

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: 29 OF 2004**

**STATE**

**-v-**

- 1. ALESI NALAVE**
- 2. KELERA MARAMA**

**Counsels** : **Ms. S. Puamau for the State**  
**Ms.T. Sharma with Mr. R. Kumar for the 1<sup>st</sup> accused**  
**Mr. Anil J. Singh for the 2<sup>nd</sup> accused**

**Date of Trial** : **16 September -23 September 2013**

**Date of Summing Up** : **24 September 2013**

**SUMMING UP**

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial –to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused persons.
2. I will direct you on matters of law which you must accept and act upon.

3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the Judges of fact. All matters of fact are for you to decide. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject.
5. The counsel for Prosecution and the counsels for the two accused made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence counsels. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused persons are innocent until they are proved guilty. The burden of proving their guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find each accused guilty, you must be satisfied so that you are sure of her guilt. If you have any reasonable doubt as to her guilt, you must find her not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
11. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.

12. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

13. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

14. The agreed facts of this case are:

- (i) That the **CORONIAL AUTOPSY REPORT** prepared by **DR. TIMOTHY DAVID KOELMEYER** and sworn before the Auckland Coroner is hereby tendered into evidence by consent.

According to this document the deceased had received a heavy blow (or blows) to the right side of the face and head which resulted in the skull fracture and the brain injuries. The incised injuries to the right hand are defense injuries and might have been caused by a knife. The coroner considers glass as to be unlikely to have caused these injuries. The bruise to the left forearm probably a defense type wound. The small stab wound to the front of the abdomen was caused by a knife. **This report is dated 7<sup>th</sup> July 2004.**

- (ii) That the medical report of **ALESI NALAVE TAWAKE** taken on 20 June 2004 is hereby tendered into evidence by consent.

According to this document, on 20.06.2004 there were no sign of obvious injury on the 1<sup>st</sup> accused.

- (iii) That the medical report of **KELERA MARAMA** also known as **MERESEINI ADIMAITOGA** taken on 20 June 04 is hereby tendered into evidence by consent.

According to this document, on 20.06.04 2<sup>nd</sup> accused had a laceration on the puff of right index finger caused by a sharp object which was a healing injury.

15. The charge against the two accused is as follows:

**COUNT 1**

***Statement of Offence***

**Murder:** Contrary to Section 199 and 200 of the **Penal Code**, Cap. 17

***Particulars of Offence***

**ALESI NALAVE TAWAKE** d/o Ranjit Kumar and **KELERA MARAMA** on the 10<sup>th</sup> day of June 2004 at **NADI** in the **WESTERN DIVISION** murdered **XIAOLU LI** also known as **SHERLY LI**.

16. Firstly I must explain the legal basis of the charge. When charge is laid jointly against more than one accused-person in this manner, it brings into focus an important legal principle, which is known as the 'doctrine of joint enterprise'

17. Usually, a person is liable in law for only acts committed by her and for her conduct and such acts or conduct attract criminal liability if they are unlawful acts or unlawful purposes. The doctrine of joint enterprise is an exception to that general rule, of course, for valid and sound reasons. The principle is explained under Section 22 of the Penal Code, which reads:

***Offences committed by joint offenders in prosecution of common purpose***

*'When two or more persons form a common intention to prosecute an unlawful purpose in connection with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.'*

18. Madam assessors and the gentleman assessor, if I am to site an example, this is how the principle works. Three people plan to rob a shop and one stands guard outside looking out for any police surveillance. One man goes inside and holds the security guard, while the other threatens the cashier with a gun and takes all the cash. All three men then make their get-away. Now you will see that only the third man did the actual act of offence, while the other two helped to execute the plan of robbery. Under the law, each one of them is held liable for the offence of robbery with violence irrespective of the individual roles played by each one of them under the doctrine of 'joint enterprise.' For the principle to work under the section, there should be evidence beyond reasonable doubt that:

- (i) There should be two or more persons forming a common intention to prosecute an unlawful purpose;
- (ii) In prosecution of that unlawful purpose, an offence/s should be committed; and
- (iii) The commission of such offence/s should be the probable consequence of the prosecution of that unlawful purpose.

19. In dealing with the principle, you must also consider the following factors as matters of law. They are:

- (i) The case of each accused must be considered separately. That is, you must find evidence as to what each accused did to demonstrate that she too had shared the intention in common to prosecute unlawful purpose;
- (ii) Each accused must have been actuated by that common intention with the doer of the unlawful purpose at the time the offence was committed and should have contributed in some meaningful way towards the prosecution of the unlawful purpose;
- (iii) Each one of them should have known that the commission of the offence is a probable consequence of the prosecution of that unlawful purpose;
- (iv) Common intention must not be confused with same or similar intention entertained independently of each other. Instead, it should clearly be distinguished from similar intention. That is, if you find no evidence to show a particular accused did not share the intention in common with others and that she was actuated by his own intention which was, however, similar to the intention of other, you can find the accused guilty only for what she has committed and not for anything else;
- (v) There must be evidence, either direct or circumstantial, or pre-arrangement or some other evidence of common intention. Sometimes, such common intention could occur on the spur of the moment;
- (vi) The mere fact of the presence of the accused at the time of the offence is not necessary evidence of common intention.

20. I will now deal with the elements of the offence. The offence of murder is defined under Section 199 of the Penal Code. "Murder", has three essential elements. For each accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) That each accused did an unlawful act;
- (ii) That the unlawful act caused the death of the deceased;
- (iii) That each of the accused person acted with malice aforethought.

21. An “unlawful act”, is simply an act not justified in law. For example, in attempting to rob someone I rushed towards him and delivered punches to his body and head. The act of punching, without any legal justification, is an assault and is an unlawful act. It is an unlawful application of force to the person of another, and is therefore an unlawful act.
22. The “unlawful act” must “cause the death of the deceased”. This is the second element of murder. The law requires a link between the unlawful act and the death. Continuing from the above example, the right hand punch I landed on the person’s head was so hard he fell to the ground. As a result, he suffered internal bleeding in his brain, and subsequently died. My punch therefore “caused the deceased’s death”, because it was a substantial cause of the injuries to his brain. Without my punch, he wouldn’t have had a brain injury, and therefore would not die. My punch was a substantial and major cause of his death.
23. The third element of murder is the accused-persons should have acted or conducted themselves with malice aforethought. Malice aforethought in law is to have thought about act or conduct in question and carried out the act of causing death of someone or causing injury.
24. The first element is called the physical element of the offence, while the second element indicates the casual link. The third is called the mental element. You have to always bear in mind that all three elements should be established by the prosecution at all times together for it to succeed in the charge of murder. It must be absolutely clear in your mind that the act or the conduct of the accused-persons were accompanied by malice aforethought, which is the necessary mental state or the faulty intention to complete the offence of murder.
25. In law ‘malice aforethought’ is deemed to have been established by evidence proving any one or more of the following circumstances:
  - (a) An intention to cause death of or to do grievous harm to any person;
  - (b) Knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not.
26. You must also bear in mind that a person’s intentions are locked up in mind. They are not often spoken out. The intent, therefore, cannot be physically observed. However this intent can be proved by what one tells others, or can be inferred from one’s conduct prior to, during and subsequent to the act or conduct in question.

27. In this case, you will not be required to decide on each accused's mental state as to intention to cause death because the prosecution is not running its case on that mental state. The prosecution is simply relying on the mental state of intention to do grievous harm and recklessness to prove its case against the each accused, beyond reasonable doubt. So, when referring to the example we discussed just previously if the prosecution proved that when I threw the punch at the person's head, I knew at the time, that serious injury would be caused on the person, but nevertheless and recklessly I threw the punch at him anyway, I would be guilty of murder, because they have satisfied beyond reasonable doubt the mental element of action without caring if death or serious harm would result.

28. If, on the other hand, the prosecution failed to prove beyond reasonable doubt, the mental element required, but have only proved beyond reasonable doubt that-

- (i) an illegal act was done
- (ii) it resulted in the death

then you are entitled to find the accused guilty of manslaughter. The elements of manslaughter are the first two elements for murder, that is, the accused did an unlawful act, which caused the deceased's death.

29. I will now explain what manslaughter is. Manslaughter is a lesser offence that stands very close to the offence of murder. It is the killing of someone by an unlawful act or omission without necessary intention or malice aforethought. If you consider that each accused did not have the necessary intention of committing the death of the deceased or the malice aforethought, but they had only the knowledge that the death would be caused by their act or conduct, then you must find the accused guilty of not of murder but of manslaughter only. Whether the accused had knowledge only or whether they had the intention to cause the death of the deceased or to do grievous harm to the deceased is a matter entirely for you to decide on the basis of facts and circumstances of the case.

30. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused-persons and connect them to the offence that they alleged to have been committed.

31. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence,

but the law requires that in every case where identification evidence is involved, that the warning be given.

32. In assessing the identification evidence, you must take following matters into account:

- (i) Whether the witness has known the accused earlier?
- (ii) For how long did the witness have the accused under observation and from what distance?
- (iii) Did the witness have any special reason to remember?
- (iv) In what light was the observation made?
- (v) Whether there was any obstacle to obstruct the view?

33. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed.

34. As a matter of law I must direct you on circumstantial evidence. In this case, the prosecution relies on certain circumstantial evidence. In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime being committed, but give evidence of other circumstances and the events that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

35. I cite the following situation as an example for circumstantial evidence. In a silent night, you hear cries of a man from a neighboring house. You come out to see that a man named 'A' is running away from that house with an object in his hand. Out of curiosity you go inside the house to see what really had happened. You see your neighbor 'B' lying fallen on pool of blood with injuries. Here you don't see 'A' committing any act on 'B'. The two independent things you saw were the circumstances of a given situation. You can connect the two things that you saw, and draw certain inferences. An inference you may draw would be that 'A' caused the injury on 'B'. In drawing that inference you must make sure that it is the only inference that could be drawn, and no other inferences could have been possibly drawn from said circumstances. That should be the inescapable inference that could be drawn against 'A' in the circumstances. Further in evidence one witness may prove one thing, and another witness may prove another thing. None of those things separately alone may be sufficient to establish guilt, but taken together may lead to the conclusion that the accused committed the crime.

36. You must consider all direct evidence—that what witnesses saw, heard or perceived by their senses, as well as circumstantial evidence.



37. Circumstances are not made by mere speculation or guesswork. They must be established beyond reasonable doubt and the proved circumstances must only be consistent with the accused having committed the crime. To find them guilty, you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the circumstances proved. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence. Before you can draw any reasonable inference, you must first be satisfied beyond reasonable doubt, that the evidence given by each witness relating to the circumstances giving rise to the issues of fact to be proved is credible and truthful.
38. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, coronial autopsy report of the deceased and the two medical reports of the accused are examples. In fact those documents are agreed by both parties. Then you can act on such evidence. You can take into account the contents of the documents.
39. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinions. They are allowed to give evidence on what they have seen, heard or felt by their physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issues/s before court on the basis of their learning, skill and experience.
40. That evidence is not accepted blindly. You will have to decide the issue of murder before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence in the case.
41. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

**Test of means of opportunity:** That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically crated just out of a case against the other party.

**Probability and Improbability:** That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

**Belatedness:** That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

**Spontaneity:** This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

**Consistency:** That is whether a witness telling a story on the same lines without variations and contradictions.

42. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.

43. I will now deal with the summary of evidence in this case.

44. The first witness for the prosecution was Sesenieli Vugakoto. On 10 June 2004 she had met the 1<sup>st</sup> accused near RB Patel around 5.00 p.m. She had asked her to come with her to go and meet her boyfriend. They have gone to Bounty restaurant and had met her boyfriend who was drinking Rum with coke. They have joined him to drink. Around 8.00 p.m. they have gone to Frequency night club. They have played Billiards till 10.00 p.m. Then she was hungry and gone to buy some barbeque. At that time 1<sup>st</sup> accused was not to be seen.

The 1<sup>st</sup> accused had asked about the boss of the night club. She had told her that she is a Chinese lady. She had also told her that the office is at the back. This was around 9.30 p.m.

After she ate barbeque she had gone back to her boyfriend. The 1<sup>st</sup> accused was not to be seen. After searching around she had decided to go home with the boyfriend around 11.00 p.m. On the way home she had seen 1<sup>st</sup> accused following her. When she questioned

about her absence 1<sup>st</sup> accused had not responded. Later she had told that she had gone to take a call to her father.

In cross examination by 1<sup>st</sup> accused, she denied saying to Police that at the time she went to buy barbeque 1<sup>st</sup> accused was sitting with her boyfriend. Further she said that she told Police about questions asked by the 1<sup>st</sup> accused about the boss of the night club.

45. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt the prosecution wants to draw the inference that 1<sup>st</sup> accused has gone to the Frequency night club and was missing from 10.00 p.m. to 11.00 p.m.

46. The next lay witness for the prosecution was Laisiasa Ulunikoro. He was a security officer attached to the Frequency Lounge night club in 2004. The owner of the night club was Sherly Li. She was working that night. On 10.6.2004 he had started work at 6.00 p.m. At about 7.00 p.m. Niraj, Deen, Sesenieli had come followed by two other women. He had known Niraj, Deen and Sesenieli earlier. The two girls had told him that they want to meet the boss. He had asked them to go and meet manager Mosese. Deen, Niraj and Sesenieli had gone out around 11.00 p.m. One of the two girls had come and pushed him and run. There was something like blood on her canvas. She had a tea towel wrapped around her hand. Her hair was not tight. The 2<sup>nd</sup> girl had a plastic bag in her hand. Her hair was also not tight. She had forced her way out.

He identified the two girls as the two accused. After the two girls left the barman had come running and informed him that boss was injured and lying on floor. He had gone running to the room. There was blood all around her. Her head was badly injured. They have taken the deceased to a doctor.

Under cross examination by the 1<sup>st</sup> accused, it was suggested to him that he failed to mention to police that 1<sup>st</sup> accused came looking for a job. He had denied that. His statement to police was marked as document for 1<sup>st</sup> accused marked D (1) (1).

When cross examined by the 2<sup>nd</sup> accused, he said that he was taken to police after he went home and having 'Grog'. He admitted that he had told about only four persons in the police statement.

47. You saw him giving evidence in Court. He had given prompt answers to questions put to him by the defence. The statement made by him is with you. There are inconsistencies between his police statement and his evidence given at court. It is up to you to decide whether you could accept his evidence or part of his evidence beyond reasonable doubt. If you accept his evidence in full, the prosecution wants to draw the inference that both accused were there in the night club at the time of the incident. If you only accept part of his evidence that 1<sup>st</sup> accused came, then that corroborates the earlier evidence of Sesenieli that 1<sup>st</sup> accused came.
48. Mary Fong was the third lay witness for the prosecution. She is known to the 1<sup>st</sup> accused since birth. She came and told court there is no person by the name of Tomasi in Votualevu. She was called to Nadi police station on 18.6.2004 and had seen the 1<sup>st</sup> accused being questioned by the police officers. She was normal with no injuries. The 1<sup>st</sup> accused had not made a complaint to her. There was no real cross examination of this witness.
49. You watched her giving evidence in court. What was her demeanor like? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt the prosecution wants to draw the inference that there is no person by the name of Timoci in Votualevu. Further prosecution wants to draw an inference that at the time this witness saw the 1<sup>st</sup> accused in Nadi police station she was normal with no visible injuries.
50. The last lay witness for the prosecution was John Rajendra Rao. On 16.6.2004 he had gone to his friend's restaurant at Lautoka. He had seen the 2<sup>nd</sup> accused there. He had seen that 2<sup>nd</sup> accused was hurt in the index finger while at the wash room. This evidence was not challenged by both accused. Therefore could draw an inference that 2<sup>nd</sup> accused's index finger was injured on 16.6.2004.
51. In evaluation of the evidence of the lay witnesses you should also remember the following caution.

52. These lay witnesses gave evidence of events that took place more than 9 years ago. You should make allowances for the fact that with passage of time, memories fade. Witnesses, whoever they may be, cannot be expected to remember with crystal clarity events which occurred more than nine years ago. Sometimes the passage of time may play tricks on memories.
53. Prosecution called Peni Tuivaga who arrested the 1<sup>st</sup> accused on 18.6.2004. On information received she was arrested at a house close to Nadi hospital. She was handed over to IO Mahesh. He denied threatening her at the time of arrest, in cross examination.
54. IP Levani Tacikalou who conducted the caution interview of the 1<sup>st</sup> accused was called to give evidence by the prosecution. He had received three commendations and had served in two overseas missions. He is an officer with 34 years experience with unblemished record.

On 18.6.2004 he had conducted the caution interview in the crime office of the Nadi police station. The witnessing officer was Sainimili Cavuilati. It was conducted in English language. The 1<sup>st</sup> accused was informed of the reasons for interview and her rights. She was given breaks and meals were provided to her. At the conclusion she was given opportunity to read and add, alter or delete anything. He had identified the original interview notes and read over those in open court. He identified the 1<sup>st</sup> accused in court. While the interview was going on witnesses were brought to clarify about Timoci. When confronted with these witnesses the 1<sup>st</sup> accused had admitted that she lied about Timoci. The 1<sup>st</sup> accused had not made any complaint and she was not assaulted or threatened during the interview.

In cross examination he denied not giving the rights and forcing the 1<sup>st</sup> accused to sign. He further denied threatening or assaulting the 1<sup>st</sup> accused. He also denied taking the 1<sup>st</sup> accused to see the 2<sup>nd</sup> accused before the interview.

When cross examined by the 2<sup>nd</sup> accused he admitted that the first time the name of the 2<sup>nd</sup> accused is mentioned by him in question 83.

55. It is up to you to decide whether the 1<sup>st</sup> accused made a statement under caution voluntarily to this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement.

56. Two accused are on trial in this case. Each of the accused is entitled to be tried solely on the evidence that is admissible against her. This means you must consider the position of each accused separately, and come to separate considered decision on each of them. It is like having two separate trials for murder but heard together. Just because they are jointly charged does not mean they must be guilty or not guilty. Most evidence in this case is admissible against both accused. However, regarding their police caution interview statements and the charge statement of the 2<sup>nd</sup> accused, which contained confessions, the statements there in are only admissible against the maker of the statement, and on no other. In other words, in each accused's caution interview statements and charge statements of the 2<sup>nd</sup> accused, you must totally disregard what each accused said about her co-accused on the commission of the offence. You can only take into account what she said about herself, regarding the role in the commission of the crime. You must keep in mind about the above rule, when you deliberate on the case.

57. W/DC Sainimili Cavuilati who was called by prosecution corroborated the evidence of the Inspector Levani Tacikalou on the caution interview of the 1<sup>st</sup> accused. In cross examination, she denied that the accused was threatened or forced to sign the interview.

58. WPC Vaciseva Kurilaba who searched and locked the 1<sup>st</sup> accused in cell on 18.6.2004 was also called to give evidence.

59. WDC Ilisapeci Rasaku was handed over the 2<sup>nd</sup> accused on 19.6.2004 at 4.50 p.m. after being arrested by Cpl. Delai. The 2<sup>nd</sup> accused was kept at the charge room seated beside her. Then she had taken her to the crime office for the interview. She was the witnessing officer of the interview. The 2<sup>nd</sup> accused was notified the reasons for the interview and given her rights. The interview was conducted in Itaukei language. Cpl. Delai is deceased now. She was present throughout the interview when Cpl. Delai recorded it. She identified and read over the original of the caution interview of the 2<sup>nd</sup> accused. She identified the 2<sup>nd</sup> accused in court. The 2<sup>nd</sup> accused was cooperating during the interview and she was not assaulted or threatened. She made no complaint to her.

Under cross examination by the counsel of the 2<sup>nd</sup> accused witness denied that 2<sup>nd</sup> accused was already in the station at the time she reported at 3.00 p.m. She further denied 2<sup>nd</sup> accused was threatened and asked to lie down on a table and threatened to be thrown out of window.

60. It is up to you to decide whether the 2<sup>nd</sup> accused made the caution interview statement voluntarily to Cpl. Delai in the presence of this witness. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducement

made to the accused by persons in authority then you could consider the facts in the caution interview statement as evidence. Then you will have to further decide whether facts in this caution interview are truthful. If you are sure that the facts in the caution interview statement are truthful then you can use those to consider whether elements of the charge are proved by this statement.

61. IP Apete who recorded the charge statement of the 2<sup>nd</sup> accused on 20.6.2004 was called to give evidence. He is an officer with 24 years experience in Fiji police force. The 2<sup>nd</sup> accused was informed of her rights and charging was done in Itaukei language. WPC Arieta Wara was the witnessing officer. The accused had not made any complaint. He identified the original notes of the charge statement and the 2<sup>nd</sup> accused.

He was cross examined in length by the counsel for the 2<sup>nd</sup> accused. It was put to him that he wrote the statement and made the 2<sup>nd</sup> accused to sign it. He denied that as a false allegation. He admitted that he used the name of the deceased in the charge at other places of the statement. He further admitted that there are typing errors in the places where this name is mentioned again and he had overlooked that.

62. It is up to you to decide whether the 2<sup>nd</sup> accused made the charge statement voluntarily to this witness. If you are sure that the charge statement was made freely and not as a result of threats, assault or inducement made to the accused by persons in authority then you could consider the facts in the charge statement as evidence. Then you will have to further decide whether facts in this charge interview are truthful. If you are sure that the facts in the charge statement are truthful then you can use those to consider whether elements of the charge are proved by this statement.

63. Prosecution also called DS Reshmi Das who had worked as a crime recorder at the Nadi police station. She was at work on 18-20 June 2004. Her office was opposite the crime office. She had seen the two accused brought to the crime office and interviewed. Nothing improper had happened. She had also taken the two accused for medical examination on 20.6.2004.

Under cross examination by the counsel for the 1<sup>st</sup> accused she denied the 1<sup>st</sup> accused was threatened by officers. She further denied seeing 1<sup>st</sup> accused beaten on knee by an officer.

She also denied that 2<sup>nd</sup> accused was threatened and made to lie down on a table in answers to the cross examination by the 2<sup>nd</sup> accused.

64. If you believe the evidence of this witness beyond reasonable doubt then she corroborates the other police witnesses that nothing improper happened during the interviews of the two accused.
65. The last witness for the prosecution was Detective Mahesh Chand. He was the investigating officer of this case. He was assigned this duty on 11.6.2004. He had recorded the statements of the witnesses and visited the scene of crime. He had visited the victim at the Lautoka hospital. She was in ICU and was unconscious. She was air lifted to New Zealand on 15.6.2004 and had died on the same day. He identified the coronial autopsy report of the deceased.

The 1<sup>st</sup> accused was arrested on 18.6.2004. Steps were taken to record her caution interview by IP Levani. He had gone to the interviewing room to give exhibits. The 1<sup>st</sup> accused was normal.

The 2<sup>nd</sup> accused was arrested on 19.6.2004 and her caution interview was recorded by Cpl. Delai. He had gone to the interviewing room to give exhibits. The 2<sup>nd</sup> accused was normal except for healing injury in the index finger.

The both accused were charged the following day. Then they were taken for medical examination.

Under cross examination by the counsel for the 1<sup>st</sup> accused he denied forcing the 1<sup>st</sup> accused to sign the caution interview or threatening her that she will be thrown out of window. He further denied seeing 1<sup>st</sup> accused beaten on knee with a baton.

In answering the questions on behalf of the 2<sup>nd</sup> accused he said he does not know the availability of the cloths of 2<sup>nd</sup> accused handed over to police. He further denied that 2<sup>nd</sup> accused was asked to lie on a table or assaulting 2<sup>nd</sup> accused with a baton on her knees.

66. If you believe the evidence of this witness beyond reasonable doubt he corroborates the evidence given by other police officers that a proper investigation was conducted.
67. After the prosecution case was closed you heard me explaining both accused their rights in defence. The both Accused elected to give evidence.
68. The position of the 1<sup>st</sup> accused was that she was forced by Sesenieli to go with her to meet her boyfriend Deen on 10.6.2004. They have gone to Bounty restaurant and had joined Deen in drinking. She has a glass of Rum with cola. Thereafter she had gone to the



Frequency night club with them. After some time at the night club she had gone out to answer a call from her dad. When she came back Sesenieli and Deen had come out to go home and she joined them. She had gone to Deen's house and spent the night there. She had a shower and washed her cloths. She had worn the same cloths after ironing them. Following day she had gone home.

At home her father was angry and stopped her playing Netball. She had gone to Lautoka with a friend. When she came back her father had told her, police officers came and took her cloths she wore previous day. Then she went to her Netball coach's house in Nadi and stayed there for a week.

On 18.6.2004 she was arrested by Peni and Delai and taken to Nadi police station. There she was told about the case at the Frequency Lounge. She was taken there. She was told that lady was hit with a bottle. She was told that she was seen there with another. Then she was taken back to the station. There she was asked to lie on a table, whack her knees with a baton and threatened that she will be thrown out of the window. She was taken to Bollywood night club.

Then she was taken back to Nadi police station. There she was beaten again and told that you know everything about Frequency Lounge. After 2<sup>nd</sup> accused was brought in she just signed a document wrote by Mr.Levani.

When cross examined by the counsel for the 2<sup>nd</sup> accused, she stated that she knew 2<sup>nd</sup> accused and met her at Mahafi drive girl's home where they went to school together. On 10.6.2004 in the morning she had met the 2<sup>nd</sup> accused. They have gone to super market and bought some fish. When she went home, father had said fish is bad thus she had gone to return it. Then 2<sup>nd</sup> accused had left her near the bus stop. She had not met her thereafter that day.

Under cross examination by the prosecution she stated that she left the Frequency night club at 11.00 p.m. on 10.6.2004. She further said that she went to take a call about 8.00 p.m. and was talking to her father for about 30 minutes. After that she was sitting outside waiting for the others. She denied that she came out to meet the 2<sup>nd</sup> accused. She further denied entering night club together, going into the office, confronting the owner and attacking her with bottles. She admitted she waited for 2 ½ hours outside the night club.

When questioned by court she said that her father was asking where she was and was growling at her for not coming home. Her home was 20 minutes bus ride from that place.

She further said although her father asked her to come home she waited outside for 2 ½ hours for others to come out.

Under further cross examination by the prosecution she denied that she ran away to coach's house. She said that she did not tell her father where she is going. Further she said although her phone was switched on father didn't call her at all. She also admitted that she never made a complaint to Magistrate. She had not made a formal complaint. But she said that she complained to prison officers. She admitted giving the name 'Tomas' to police.

In re-examination she told the name of 'Tomas' as she was beaten up by police to give the other name and she could not bear the pain. Thus she had told a lie.

69. You watched the 1<sup>st</sup> accused giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? The position taken up by the 1<sup>st</sup> accused in giving evidence in the court is different from his caution interview statement and the position taken up by her at the time of cross examination of prosecution lay witnesses. In other words her version is inconsistent.

Further you have to decide whether it is probable for the first accused to wait for 2 ½ hours in front of the Frequency night club when her father was asking her to come home and her house is 20 minutes bus ride from that place. It is up to you to decide whether you could accept her version and her version is sufficient to establish a reasonable doubt in the prosecution case. If you accept her version 2<sup>nd</sup> accused should be discharged. Even if you reject her version still the prosecution should prove its case beyond reasonable doubt.

70. Second accused also gave evidence. Her position was that she met 1<sup>st</sup> accused on her way to work on 10.6.2004. She had gone with her to super market to buy some fish. Then she had gone to 1<sup>st</sup> accused's house. Then she had gone to work after 1.00 p.m. She had finished work at about 5.00 p.m. Then she had lunch at Lautoka and had gone to Namaka to the house she was staying at. She had come back to Lautoka for work at 7.00 p.m. She was at work till 2.00 a.m. the following day. She had gone back to Namaka after 3.00 a.m. She was there till 9.00 a.m. following morning. On 16.6.2004 she had gone to a restaurant for lunch. There index finger in her right hand got injured on a nail in the wash room. While she was working at Bollywood night club she was arrested and taken to Nadi police station.

She was questioned about the incident at Frequency Lounge night club. She had told that she was working in Lautoka at the time of the incident. IP Mahesh hit her on the head with a baton. Officer Peni made her to lie on a table. Then he had beaten sole of her feet with a baton. Further he had got hold of collar and pants and told her that she will be thrown out

of the window. She was frightened. Then she was taken to the interview room. WPC Rasaku was not present at the interview and came only when she went to sign the statement. She had browsed through the statement and had signed it.

She had not made a complaint to police or the Magistrate about this. She complained to prison officers. She drafted a letter, signed it and sent but she had not heard back. Beside prison she had told her counsel. She had not seen the 1<sup>st</sup> accused at the police station. She had not mentioned the name of the deceased in the charge statement.

While being cross examined by the State counsel she admitted that she signed her caution interview statement on her free will. Further she admitted that no one ill treated her during the record of charge statement and she signed that document.

71. The 2<sup>nd</sup> accused's defence is one of alibi. She says that she was not at the scene of crime when it was committed. As the prosecution has to prove her guilt so that you are sure of it, she does not have to prove she was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.

72. Before the Criminal Procedure Decree came into force in 2009 the legal position regarding alibi was in Section 234 of the Criminal Procedure Code. Section 234 provides that:

'On a trial before the Supreme Court the defendant shall not without the leave of the Court adduce evidence in support of an alibi unless, before the end of the prescribed period he gives notice of particulars of the alibi.

In this Section "prescribed period" means the period of fourteen days from the end of the preliminary inquiry before the magistrate.

73. Present Criminal Procedure Decree in Section 125 provides that:

'On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

A notice under this Section shall be given-

(a) Within 21 days of an order being made for transfer of the matter to the High Court (if such order is made); or

(b) In writing to the prosecution, complainant and the court at least 21 days before the date set for trial of the matter, in any other case.

74. A notice was given of alibi in this case only on 18/09/13 that is well outside the prescribed by law.

75. You watched the 2<sup>nd</sup> accused giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? The position taken up by the 2<sup>nd</sup> accused in giving evidence in the court is different from her caution interview statement, charge statement and the position taken up by her at the time of cross examination of prosecution lay witnesses. In other words her version is inconsistent.

Further you have to decide whether it is probable for the second accused to go have lunch at Lautoka after 5.00 p.m. on 10.6.2004 and then go to Namaka and come back to Lautoka at 7.00p.m. It is up to you to decide whether you could accept her version and her version is sufficient to establish a reasonable doubt in the prosecution case. If you accept her version 2<sup>nd</sup> accused should be discharged. Even if you reject her version still the prosecution should prove its case beyond reasonable doubt.

76. I must remind you that when an accused person has given evidence she assumes no onus of proof. That remains on the prosecution throughout. Her evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

77. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:

- (i) You may believe her and, if you believe her, then your opinion must be Not Guilty. She did not commit the offences.
- (ii) Alternatively without necessarily believing her you may say 'well that might be true'. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) The third possibility is that you reject her evidence as being untrue. That does not mean that she is automatically guilty of the offence. The situation then would be the same as if she had not given any evidence at all. She would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that she committed the offences then the proper opinion would be Guilty.

78. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and from your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

79. It is up to you to decide whether you could accept the evidence of each of the accused. The accused does not have to prove anything. If the accused had raised a reasonable doubt then the benefit of that doubt should be given to her and she should be found not guilty.

80. Remember, the burden to prove each accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt.

81. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of each accused's guilt of, you must find her guilty for the charge. You have to consider evidence against each accused separately. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of each accused's guilt, you must find her not guilty as charged.

82. Your possible opinions are as follows:

The charge of Murder 1<sup>st</sup> Accused – Guilty or Not Guilty

2<sup>nd</sup> Accused – Guilty or Not Guilty

Manslaughter 1<sup>st</sup> Accused – Guilty or Not Guilty

2<sup>nd</sup> Accused-Guilty or Not Guilty

83. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

84. Any re-directions?

Sudharshana De Silva  
**JUDGE**

**AT LAUTOKA**  
**On 24<sup>th</sup> September 2013**

**Solicitors for the State:**  
**Solicitors for the 1<sup>st</sup> Accused:**  
**Solicitors for the 2<sup>nd</sup> Accused:**

**Office of the Director of Public Prosecution**  
**Office of the Legal Aid Commission**  
**Mr. Anil J Singh**