. All I am saying is that you can get that happening relatively rapidly, but you can also have a situation where it can take many minutes".⁹

DEFENCE CASE

63. The accused gave evidence wherein he denied the incidents at the Reef Bar. He denied putting the deceased's neck in a headlock both inside and outside the VIP Lounge. He stated that inside the VIP Lounge he lifted the deceased by putting his arms under her armpits. He stated that he did this to help her stand up.
64. The accused admitted being in Bureka's car with the deceased at the Akibwib's house but denied that he did anything to cause her death.
65. He admitted that he and the deceased were driven in Bureka's car to Jayma's house where he was living at the time. He pulled the deceased out of the car by putting his hands under her armpits. He pulled her out of the car with the assistance of Agege and Edison, who held her legs. The deceased was carried into the bedroom which he was occupying in the house.
66. The deceased was left on the bed with her head facing the ceiling. The accused stated that he later took off the deceased's pants and panties as it was hot and it was then that he turned her sideways to face the wall.
67. He admitted that when the deceased was brought into the house she did not have any facial injuries and in particular there were no injuries to her lips. He stated that he was not aware of any injuries to the deceased and that maybe the injuries on the lips were later caused by the deceased's mother.

⁹ Master Transcript, page 320.

68. He said that he was not aware that the deceased had died and only realised that she was dead when her mother and sister came into the bedroom.
69. He denied that he hit her on her lips or strangled her at any point in time.

CIRCUMSTANTIAL EVIDENCE

70. As I stated earlier the case against the accused is circumstantial. In *The Queen v Baden-Clay*¹⁰ the High Court stated as follows:

Hypothesis consistent with innocence

- [46] The prosecution's case against the respondent was circumstantial. The principles concerning cases that turn on circumstantial evidence are well settled. In *Barca v The Queen*, Gibbs, Stephen and Mason JJ said:

'When the case against an accused rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are 'such as to be consistent with any reasonable hypothesis other than the guilt of the accused': *Peacock v The King*¹¹ to enable a jury to be satisfied beyond reasonable doubt of the accused, it is necessary not only that his guilt should be a rational inference but that it should be 'the only rational inference that the circumstances would enable them to draw': *Plomp v The Queen*¹²; see also *Thomas v The Queen*¹³.

- [47] For an inference to be reasonable, it must 'rest upon something more than mere conjecture. The bare possibility of innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference open to reasonable men upon a consideration of all the facts in evidence'¹⁴. (Emphasis added). Further 'in considering a circumstantial case, all of the circumstances established by the evidence are to be considered and weighed in deciding whether there is an inference consistent with innocence reasonably open on the evidence'¹⁵ (emphasis added). The evidence is not to be looked at in a piecemeal fashion, at trial or on appeal¹⁶. See also *Chamberlain v The Queen (No.2)*.

- [48] Further, a criminal trial is accusatorial but also adversarial. Subject to well-defined exception, 'parties are bound by the conduct of their counsel, who exercise a wide range of discretion in deciding what issues to contest, what

¹⁰ 2016 HCA 35 [46], [47], [48], [49].

¹¹ (1911) 13 CLR 619 at 634; [1911] HCA 66.

¹² (1963) 110 CLR 234 at 253; [1963] HCA 44.

¹³ (1960) 102 CLR 584 at 605-606; [1960] HCA 2.

¹⁴ *Peacock v King* (1911) 131 CLR 619 at 661, quoted in *Barca v The Queen* (1975) 133 CLR 82 at 104.

¹⁵ *R v Hillier* (2007) 228 CLR 618 at 638 [46]; [2007] HCA 13.

¹⁶ *R v Hillier* (2007) 228 CLR 618 at 638 [48]. See also *Chamberlain v The Queen [No. 2]* (1984) 153 CLR 521 at 535; [1984] HCA No. 7.

witnesses to call, what evidence to lead or seek to have excluded, and what lines of argument to pursue’.

- [49] The onus of proof of matter, including proof of respondent’s intention to kill or cause grievous bodily harm, was always upon the prosecution. It is common ground that the jury rejected (and were entitled to reject) beyond reasonable doubt the respondent’s hypothesis that his wife had taken her own life or had died of alcohol or drug toxicity. The coroner appeals the reasoning proceeded on the assumption that there could be no reasonable doubt that the respondent killed his wife.

SUBMISSIONS

71. After the close of the case, both counsel for the defence and prosecution filed written closing submissions and subsequently elaborated on those in their oral submissions.

CONSIDERATION

Headlock inside the Reef Bar (VIP Lounge)

72. The incident of the accused head locking the deceased using his arm around her neck, was witnessed by Ursula, Belson, Bureka and Nason. None of these witnesses were cross-examined by the defence on this issue. Nor did the defence suggest to any of the witnesses that the defendant did not do any such thing or that he did it differently as is suggested. It was not put to any of the witnesses that the accused merely put his hands under her armpits. The failure by the defence to challenge any of the witnesses, suggest that they accepted the version relayed by each of the witnesses.
73. During the defence case, the accused gave a different version of events to the prosecution witnesses. Failure by the defence of putting that version to the prosecution witnesses and then seeking to rely on the accused’s version amounted to a breach of the rule in *Browne and Dunn*.¹⁷
74. Therefore I accept that the accused got hold of the deceased’s head in a headlock inside the VIP Lounge of the Reef Bar as described by the multiple prosecution witnesses.

Incident outside the Reef Bar

75. Once out of the Reef Bar the accused is alleged to have put his arm around the deceased’s neck in a headlock position to choke her until they fell to the ground. The incident was witnessed by David, Damoon Akibwib (Damoon) and Ursula. The accused held the deceased in a headlock position and was refusing to release her despite interventions of the bystanders. He only released her when David poked him in his eyes. This incident was witnessed by David, Damoon and Ursula and yet none of them were cross-examined on this issue. Therefore their evidence went in unchallenged. I accept their evidence that the accused put the deceased’s neck in a headlock.

¹⁷ (1893) 6 R 67.

Snapping of neck

76. Ursula gave evidence that she heard the accused say that he will snap her neck. This portion of evidence was not in her statement to the police which was disclosed to the defence. As I said earlier, I did not have a copy of her statement either because of the confusion surrounding the transfer of the charge from the District Court to this Court. Obviously that portion of her evidence was a substantial departure from the statement she gave to the police.
77. The defence did not object to her giving that evidence despite the fact that it was not contained in her statement. Ursula said that when the accused allegedly said he would “snap the neck” of the deceased, it was heard by other bystanders which would include David and Damoon. They did not give evidence that they heard the accused say that, nor were they questioned by the prosecution in that regard.
78. For this reason I am unable to place any weight on this component of Ursula’s evidence.

Where did she die?

79. The prosecution submits that the death took place in Bureka’s car before the accused and the deceased were taken to Jayma’s house on Saturday 10 December 2016.
80. The prosecution’s submission is at odds with the evidence of Agege, who said that he did not see any injuries on the deceased’s face as he assisted the accused to take the deceased inside the house from the car. Jayma in her cross-examination stated that she also did not see any injuries on the deceased’s face. The accused’s evidence is that he did not see any injuries on her face including injuries to her lips.
81. Ms. Tabuakuro submits that it is possible that Agege and Jayma did not see the injuries. In the case of Agege the evidence as to whether the deceased had any injuries was adduced by the prosecution and he was quite adamant that he did not see any injuries; whereas in the case of Jayma she said in cross-examination that she did not see any facial injuries on the deceased. Despite that evidence Ms. Tabuakuro did not re-examine her at all. Ms. Tabuakuro further failed to ask Jayma as to whether she saw the injuries on the deceased’s lips at the time it was discovered that she was dead, and if those were the same injuries as shown in the photographs of prosecution exhibit 1.
82. In view of the prosecution’s submissions in relation to the injury to the lips, fairness dictated that Ms Tabuakuro should have also shown prosecution exhibit 1 to Agege in order to seek his confirmation as to whether he observed those injuries on the deceased at the time she was carried into the house.
83. A party calling a witness is bound by his or her testimony and cannot challenge that by way of submissions. If that was allowed, then why have the witnesses give evidence?

84. On the evidence before me I am satisfied that the deceased did not have any injuries to her lips when she was taken into Jayma's house.

Deceased at Jayma's house

85. The deceased was with the accused from the time she arrived in Jayma's house until she was found dead, except for the period when he went out drinking for a short while, according to Jayma's evidence.
86. It is correct that when the deceased was taken into the house her body was very slack and her limbs were hanging. However, I do not consider the slackness of her body as suggesting that she was already dead at this stage.
87. Professor Ranson stated that the fracture of the mandible occurred when the deceased was alive and had blood pressure. Professor Ranson relied on Dr. Baber's autopsy report, as well as the photographs taken of the internal examination which clearly stated that there was internal haemorrhaging. Professor Ranson explained that this internal haemorrhaging was indicative of the fact that the injuries were inflicted whilst the deceased was still alive.
88. Having taken all the matters into consideration I am satisfied that the accused caused the injuries to the deceased's lips and fractured her mandible through an application of blunt force. I am further satisfied that the accused strangled her to death by neck compression.

Hypotheses consistent with innocence

89. The prosecution still bears the burden of proof to exclude all reasonable hypotheses consistent with his innocence. I refer to *The Queen v Baden-Clay*¹⁸ where it is stated:

[50] Given the unchallenged conclusion that the respondent was the agent of his wife's death, the compelling inference is that he was the last person to see his wife alive and was the only person who knew the circumstances of her death. That inference did not, of course, diminish the overall burden on the prosecution of proving beyond reasonable doubt all the elements of the offence of murder with which the respondent was charged. In the case of circumstantial evidence, the prosecution's burden requires it to exclude all reasonable hypotheses consistent with innocence. However, where an accused person with knowledge of the facts is silent then as was said in *Weissensteiner v The Queen*¹⁹:

'in a criminal trial, hypotheses consistent with innocence may cease to be rational or reasonable in the absence of evidence to support them when that evidence, if it exists at all, must be within the knowledge of the accused.'

¹⁸ [2016] HCA 35 [50].

¹⁹ (1993) 178 CLR 217 at 227-228 per Mason CJ, Dean and Dawson JJ; [1993] HCA 65.

90. In this matter the only other persons that were alone with the deceased were Bureka, Nason and Agege. Bureka was at one stage a potential suspect, however, there is evidence from multiple witnesses that point to the deceased being alive when returning to Akibwib's house. Specifically, there is evidence that after the deceased and Bureka returned to the Akibwib's house, the deceased got out of the car and moved to the back seat. There is further evidence that the deceased had spoken requesting that the air-conditioner be turned on, and evidence that she was sleeping on the backseat. Furthermore, according to the defence witness Cullen Gadaneang, that she was moving.
91. Nason and Agege were in the car with the deceased and left at the request of the accused and at the material time the deceased was sleeping and alive. Therefore neither of them could have caused her death.
92. I asked Mr. Valenitabua whether he wanted to make any submissions as to any alternative hypotheses that the defence would like me to consider. He submitted that this case was either murder or nothing. Mr. Valenitabua maintained that the defendant did not kill the deceased. He further informed me that he did not have alternative hypotheses— except that he was relying on Dr. Leona's timeline of death evidence in relation to when a body would be in a state of 'rigor mortis'.
93. Mr. Valenitabua submitted that if Dr. Leona's evidence is accepted then the death of the deceased was estimated as being within 12-24 hours before he examined her. Mr. Valenitabua further submitted that this would put the time of death at between 10a.m. and 12noon on Saturday 10 December 2016, when the accused was not with the deceased at this time, and thus he could not have caused the death.
94. On rigor mortis I have before me evidence of Dr Leona as well as Professor Ranson. I note once again that Professor Ranson was not cross-examined by the defence. Professor Ranson and Dr. Leona both note that the length of time that it takes for rigor mortis to set in depends on the weather and other conditions including the personal characteristics of the deceased and the cause of death. Professor Ranson said that in hot conditions rigor mortis could set in more rapidly whereas in temperate conditions it could take up to 12 hours for it to set in.
95. The only other person who was with the deceased at Jayma's house was Jayma herself. When the accused went out for a short period to drink back at the Akibwib's place, there is evidence that Jayma did not enter the bedroom, nor according to her, did any other person who was working around her house, enter the bedroom.
96. The deceased and accused had broken up a day earlier, and the accused displayed aggressive behaviour later that evening at the Reef Bar in the presence of many people. I further note that on the second occasion, his aggression had intensified. He refused to release the deceased, and only did so when he was poked in the eyes.
97. His aggressive behaviour continued on until he arrived home in the evening. Despite his father trying to pacify him and to persuade him to stop drinking, the accused again showed aggression towards his father and they ended up having a fist fight. The father was unable to control him and contacted the police. The police arrived and the accused was arrested and taken into custody.

98. The accused's aggression displayed that he was a jealous and controlling boyfriend. I further note that his aggression is indicative of his inability to control his temper.
99. In the circumstances it is therefore reasonable to infer that the accused had motive and or intention to harm the deceased. Further, having considered all the hypotheses consistent with innocence of the accused and taking into account other alternatives, I find that the accused had intended to cause, or was reckless about causing the death of the deceased. I find that he did so when he was alone with her at Jayma's house.

Post Offence Lies

100. In *The Queen v Baden-Clay*²⁰ it is stated as follows at:

Post Offence Concealment and Lies

[72] The respondent's false denial to the police about his ongoing affair, his suggestion to Ms McHugh that she should 'lie low', and his enquiry as to whether she had revealed the affair to the police were all capable of being regarded by the jury as evidence in a strong anxiety to conceal from the police the existence and true nature of his affair with McHugh. The anxiety could reasonably be seen as indicative that, in his mind, the affair and the killing were inter-related, and that the killing was not unintended, tragic death of his wife, but an intentional killing.

[73] In *R v White*²¹ Major J said:

'As a general rule, it will be for the jury to decide, on the basis of the evidence as a whole, whether the post offence conduct of the accused is related to the crime before them rather than to some other culpable act. It is also within the province of the jury to consider how much weight, if any, such evidence should be accorded in the final determination of guilt or innocence. For the trial judge to interfere in the process will in most cases constitute a usurpation of the jury's exclusive fact finding role.'

[74] In *R v White*, Major J went on to say that there may be cases where post offence conduct, such as accused's flight or concealment, is out of proportion to the level culpability involved in a lesser offence that it might be found by the jury to be more consistent with the more serious offence charged²². There may be cases where an accused goes to such lengths to conceal death or to distance himself or herself from it as to provide a basis on which the jury might conclude that the accused had committed an extremely serious crime and so warrant a conclusion beyond reasonable doubt as to the responsibility of the accused for the death and the concurrent existence in the accused of the intent necessary for murder²³. There is no hard and fast rule that evidence of post

²⁰ [72], [73] and [74].

²¹ (1998) 2SCR 72 at 89 [27], in the Supreme Court of Canada.

²² (1998) 2 SCR 72 at 91 [32].

²³ *R v Ciantar* (2006) 16 VR 26 at 39 [38]- [40], [47], [65]-[67]; *R v DAN* [2007] QCA 626 at [89], [99].

offence concealment and lies is always intractably neutral between murder and manslaughter. As Major (1998 2SCR 72 at 91[32]) said:

‘The result will always turn on the nature of the evidence in question and its relevance to the real dispute in issue.’

101. In this matter the accused was attempting to deflect the blame on Ronay Dick the deceased’s mother. In his evidence he stated that the mother more than likely caused the injuries on her lips. In the cross-examination of Ronay Dick, his counsel, Mr Valenitabua, put directly to her that she caused those injuries on the neck and she refuted those allegations. Ronay became very upset about the allegations that she had caused her daughter’s death.
102. Obviously those questions were asked by Mr Valenitabua on the instructions of his client. This goes to show that the accused would go to any lengths to deflect the blame and distance himself from what he did. His claims that Ronay caused the injuries and death of the deceased was and is a lie, as the deceased was already dead. I agree with the prosecution that any reasonable person in the room with the deceased prior to Ronay entering, would have known the deceased was dead as she was already in rigor mortis.

CONCLUSION

103. I find that his actions in trying to deflect the blame on an entirely innocent person, particularly in light of the compelling circumstantial evidence pointing to him, and him alone, as well as the lack of alternative hypotheses consistent with his innocence; is sufficient in my opinion to establish the ‘intent’ necessary for the charge of murder.
104. For the foregoing reasons, I find the accused guilty of the charge of murder.

Dated this 1 day of May 2018



Mohammed Shafiullah Khan
Judge

