

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

**CRIMINAL CASE NO: HAC 384 OF 2012**

**BETWEEN** : STATE

**AND** : AMINIO RAWAIDUVU

**Counsel** : Ms. L. Latu with Ms. M Khan for the State  
Mr. S. Valenitabua for the Accused

**Hearing** : 28<sup>th</sup>, 29<sup>th</sup> 30<sup>th</sup> October 2013 and 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup>  
November 2013

**Summing Up** : 8<sup>th</sup> November 2013

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## SUMMING UP

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1. **ROLE OF THE JUDGE AND ASSESSORS.**

Madam Assessor and Gentlemen Assessors:

- (i) The evidence for the prosecution and the defence have been led and concluded. There will be no more evidence. The learned Counsel for both parties made their closing addresses to you. It is now my duty to sum up the case to you. After my summing up you will be asked to retire for your deliberations. Once, each of you, madam assessor and gentlemen assessors, reach to a conclusion on the final verdict, the court will re-convene and your individual opinion will be asked. At any time, you will not be asked to give

reasons for your opinions. The opinions of you three need not to be unanimous. Nevertheless, it would be desirable if you could agree on the final opinion. As the presiding judge of this case, though I am not bound by your opinions in delivering the final judgment of the court, I assure you, that your opinions will carry a great weight with me when I deliver my judgment.

- (ii) In my Summing Up I will direct you on the relevant areas of law which apply to this particular instance. You must accept that legal position and act upon that. In other words, you must apply the law as I direct you to the facts of this case. Facts, as you heard and saw in this court room, are entirely within your domain. You are the masters of the facts or judges of the facts of this case. It is your duty to determine what exactly happened in front of East Court Restaurant on 21<sup>st</sup> of October 2012, based on the facts of the case.
- (iii) In reaching to your final opinion, you have to rely on the evidence you saw and heard, from the witness box and the documentary evidence tendered in court, and nothing else. You should simply disregard what you saw or heard from the printed or electronic media regarding this case before or during the trial. At the same time, any views or opinions expressed by your friends, family members, relatives or anybody should face the same fate. It is you who have to draw your own conclusions based on the evidence in this case. The learned counsel for the prosecution and defence, while making their closing submissions highlighted certain facts and tried to formulate their opinions according to their own case theories. You need not to accept either of those versions unless you agree with those. Same principle applies to me as well. If I express any opinion or appear to do so regarding any of the facts, do not follow it, simply because it came out of the Judge. It is solely your task to form your own opinions. In my summing up I might not touch all the areas or evidence which you think to be important. Please feel free to give due consideration to all the evidence you see fit, though I mention it or not.
- (iv) You have to decide the credibility and truthfulness of each and every witness. In doing so, you can rely on not only what you heard, but what you saw as well. The way witnesses offered evidence from the witness box, how they face the cross-examination of the opposing counsel, were they firm on their stand or evasive, can be helpful in determining their demeanor and in turn to judge their credibility as well. I would like to emphasize that you madam

assessor and gentlemen assessors, you were chosen to be judges of the facts of this trial as you represent a cross section of the pulse of the society. Your common sense and the experience in day to day life must come into operation when you deliberate this case. That common sense and the life experience have to be utilized in deciding or assessing the truthfulness or honesty of witnesses. In that task, you have the liberty to accept the whole version of a testimony of a witness or a portion of that testimony and reject the rest. You can refuse to accept even the whole testimony of a witness.

## 2. THE BURDEN OF PROOF

- (i) When approaching the matter in hand, you madam assessor and gentlemen assessors, I would like to draw your attention to certain basic rules which govern our criminal justice system. The accused is presumed to be innocent, though he is charged before this court with a count of Manslaughter, until he is found guilty by this court. Proving his guilt is the sole burden of the prosecution, as it was the prosecution, who accuses the accused of committing the offence of Manslaughter. The duty of the prosecution to prove the case against the accused continues throughout the trial and it never shifts to the accused. The law does not impose any obligation or duty upon the accused to prove his innocence or otherwise.
- (ii) When proving the case against the accused, the law expects the prosecution to prove it beyond reasonable doubt. That means the prosecution must prove the case for you to be 'sure' of the guilt of the accused and nothing else will discharge their burden. There is no specific formula where you can have a mathematical precision to be 'sure'. It is all about your day to day experiences and common sense come into play once again. The ultimatum is that you, madam assessor and gentlemen assessors, must be 'sure' of the guilt of the accused based on the presented evidence in court by the prosecution. If you have a 'reasonable doubt' over the guilt of the accused that benefit should immediately be awarded to the accused. Such a doubt, as stated, should definitely be a 'reasonable doubt'. A mere possible doubt or trivial and imaginary doubts will not create a reasonable doubt. It should be an actual or substantial doubt which shakes the foundation of the case of the prosecution. The doubts should stem out of the evidence what you saw and heard in court.

### 3. THE INFORMATION

- (i) The Director of Public Prosecutions, on behalf of the State has charged the accused for the following count of Manslaughter.

First Count  
*Statement of Offence*

**MANSLAUGHTER:** Contrary to section 239 of the Crimes Decree 44 of 2009.

*Particulars of Offence*

**AMINIO RAWAIDUVU**, on the 21<sup>st</sup> day of October 2012 at Suva in the Central Division, punched **CAI HANWEN** causing his death and **AMINIO RAWAIDUVU**, was reckless as to the risk that the punch will cause serious harm to **CAI HANWEN**.

### 4. ELEMENTS OF THE OFFENCE

- (i) In this case prosecution has to prove the following elements to prove the offence of 'Manslaughter'.
- The accused, (Aminio Rawaiduvu in this instance)
  - causes the death of another person (Cai Hanwen)
  - by engaging in a conduct (punch).
  - either with the intention to cause serious harm to Cai Hanwen or
  - was reckless as to the risk that his conduct will cause serious harm to Cai Hanwen.
- (ii) 'Conduct', in legal context, is an 'act' or 'state of affairs'. 'Engaging in a conduct' means 'doing an act'. Therefore, 'punching' the deceased by the accused is engaging in a conduct.
- (iii) That act need not be done with the intention of killing a person. But, it must do either with the intention of causing serious harm to the victim or

having been reckless to the risk that his act will cause serious harm to the deceased.

- (iv) A person possesses an 'intention' in respect of his 'act', if he really means to engage in that act. If he believes that the circumstances exist or will exist, he has the 'intention' about the 'circumstance' he deals with. Finally, he has the 'intention' of a 'result' on his act, if he means to bring such result or was aware that such a result will occur in the ordinary cause of events.
- (v) In law, the accused person is 'reckless' in respect of a 'circumstance', if he is aware that a substantial risk exists or will exist with the circumstances known to him and still proceeds to take such risk in an unjustifiable manner. The accused is 'reckless' in respect of the 'result' of his 'conduct' if he was aware that the substantial risk that he is going to take will lead to the 'result' and yet takes such an unjustifiable risk. It is a matter of fact for you madam assessor and gentlemen assessors to decide whether taking such a risk is unjustifiable or not. In deciding that, you can consider the intention and the knowledge of the accused as well.

## 5. AGREED FACTS

- (i) The following facts are been agreed between the prosecution and the defense at the beginning of this trial. Thus, the prosecution is relieved from proving those facts. You madam assessor and gentlemen assessors can positively assume that the prosecution has proved those facts beyond reasonable doubt.
- That the accused is **alleged** to have committed the offence of manslaughter contrary to section 237 of the Crimes Decree No. 44 of 2009 in that the Accused on the 21<sup>st</sup> day of October 2012, at Suva in the Central Division, punched Cai Hanwen ["the Deceased"] causing his death and, at the time of punching, the Accused was reckless as to causing death.
  - That it is admitted that the Accused is Aminio Rawaiduvu, who was 32 years old at the time the alleged offence was committed and who was at all material times employed as a service station attendant at Total Service Station, Victoria Parade, Suva.

- That it is admitted that the Accused is now employed at Total Service Station, Lami Town.
- That the alleged offence occurred on the 21<sup>st</sup> day of October 2012 at Victoria Parade, Suva.
- That the Accused was caution-interviewed by D/Cpl 2105 Senitiki Nasave on the 23<sup>rd</sup> day of October 2012.
- That the accused was formally charged by WDC 3124 Arieta Samosi on the 24<sup>th</sup> day of October 2012.
- That the Accused punched the Deceased on the face and the impact of the single blow caused the Deceased to fall backwards, where his head landed on the pavement.

### **Agreed Documents**

- Medical Cause of Death of Cai Hanwen subject to cross-examination of Assoc/Prof Ramaswamy Ponnu Swamy Goundar.
- Pathologist or Post-Mortem Examination Report of Assoc/Prof Ramaswamy Ponnu Swamy Goundar subject to cross-examination.
- Passport of Cai Hanwen.
- Record of Interview of Aminio Rawaiduvu dated the 23<sup>rd</sup> day of October 2012.
- Charge Statement of Aminio Rawaiduvu dated the 24<sup>th</sup> day of October 2012.
- Statement form of Zhang Shukui dated the 22<sup>nd</sup> day of October 2012.
- Statement form of Semisi Tanalaba dated the 24<sup>th</sup> day of October 2012.
- Statement form of Luke Seniceva dated the 23<sup>rd</sup> day of October 2012.
- Statement form of Rajen Prasad dated the 24<sup>th</sup> October 2012.
- Statement form of D/Cpl Marika Momo dated the 23<sup>rd</sup> day of October 2012.
- Statement form of WDC 3142 Arieta Samosi dated the 24<sup>th</sup> day of October 2012.

- Statement form of WPC Kalisi Tawake dated the 23<sup>rd</sup> day of October 2012.

## **6. THE CASE OF THE PROSECUTION**

- (i) Mr. Esala Ligani, a Security Officer of Angel's Night Club was the 1<sup>st</sup> prosecution witness. He recalled 21<sup>st</sup> of October 2012 and said he was on duty around 11.30 in the night when he saw the accused, the Bouncer of Union Night Club and another went passing him to go to East Court Restaurant. Whilst the bouncer was waiting outside, the other two had gone inside the restaurant. Mr. Ligani had seen the accused pulling the hair of a 'Chinese man' who was talking on phone, when he came out of the restaurant. Then both the accused and the Chinese man had started to tussle. During the tussle, the accused had fallen on the ground and the bouncer of Signal Night Club had managed to pull the Chinese man away.
- (ii) Then the Chinese man had been taken in front of Signal's Night Club. He had returned to the same place where he was and started playing with his mobile phone again. Mr. Ligani said the Chinese man was standing in between East Court Restaurant and Signal Night Club, facing Angel's Night Club where he was watching all this. Mr. Ligani then said that he saw the accused giving the food and his bag to another person came with him, walked towards the Chinese man and punched his face. Mr. Ligani demonstrated in court how the accused punched the Chinese man and how the Chinese man fell on ground.
- (iii) The witness said that the Chinese man did not have any time to defend as he was fully concentrating on the phone. Accused had been taken away by his friends. Then Mr. Ligani and some other Chinese people had tried to wake up the injured Chinese man but failed as he was unconscious by that time. Then the injured had been sent to the hospital by a taxi along with 3 other Chinese men.
- (iv) Dr. Vivek Lal of Colonial War Memorial Hospital was the 2<sup>nd</sup> prosecution witness. He had examined a Chinese national who was brought to the hospital on a wheel chair around 5am on 22<sup>nd</sup> of October 2012. He said the

patient was smelling liquor and in a coma. He had not responded to the light as right pupil was dilated. He had managed to gather from the other Chinese persons who accompanied the patient through sign language that the patient had a struck on his head. A bruise had been noted on his right knee. With the dilated pupil, the doctor said that he suspected of increased pressure inside the skull because of internal bleeding. The witness said the related history to him about the patient was consistent with his findings. The patient had been referred to a CT scan, which had confirmed the accumulation of blood in right parietal area, and then to the operation theatre. Dr. Vivek confirmed that there was no skull fracture or massive external bleeding, but the reading of 6/15 in the Glasgow Coma scale showed that the patient was in a coma. Finally, the doctor said, a blunt force trauma could have been the reason for the injury he observed.

- (v) Former Detective Sergeant Senitiki Nasave was the next witness of the prosecution. He was the Investigating Officer in this case and had interviewed the accused. He tendered the cautioned interview notes, both the hand-written and typed versions to court marked as prosecution Exhibit No. 8 (1) and (2). Further, he tendered the Charged statement of the accused, both handwritten and typed versions, as prosecution Exhibit No. 9 (1) and (2). Both these documents were tendered to court with the consent of the defence. Finally, he tendered a photocopy of the Passport of the deceased, Cai Hanwen, as prosecution Exhibit No. 10 as defence did not have any objection to that document.
- (vi) Police Constable 4309, Sakiasi Koroi, a Crime Scene Officer testified to the effect that he photographed the alleged crime scene and the corpse during the Post Mortem. A booklet contained those photographs was tendered to Court marked as prosecution Exhibit No. 8.
- (vii) Associate Professor Ramaswamy Ponnuswamy Goundar tendered the Post Mortem Report he prepared after the autopsy of the deceased as prosecution Exhibit No. 12. He formulated an expert opinion as to the cause of death of the deceased. The main reason, according to Prof. Goundar was "Compression of Medulla Oblongata". He described the medical terminology in simple terms as when there is an increased pressure inside the skull, the brain pushes downwards and such a pressure affects the function of the vital



organs such as heart and lungs, which leads to the death of a person. The Professor said that an 'increased pressure' can be caused by falling on ground after a 'blow' on face. The expert witness elaborated how the hemorrhages can cause on brain 'with ruptured blood vessels in the covering layers. Finally, Professor Goundar said that he noted an 'excessive loss of blood' from the deceased and opined that it also contributes to the death. His expert opinion was that the clinical history of 'assault' he obtained from the police officers and the hospital file was consistent with his autopsy findings.

- (viii) That is the case of the prosecution. The crux of their case is that the accused punched on the face of the deceased and the deceased fell on the ground whereby he hit his head on the cement footpath. The injuries you madam assessor and gentlemen assessors, saw in the booklet, according to the prosecution, were caused as a direct result of the conduct or punch of the accused. In this background, the court called for the defence from the accused.

## **7. THE DEFENCE CASE**

- (i) Mr. Aminio Rawaiduvu, the accused offered evidence from the witness box. He said that he went to East Court Restaurant to buy some food and cigarettes. After buying the food, he had tried to come out, but failed as a gang of Chinese men were blocking his doorway. He had therefore pushed one man and came out of the restaurant. The Chinese man then came behind the accused and held him from his collar and had thrown him away. Upon falling on ground, the Chinese man had kicked his mouth and stepped on his back. The accused had sustained a bruise on his forehead. The Medical Examination form of the accused was tendered to court as defence Exhibit No. 3 with the consent of the prosecution. He denied that he pulled the hair of the Chinese man before this brawl.
- (ii) Thereafter, the accused had stood up, given the bag contained food to one of his friends and punched the Chinese man on his face as the Chinese man was getting ready to fight again. The accused said that the deceased fell backwards on the flat cement footpath with his punch and hit the back side of his head. Mr. Aminio said that he never intended to cause the death of the

deceased/Chinese man and he punched the Chinese man because he was assaulted. Finally, the accused said that he told the exact true story to the police as well, when he was interviewed and charged. That is the defence case.

## 8. ANALYSIS

Madam assessor and gentlemen assessors.

- (i) There is no dispute in this instance that Cai Hanwen, a Chinese national was dead. There is no dispute that the accused punched his face and he fell backwards hitting his head on ground with that punch. The prosecution says that the accused knew when he punched the small made Chinese man on his face that the said Chinese man will fall on the ground and therefore the accused was reckless in his conduct, which caused the death of Cai Hanwen due to the injuries on the brain. In contrary, the defence says that the accused never intended to kill the Chinese man and never anticipated him to fall on ground as a result of the punch. It is now your duty madam assessor and gentlemen assessors, to decide what narration of events, out of these two, you are going to accept.
- (ii) Mr. Esala Ligani, the Security officer of Angel's Night Club said the accused and two others went passed him and he saw two of them going to East Court Restaurant. Then he said he saw the accused pulling the hair of a Chinese man, both accused and that Chinese man got involved in a tussle and later accused punching the face of the Chinese man to fall down backwards on the ground. The accused denied that he pulled the hair of the deceased, but said that he only pushed him. According to the accused, it was the deceased who had started attacking him after that push and in fact he was 'thrown' away by the deceased, kicked and stepped on his back. Defence suggested to Mr. Ligani that he was not properly placed to see what took place between the accused and the deceased. Mr. Ligani denied the suggestion and said he was standing just two doors or 10 – 15 meters feet away to the scene. Nothing was shown to court by either party that Mr. Ligani has a personal interest to this case. You madam assessor and gentlemen assessors, have to decide what weight that you are going to attach to the credibility and truthfulness of the evidence of Mr. Ligani.

- (iii) Referring to the 2<sup>nd</sup> episode, Mr. Ligani said that it was the accused who punched the deceased after giving the bag contained food to one of his friends whilst the Chinese man was 'playing' with his mobile phone. The accused said that after the initial tussle he had to punch the deceased to defend himself. I will direct you the law pertaining to 'self defence' in the next paragraph. First, madam assessor and gentlemen assessors, you have to decide whose version you are going to believe, Mr. Ligani's or the accused's. If you prefer to believe the accused's version, then you can proceed to assess whether the accused acted in self defence or not.
- (iv) After evaluating the available evidence, if you think that the accused had acted or may have been acting in lawful self-defence, the accused is entitled to be found not guilty of the charge of manslaughter. The duty rests on the prosecution to prove beyond reasonable doubt that the accused did not act in self defence. The accused need not to prove anything, inclusive of acting in self defence as I told you at the very beginning. In deciding whether the accused acted in self defence or not, first you have to satisfy yourselves that the accused believed that there was a need or necessity to use force to defend himself. 'Need to use force' does not apply when the aggressor was the accused himself or the accused acted in revenge or when the accused knew that he need not to resort to violence.
- (v) Having regard to the circumstances of this case, if you think that the accused did not honestly believe that there is a necessity to use force against the deceased, he was not acting in lawful self defence. Nevertheless, if you think that it was necessary for the accused to use force in that instance, you must consider whether the type and amount of force used by the accused was reasonable or not. We cannot have a mathematical calculation and say that this amount of force would have been sufficient in a given scenario as everything happens according to the way brain responds on the spur of the moment. Yet, if the force used is blown out of proportion to the attack anticipated on the accused, it is unreasonable. Though you think that the accused had all the reasons to believe that he should use 'force' to defend himself, if you think that the 'force' he used was unreasonable, it cannot be said that the accused acted in self defence. With the assistance of these principles of law, you have to decide now, whether the accused was acting in

self defence or not. Madam assessor and gentlemen assessors, before you come to this extent, you have to decide for yourselves, whose version that you are going to believe and relied upon, either Mr. Ligani's or accused's.

- (vi) The reason averred by the accused to hit back was that the deceased assaulted him by throwing away like in the game of 'JUDO', kicking his face when fallen on ground and stepped on his back. The prosecution challenged that version by highlighting the Medical Examination Form (defence Exhibit No. 3) of the accused. It reflects a minor bruising on the face and a minor laceration on right index finger. You madam assessor and gentlemen assessors might have to take a note of this factor when reaching to your final determinations.
- (vii) Defence challenged the 'chain of events' from the point deceased receiving the punch and until him been hospitalized at CWM, that is, more precisely, from 11.30pm to 5am in the night in issue. It was stressed by the defence that nobody knows what exactly took place during that period as the two Chinese people who accompanied the deceased throughout this duration were not present in court to have clarifications. Yet, the defence pointed to their statements (Mr. Lin Masheng and Yang Chang) and said the deceased had fallen on the wharf for the 2<sup>nd</sup> time before taking him to the hospital. The learned defence counsel highlighted that the deceased was taken straight to the hospital from the crime scene and he had come back without getting admitted or taking treatments. He said, when the two Chinese nationals say they went to the hospital directly from the wharf, Rajen Prasad, the taxi driver who took the Chinese people to the hospital had told that he picked them from Gaji Road.
- (viii) In contrary, the prosecution says what matters is the initial incident which took place in front of East Court Restaurant as all the other subsequent health issues of the deceased arisen out of that 'punch' and the fall. They highlighted that the defence agreed and admitted that the accused punched the deceased on his face and the impact of that single blow caused the deceased to fall backwards, whereby the deceased's head hit the ground. The prosecution basically relied on the expert medical evidence. Doctor Vivek Lal said that it will take 6 – 8 hours for the symptoms of a brain damage to be visible. Professor Goundar said that it is possible for the deceased to walk a distance

and fall again due to the pressure inside the brain. Further, he said that there is no specialist Neuro Surgeon in Fiji right now and the Surgeon who did the brain surgery had given his best try to save the life of the deceased by decompressing the brain pressure. With the assistance of two medical experts and Mr. Ligani, prosecution says, that they proved it beyond reasonable doubt that it was the punch of the accused directly affected to cause the death of the deceased. It is now your turn to weigh the two sides and decide what appeals you most.

- (ix) When doing so, you might have to consider the evidence given by the medical experts in depth. The two medical professionals took the stand as 'experts' in their respective subject areas. Expert evidence is permitted in the criminal trials to provide the panel of assessors a better view on certain scientific information, which is outside your experience and knowledge. An expert witness is entitled to express his opinion in relation to the issues arise within his subject area of expertise. Nevertheless, after a careful consideration of the expert opinions, you can either accept the expert opinion or reject it. Once again it is for you to decide whose evidence and whose opinions you are going to accept or reject.

## 9. SUMMARY

- (i) I remind you once again that the accused need not to prove anything to show his innocence. The fact you do not believe his version, does not necessarily mean that he is guilty of the charge. The prosecution still must prove the charge beyond reasonable doubt or to your fullest satisfaction over the guilt of the accused. If you have any reasonable doubt on the case of the prosecution, you have to find the accused 'NOT GUILTY'.
- (ii) Finally, I recall the instructions I gave you in my opening address. I hope you approached this case with an open mind. The accused is presumed to be innocent until proven guilty by a court of law. Thus, if you are satisfied beyond reasonable doubt or for sure that the prosecution has proved its case, you must find the accused guilty to the charge of Manslaughter. If you are not sure of the guilt of the accused after having analyzed the evidence of the prosecution, you must find him 'NOT GUILTY'.

- (iii) Your possible opinions in this instance are 'GUILTY or 'NOT GUILTY' to the charge of Manslaughter.
- (iv) You may now retire to deliberate your opinions. When you are ready with the opinions, I will reconvene the court and ask your individual opinion.
- (v) Any re-directions or additions to what I said in my summing up Ms. Latu and Mr. Valenitabua?

Janaka Bandara  
**Judge**

**At Suva**  
Officer of the Director of Prosecution for State  
Esvee Legal for the Accused