

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 261 OF 2015S

STATE

vs

1. JOSAIYA VUSUYA
2. KELEPI SAMUTA QAQA
3. TEVITA DAKUITURAGA

Counsels : Ms. S. Serukai and Ms. S. Tivao for State  
Ms. A. Tuiketeti and Mr. S. Vuki for Accused No. 1  
Ms. T. Kean for Accused No. 2  
Ms. E. Leweni for Accused No. 3

Hearings : 27 to 31 March, 3, 6, 7, 10 and 11 April, 2017

Summing Up : 13 April, 2017

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## SUMMING UP

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### A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.

2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.
3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accuseds. There is no obligation on the accuseds to prove their innocence. Under our system of criminal justice, an accused person is presumed innocent until he is proved guilty.
5. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt, so that you are not sure of their guilt, then you must express an opinion, that they are not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accuseds or the victims. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. We will now discuss the information. You have a copy of the information with you, and I will now read the same to you:

*"...[read from the information]..."*

**D. THE MAIN ISSUES**

8. In this case, as assessors and judges of fact, each of you will have to answer the following questions:
- (i) On Count No. 1, did the accuseds, on 18 July 2015, at Nausori in the Central Division, murder Epineri Waqawai?
  - (ii) On Count No. 2, did accused no. 2, on 18 July 2015, at Nausori in the Central Division, with intent to cause grievous harm to Savenaca Naitaba, unlawfully wounded him by hitting his head with a beer glass?

**E. THE OFFENCES AND THEIR ELEMENTS**

9. There were two counts in the information. We will first discuss count no. 1, which involved the serious offence of murder. It was alleged that the accuseds, on 18 July 2015, murdered Epineri Waqawai, at Nausori in the Central Division, contrary to section 237 of the Crimes Act 2009. For an accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused did a wilful act; and
  - (ii) that wilful act caused the death of the deceased; and
  - (iii) at the time of the wilful act, the accused either;
    - (a) intended to cause the death of the deceased; or
    - (b) is reckless as to causing the death of the deceased.
10. On the first element of murder, a "wilful act" is a voluntarily act by the accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, A wants to shoot B with a gun. A picks up a gun, and shoots B in the heart, and as such, A did "a wilful act". Likewise, when A assaults B. When A assaults B, A did "a wilful act".
11. On the second element of murder, "the wilful act must cause the death of the deceased". This simply means that the accused's wilful act, substantially contributed to the death of the deceased. The accused's wilful act must be a substantial contributor to the death of the deceased. In other words, the accused's wilful act was a substantial cause of the deceased's death. Continuing from the above examples when A shot B in the heart, with a gun, B later died as a result of the injuries to his heart. A's shooting B in the heart (wilful act) was a substantial

cause of B's death. Likewise, when A assaults B, causing injuries to his body, which later resulted in B's death. A's assaulting B's body (wilful act) set in motion a chain of events which led to B's death (A's wilful act causes B's death) and as such, was a substantial cause of B's death.

12. The third element of murder concerned its fault element. There are two fault elements in murder, as described in paragraph 9(iii)(a) and 9(iii)(b). In this case, the prosecution is running its case on the fault element described in paragraph 9(iii)(b). We will therefore ignore the fault element described in paragraph 9(iii)(a), as the prosecution need only prove one fault element to succeed on the charge of murder. The prosecution's case theory in this case was that the three accuseds jointly assaulted the deceased at the material time, and as such, were reckless as to causing his death. In law, a person is reckless with respect to a result if:

- (i) he is aware of a substantiable risk that the result will occur, and
- (ii) having regard to the circumstances known to him, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact for you. The following questions had to be examined and answered: Were the accuseds aware of a substantial risk that the deceased would die if they continued to assault him? And having regard to the circumstances known to them, was it justifiable to take the risk by continuing to assault him, at the material time? If you think they were not justified in taking the risk, then they were reckless in causing the deceased's death, and they would be guilty of murder. If you think they were not reckless, then they were not guilty of murder.

13. If you are sure that all the elements of murder, as expressed in paragraph 9(i), 9(ii) and 9(iii)(b) hereof are satisfied; then you must find the accuseds guilty as charged. If you find that the accuseds are not guilty of murder, then you are entitled to look at the lesser offence of "manslaughter", although they were not formally charged with the same. Manslaughter consisted of three elements:

- (i) that the accused did a wilful act; and
- (ii) that wilful act caused the death of the deceased; and
- (iii) at the time of the wilful act, the accused either:
  - (a) intended to cause serious harm to the deceased; or
  - (b) is reckless as to causing serious harm to the deceased.

The first and second element of manslaughter are similar to the first and second element of murder. The difference is the fault element. For manslaughter, the accused must have intended serious harm, not death; alternatively, he was reckless as to causing serious harm, not death, to the deceased.

14. You will notice in the information that the prosecution, in count no. 1, in the particulars of offence, began with the phrase, “...**JOSAIA VUSUYA, KELEPI SAMUTA QAQA and TEVITA DAKUITURAGA...**” The prosecution is alleging that the accuseds committed the above offence as a group. In other words, to make them jointly liable for the above offence, the prosecution is relying on and running its case, on the concept of “joint enterprise”.
15. “Joint enterprise” is “when two or more persons form a common intention to prosecute an unlawful purpose in conjunction 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” (Section 46, Crimes Act 2009). In the Oxford Advanced Learners Dictionary, Oxford University Press, 6<sup>th</sup> ed 2002, the word “probable” means “likely to happen, to exist or to be true”, and “consequence” means “a result of something that has happened”. In this case, there were three accuseds. Each participant must be shown to have in contemplation the probability of infliction of serious harm on the deceased in the execution of the planned unlawful purpose. You must examine the whole evidence, and consider each accused's case separately.
16. When considering each accused, you will have to ask yourself the following questions: Did each of them form a common intention to assault Epineri Waqawai? In other words, did they jointly agree to assault Epineri? An agreement does not have to be done formally, it could be done by a wink or nod or by conduct. You will have to look at the parties' conduct and the surrounding circumstances to decide the above issue. If you find that the accuseds formed a common intention to jointly assault Epineri, was his death a probable consequence of the joint assault on him? If your answer to the above is yes, all the accuseds are guilty as charged on count no. 1. If its otherwise, then they are not guilty as charged. It is a matter entirely for you.
17. In the case of Mr. Josaia Vusuya (Accused No. 1), he argued that when he punched Epineri on the right jaw and/or cheek, at the material time, he was doing so in self-defence, and thus was

not liable for murder and/or manslaughter. Section 42 (1) and (2) of the Crimes Act 2009 reads as follows:

*“...A person is not criminally responsible for an offence if he carries out the conduct constituting the offence in self-defence. A person carries out conduct in self-defence if and only if he believes the conduct is necessary: (a) to defend himself or another person...”*

If you find on the facts that the accused was acting in self-defence, when he punched Epineri on the right jaw and/or cheek and you are sure of the same, he is not guilty of murder or manslaughter. If it's otherwise, then he is guilty of either murder, or alternatively, manslaughter.

18. On count no. 2, Accused No. 2 was charged with “act intended to cause grievous harm”, contrary to section 255(a) of the Crimes Act 2009. It was alleged that on 18 July 2015, at Nausori in the Central Division, he wounded Savenaca Naitaba when he punched him on the head while holding a beer glass. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt the following elements:
  - (i) the accused
  - (ii) with intent to do some grievous harm
  - (iii) to the complainant
  - (iv) unlawfully wounds him
  - (v) by any means
  
19. The fault element of the offence involved the accused intending to do some grievous harm to the complainant. Grievous harm meant some serious or dangerous harm. With the above intention in his mind, the accused then proceeded to unlawfully wound the complainant by any means whatsoever.
  
20. There are three accuseds on trial. Each of the accused is entitled to be tried solely on the evidence that is admissible against him. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged, does not mean that they must all be guilty or not guilty.

21. There are two counts in the information. You must consider them separately and come to a considered decision on each of them, in the light of the total evidence presented.

**F. THE PROSECUTION'S CASE**

22. The prosecution's case were as follows. On 18 July 2015, the deceased Epineri Waqawai was 25 years old. His younger brother, Savenaca Naitaba (PW1) was 23 years old. He was then working as a ferris wheel attendant. Josaia Vusuya (Accused No. 1) was 30 years old. He was a Nausori food vendor. Kelepi Qaqa (Accused No. 2) was 28 years old. He was unemployed at the time. Tevita Dakuituraga (Accused No. 3) was 32 years old at the time. He was a labourer.
23. According to the prosecution, Savenaca and his brother Epineri were at the Bridge Nightclub at Nausori on 18 July 2015 at about 9pm. They were drinking liquor with an Indo-Fijian man, and were having a good time. According to the prosecution, Kelepi and two of his friends joined the group and they were consuming liquor together. Savenaca and his brother decided to go to another nightclub, as they were the only ones buying the beer. Kelepi and his friends were becoming loud and noisy. Savenaca and Epineri left the nightclub. Kelepi followed the two outside the nightclub and asked for his money. Savenaca and his brother denied taking his money.
24. Kelepi left and Savenaca and Epineri went towards the Whishling Duck nightclub. Near RB Patel supermarket, Kelepi suddenly re-appeared and threw two left hand punches at Savenaca's head above the right ear. According to the prosecution, Kelepi was holding a beer glass in his hand. The same cracked when he punched Savenaca, and according to the prosecution, he used the same to cut the right side of Savenaca's head to the back. Savenaca was injured and bleeding as a result. According to the prosecution, Kelepi and Tevita went towards Epineri and jointly attacked him by repeatedly punching him. Epineri was defending himself by punching them back.
25. According to the prosecution the above fight moved towards Brown Lane and towards Ross Street and to the back of Westpac Bank. Kelepi and Tevita were attacking Epineri. Savenaca was standing by injured, and was too weak to assist his brother. According to the prosecution Josaia appeared at the scene, and joined Kelepi and Tevita attack Epineri. He threw a hard straight left at Epineri's right cheek and/or jaw, and he fell with his head hitting an iron fence post. He then fell down with his head hitting the concrete drain. According to the prosecution, Josaia,

Kelepi and Tevita then repeatedly stomped, kicked and punched Epineri while he lay unconscious on the ground. They also swore at him. Josaia, Kelepi and Tevita later fled the scene. Savenaca and Epineri were later taken to Nausori Health Centre for medical assistance. Later Epineri was taken to CWM Hospital. He died on 20 July 2015 at 6am, 31 hours after the above assaults.

26. The matter was reported to police. An investigation was carried out. On 23 July 2015, the accuseds appeared in Nausori Magistrate Court charged with murdering Epineri (count no. 1) and Kelepi was charged with unlawfully wounding Savenaca with intent to cause grievous harm (count no. 2). Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accuseds guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASES**

27. On 27 March 2017, the first day of the trial, the information was put to the accuseds, in the presence of their counsels. They pleaded not guilty to the charges. In other words, they denied the allegations against them. When a prima facie case was found against them, at the end of the prosecution's case, wherein they were called upon to make their defence, they choose to give sworn evidence, in their defence. Josaia called Doctor Salome Natuva (DW2) and his younger brother Sirino Vakatawa (DW3) as his two witnesses. Kelepi also relied on DW2 and DW3 as his witnesses. Tevita called no witness. What the accused did above were within their rights.
28. The accuseds' cases were very simple. They denied the prosecution's version of events on oath. As for Josaia, he admitted he was at the crime scene at the material time. He admitted he threw a straight left hand punch at Epineri's right cheek and/or jaw, at the material time. However, he said, that was done in self-defence as Epineri had attacked him and tried to spear his right neck with a broken beer glass. He said, he had to do the above to save himself, or he would have been seriously injured and possibly died. He said, Epineri appeared to blame him for Savenaca's head injuries. He said, when he punched Epineri, he fell on the ground, in a sitting position. He denied stomping, kicking or punching Epineri thereafter. He said, after a while he left the crime scene, and returned to his food stall to sell food.
29. As for Kelepi, he admitted punching Savenaca twice above the right ear, while holding a beer glass. He said, he felt blood in his hand thereafter. He appear to deny that he used the broken glass to cut Savenaca's head. Kelepi also denied ever attacking Epineri with Tevita. He denied



stomping, kicking and punching Epineri after Josaia fell him to the ground. He denied the prosecution's version of events. He said, that night, he was only interested in recovering his \$15 from Savenaca and Epineri.

30. As for Tevita, he denied the prosecution's version of events. He admitted being at the crime scene, at the material time. He said, on 18 July 2015 after 11pm, he went towards Brown Lane from Dunstan Street. He said, he heard people arguing about money. He kept moving on. He said, suddenly two persons attacked him by repeatedly punching the back of his head and back. He said, they challenged him to a fight. He said, they kept punching him and they moved towards ANZ Bank, Bull Shooters grog shop and Westpac. He said, someone kicked his right leg and he injured his right knee. He had difficulty standing. He said, a while later he called a vehicle and went home. He denied ever stomping, kicking or punching Epineri after he was fell by Josaia's punch.
31. All three accuseds denied the prosecution's allegations. Because of the above, they are asking you, as assessors and judges of fact, to find them not guilty as charged. That was the case for the accuseds.

## H. ANALYSIS OF THE EVIDENCE

### (a) Introduction:

32. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the "Agreed Facts" and its significance. Then we will discuss the State's case against the three accuseds, in relation to whether or not they had proven the elements of the offences against them. Then, we will discuss the defences' cases, and the need to look at all the evidence.

### (b) The Agreed Facts:

33. Each of the accused submitted an "Agreed Facts" with the prosecution. A copy is with you. Please, read it carefully. In Accused No. 1's case, there are seven paragraphs of Agreed Facts. For Accused No. 2, there are four paragraphs of Agreed Facts. For Accused No. 3, there are six paragraphs of Agreed Facts. For Accused No. 1 and 3, the significance of the Agreed Facts

were that they admitted they were at the crime scene at the material time. Because the parties do not dispute the Agreed Facts, you may treat the same as established facts, and that the prosecution had proven the same beyond a reasonable doubt.

**(c) The State's Case Against the Accuseds:**

34. We will start with the murder charge (count no. 1) first. It was the State's theory that Kelepi and Tevita were jointly attacking Epineri around the Brown Lane and Ross Street areas on 18 July 2015 after 11pm. According to the prosecution, Kelepi and Tevita were throwing left and right punches at Epineri. Epineri was trying to defend himself against the two by throwing punches back at them. At times, they ran out of steam and rested. Then they continued again. While fighting, the three were moving around. Savenaca (PW1), Epineri's younger brother, was at times following the three, but was too weak to assist Epineri because he had an injury on the head. The fighting three and PW1 were all drunk. It was the prosecution's case that when Tevita, Kelepi and Epineri came towards the back of Westpac Bank, Josaia then appeared. It was the prosecution's case that Josaia, by conduct, joined Tevita and Kelepi in attacking Epineri. According to the prosecution, Josaia delivered a hard straight left punch at Epineri's right cheek and/or jaw, and this punch fell Epineri. According to the prosecution, Epineri's head hit an iron fence post and his head landed on a concrete drain. He was motionless when he hit the ground. According to the prosecution, Josaia, Kelepi and Tevita then jointly stomped, kicked and punched Epineri repeatedly while he was lying unconscious on the ground.
35. The prosecution contended that the abovementioned acts by Josaia, Kelepi and Tevita, constituted "the accuseds doing wilful acts", which satisfied the first element of "murder", as described in paragraphs 9(i) and 10 hereof. To prove the above "wilful acts" by Josaia, Kelepi and Tevita, the prosecution relied mainly on the evidence of Savenaca Nacanitaba (PW1); Pita Rabaka (PW2); Alesi Ranadi (PW3) and Moape Batigai (PW4). The success or otherwise of the prosecution's case against the three accuseds, with depend on whether or not you accept all or some of the above witnesses' evidence. A crime can be proven with the acceptance of one witness's evidence alone. We will start with Savenaca's (PW1) evidence. PW1 said, Kelepi ran after Epineri, after he assaulted him. PW1 said, Kelepi was joined by Tevita. PW1 said, he saw both Tevita and Kelepi attacking his brother with left and right punches. The punches were hard ones. PW1 said, he was 5 foot steps away and the area was lighted up by lights from the nearby buildings. PW1 said, he saw Josaia punched Epineri on the right jaw. PW1 said, it was a hard punch. PW1 said, he saw his brother fall down and his head hit a post. PW1 said, Epineri later

fell into a concrete drain. PW1 said, he saw Josaia, Kelepi and Tevita stomp on Epineri repeatedly, while he lay motionless on the ground. PW1 said, after beating Epineri up, they left him there.

36. Pita Rabaka (PW2) next gave evidence. PW2 said, on 18 July 2015 after 11pm, he was present at the crime scene. PW2 said, he saw Tevita fighting Epineri. PW2 said, the two were exchanging left and right punches at each other. Tevita was the aggressor and Epineri was defending himself. PW2 said, while fighting the two were moving around and he was two footsteps away. PW2 said, he was watching them for 10 minutes. PW2 said, the area was lighted up by lights from the surrounding buildings. PW2 said, they ran out of steam and rested for a while. PW2 said, Kelepi joined the two. PW2 said, he saw Kelepi throw left and right punches at Epineri. PW2 said, Epineri was re-treating and trying to save his life. PW2 said, all three were drunk. PW2 said, the fight moved to the back of Westpac Bank. PW2 said, he saw Epineri fall to the ground. PW2 said, he later realized another person had joined Kelepi and Tevita to attack Epineri. PW2 said, he did not see the other person's punch that fell Epineri. PW2 said, he saw Kelepi, Tevita and the other person stomped Epineri repeatedly on the chest and the front of his face, while he was unconscious on the ground. PW2 said, he started looking for a vehicle and later took Savenaca and Epineri to Nausori Health Centre.

37. Alesi Ranadi (PW3) next gave evidence. PW3 said, she had been selling BBQ food at the corner of Brown Lane and Ross Street for the past 10 years. PW3 said, she knew the area well. PW3 said, 7 lights from nearby shops lighted up Brown Lane and Ross Street. Near Tara Supermarket was a street light. PW3 said, on 18 July 2015, after 11 pm, she was selling BBQ food from her stall next to the Pawn shop. PW3 said, she saw 4 boys fighting. They came from Brown Lane to Ross Street next to her BBQ stall. PW3 said, the four boys were punching and slapping each other. PW3 later identified the boys as Kelepi and Tevita. PW3 said, she knew Epineri and Savenaca (PW1). PW3 said, those were the boys she saw fighting that night. PW3 said, the boys were 12 to 15 footsteps away and she was observing them for 10 minutes. PW3 said, the fight moved behind Westpac Bank. PW3 said, she saw Josaia came in to join the fight. PW3 said, she saw Josaia throw a straight left punch at Epineri's right jaw. PW3 said, Epineri fell, his head hit the iron post of the Westpac Bank fence and he fell on the concrete ground with his head in the drain facing up. PW3 said, she saw Josaia, Kelepi and Tevita repeatedly stomped, punched and swore at Epineri, while he lay unconscious on the ground. They stomped his face and chest. PW3 said, she saw Tevita fall to the ground after stomping Epineri. PW3

said, Tevita hurt his knee as a result of his stomping Epineri. He had to ask others straighten up his leg as a result of his knee injury. PW3 said, she saw Tevita crawl away from the crime scene.

38. Moape Batigai (PW4) then gave evidence. PW4 said, he was at the crime scene at the material time and was selling BBQ food with his wife, PW3. In his evidence, PW4 basically confirmed what his wife PW3 said in evidence. If you accept what PW1, PW2, PW3 and PW4 said above, then you will have to find that the prosecution had proven beyond reasonable doubt the first element of murder, as described in paragraphs 9(i) and 10 hereof, that is, the accuseds did wilful acts of repeatedly punching and stomping Epineri, at the material time. If you reject the above witnesses' evidence, then you will have to find the accuseds not guilty as charged. If you accept their evidence, you will have to consider the second question: Did the accuseds' punches and stomping cause Epineri's death? This leads to a consideration of the second element of murder as described in paragraphs 9(ii) and 11 hereof. The answer to this question laid in the examination of Doctor James Kalougivaki's evidence.
39. Doctor James Kalougivaki (PW7) had done more than 800 post-mortem examinations, and had prepared more than 800 post-mortem reports. PW7 said, on 20 July 2015 he conducted a post-mortem examination of Epineri Waqawai at the CWM Hospital mortuary. He prepared a post-mortem report which he tendered in evidence as Prosecution Exhibit No. 6. In describing Epineri's external and internal injuries, PW7 said the following:

**"...There was a single tear of the skin above the upper lip. Further examination of inside the mouth reveal a deep tear of the upper lip. There was surrounding bruising. Both the upper teeth on the left front aspect showed a crack and marked instability (ie can be moved easily). Examination of right ear showed prominent bruise raise. There was evidence of bleeding from the right ear. The left upper front side of the scalp showed a burr hole (surgical burr hole wound was done by doctors ie a surgical intervention). Internal injuries: The examination of skin on top of his head showed bruising within the layers of the skin at all levels and the left front upper aspect of the head and also the right side aspect. Further examination of muscle of right side of head reveal marked bleeding within the muscles. On removal of top of scalp there was prominent bleeding over the first covering of the**

brain and also under the second covering of the brain, along the same area ie. left upper front side. Examination of the brain externally showed a swollen brain and further examination of the inside of the brain showed a large bruise of the brain on the left side at the back of the brain. Chest area: Internal aspect showed the presence of 200mls of blood in the left chest cavity. The examination of the lungs showed it to be pale externally and moderately expanded. The lower back part of the left lung showed bleeding within the lung and under its covering. Kidney: Both kidneys at its lower end showed marked bruising around the surrounding fat. Both kidneys were unremarkable. The cause of death is severe traumatic brain injuries and bleeding within the skull cavity and severe traumatic head injury and other traumatic small injuries. Those injuries were caused by blunt force trauma. Blunt force trauma is due to a rounded solid object ie. it can include a fist, feet and even a baseball bat – anything rounded. The two tears over and within the upper lip were due to blunt force traumatic injuries that could arise from a fist, knee or any blunt force object. Looking at the injuries on the mouth, it was likely that multiple blunt force trauma over the mouth caused the same. The tear was recent ie. within 24 hours before death. The crack teeth need a lot of force to crack it and to move it. It is a result of high energy impact ie. blunt force trauma ie. a single or multiple blows to the teeth. The cause of death is severe brain injuries as a result of blunt force trauma ie. assaults, with this case, the brain injuries were such that, there was little chances of survival, even with surgical intervention. The injuries to Epineri's body were not normal..."

40. When cross-examined, Doctor Kalougivaki said the following, *"...I didn't see any injuries on the right cheek. The assault or assaults to the mouth could cause or contribute to the brain injuries noted at the upper left of the brain. The trauma to the mouth is a highly likely contributor to the brain injuries, not the bleeding from the tear of the mouth...The bleeding in the scalp was recent ie. within 72 hours. There was a large bruise in the brain that caused the swelling. The blood in the lungs were fresh and in the lungs and outside of it. If there was blood in the lungs, it would cause difficulty in breathing. The 200ml*

***blood was in the left chest cavity, not in the left lung. There were some blood in the lungs and under its covering. To some extent, he would have difficulty breathing. The injuries to the lungs are low contributor to death; but the main contributor to death is the brain injuries. The immediate cause of all the injuries are blunt force trauma ie. assault or assaults...”***

41. You will have to ask yourselves the following questions: Did the assaults from Josaia, Kelepi and Tevita cause the above injuries to Epineri? Did their punches to Epineri's head cause the above injuries? Did their repeated stomping of Epineri while he lay unconscious on the concrete floor, cause the above injuries? Although Epineri is dead, his injuries speak to us on how he met his death. If you think and accept that the assaults from Josaia, Kelepi and Tevita, as described by PW1, PW2, PW3 and PW4, caused Epineri's death, then you will have to find that the prosecution had proven beyond reasonable doubt the second element of murder, as described in paragraphs 9(ii) and 11 hereof, that is, the three accuseds wilful acts of continued assaults on Epineri caused his death. If you find otherwise, then you will have to find all accuseds not guilty as charged. It is a matter entirely for you.
42. If you find that the prosecution had made you sure that the accuseds' wilful acts of assaults on Epineri caused his death, then you will have to consider the third element of murder, as described in paragraphs 9(iii)(b) and 12 hereof. The question becomes: At the time of the accuseds' wilful acts of assault on Epineri, were they reckless as to causing his death? In answering the above question, you will have to take on board my directions in paragraph 12 hereof. In law, a person is reckless with respect to a result if: (i) he is aware of substantial risk that death would occur, and (ii) having regard to the circumstances know to him, it was unjustifiable to take the risk of assaulting him. The question whether taking a risk was unjustifiable is one of fact for you. Were the accuseds aware of a substantial risk that the deceased would die if they continue to assault him? And having regard to the circumstances know to them, was it justifiable to take the risk by continuing to assault him, at the material time? You have heard the evidence of Savenaca (PW1), Pita (PW2), Alesi (PW3) and Moape (PW4). The details of what they said in evidence are still fresh in your mind and I don't want to bore you with the details. If you think and accept that the accuseds were aware of a substantial risk that Epineri would die if they continued to assault him, and having regard to the circumstances know to them, it was unjustifiable to take the risk by continuing to assault him, then the prosecution would have proven beyond reasonable doubt that the accuseds were

reckless at the material time, and they would have satisfied the third element of murder, as described in paragraphs 9(iii)(b) and 12 hereof. If you think otherwise, then you will have to find all the accuseds not guilty of murder.

43. If you find all the elements of murder, as described in paragraphs 9(i), 9(ii) and 9(iii)(b) hereof satisfied by the prosecution beyond reasonable doubt, then you will have to find them guilty as charged on count no. 1. If otherwise, you will have to find them not guilty of murder. It is a matter entirely for you. If you find them not guilty of murder, then take on board my directions in paragraphs 13 hereof. Consider whether or not they are guilty of the lesser offence of manslaughter.

44. On count no. 2, that is, "act with intent to cause grievous harm", the State relied primarily on Savenaca's (PW1) evidence. PW1 said, Kelepi threw two punches to his head above his right ear, while holding a beer glass, at the material time. The glass cracked and caused injuries to his head. PW1 said, Kelepi then used the crack glass to cut the skin of his head above his right ear to the back of his head. Doctor Singh (PW6) examined PW1 at Nausori Heath Centre on 19 July 2015 at 11.45pm. He found laceration above his right ear and laceration along the back of his neck. He submitted his medical report in evidence as Prosecution Exhibit No. 5. PW1 said, after Kelepi injured him on 18 July 2015, he was bleeding heavily and was dizzy and weak. That was the reason he could not assist his brother Epineri defend himself. If you accept PW1's evidence mentioned about, you will have to find Kelepi guilty as charged on count no. 2. If otherwise, you will have to find Kelepi not guilty as charged. It is a matter entirely for you.

**(d) The Defence's Cases:**

45. We will start with Josaia (Accused No. 1 and DW1). Josaia did not deny being at the crime scene at the material time. He did not deny punching Epineri as alleged by the prosecution. However, he said, he did so in self-defence. He said, Epineri blamed him for Savenaca's head injuries at the time. He said Epineri rushed to stab his neck with a cracked beer glass. He said, he didn't want to fight. However, he punched Epineri to defend himself. He said, had he not done so, Epineri would cause injury to his neck and possibly his death. You have listened to the prosecution's witness's evidence and Josaia's on what occurred that night. In considering Josaia's defence, I will direct you as follows.

46. If you think that the accused was or may have been acting in lawful self-defence, he is entitled to be found not guilty. Because the prosecution must prove the accused's guilt, it is for the prosecution to prove that the accused was not acting in lawful self-defence, not for the accused to establish that he was; and you must consider the matter of self-defence in the light of the situation which the accused honestly believed he faced. You must first ask whether the accused honestly believe that it was necessary to use force to defend himself at all. This would not be the case if the accused [was the aggressor], [acted in revenge], [knew that he did not need to resort to violence]. If you are sure that he did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence, and you need consider this matter no further. But what if you think that the accused did honestly believe or may honestly have believed that it was necessary to use force to defend himself? You must then decide whether the type and amount of force the accused used was reasonable. Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself. On the other hand, if he goes over the top and uses force out of all proportion to the [anticipated] attack on him, or more force than is really necessary to defend himself, the force used would not be reasonable. So you must take into account both the nature of the attack on the accused and what he then did. If you are sure that the force the accused used was unreasonable, then the accused cannot have been acting in lawful self-defence; but if you think that the force the accused used was or may have reasonable, he is entitled to be acquitted.
47. Josaia denied the prosecution's version of events as stated by PW1, PW2, PW3 and PW4. If you accept Josaia's position on the case, you will have to find him not guilty as charged on count no. 1.
48. As for Kelepi (Accused No. 2 and DW4), he did not deny he was at the crime scene at the material time. However, he denied the prosecution's version of events as stated by Savenaca (PW1), Pita (PW2), Alesi (PW3) and Moape (PW4). He said, at the material time, he was only interested in recovering his \$15 from Savenaca (PW1) or Epineri. He agreed, he punched PW1 twice with his left hand while holding a beer glass. He admitted, he felt blood in his hand after he assaulted PW1. He said, he did not assault Epineri and did not participate in his murder. If you accept Kelepi's position, then you will find him not guilty of murder (count no. 1). On count no. 2, you have heard the evidence, and your decision is a matter entirely for you.



49. As for Tevita (Accused No. 3 and DW5), he denied the prosecution's version of events as portrayed by Savenaca (PW1), Pita (PW2), Alesi (PW3) and Moape (PW4). He denied participating in the murder of Epineri at the material time. He said, he was the victim that night as he was attacked by two persons he could not identify. He said, those person kicked his knee causing him injuries. He said, he later caught a vehicle and went home. If you accept Tevita's position on the case, you will have to find him not guilty as charged on count no. 1.

**(e) The Need to Consider all the Evidence:**

50. Eight witnesses gave evidence for the prosecution, that is, Savenaca (PW1), Pita (PW2), Alesi (PW3), Moape (PW4), Kumar (PW5), Doctor Singh (PW6), Doctor Kalougivaki (PW7) and DC 3508 Prakash (PW8). The prosecution submitted 6 exhibits, that is, Exhibit No. 1 – Doctor Kalougivaki's Curriculum Vitae; Exhibit No. 2 – Booklet of Photos; Exhibit No. 3 – Police Sketch Plan; Exhibit No. 4 – Epineri's Medical Report;
51. Exhibit No. 5 – Savenaca's Medical Report and Exhibit No. 6 – Epineri's Post-Mortem Report. Five witnesses gave evidence for the defence, that is, Josaia (DW1), Doctor Losana Natuva (DW2), Sirino (DW3), Kelepi (DW4) and Tevita (DW5). The defence submitted 3 exhibits, that is, Exhibit No. 1 – Josaia's Medical Report; Exhibit No. 2 – Kelepi's Medical Report and Exhibit No. 3 – Tevita's Medical Report. You must consider and compare all the above evidence. You are entitled to accept the whole or some of the witnesses' evidence. Likewise, you are entitle to reject the whole or some of the witnesses' evidence. Your decision will be based on whether or not you find the particulars witness credible or otherwise.

**I. SUMMARY**

52. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accuseds are not required to prove their innocence, or prove anything at all. In fact, they are presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accuseds' guilt, you must find them guilty as charged. 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 the accuseds' guilt, you must find them not guilty as charged.
53. Your possible opinions are as follows:
- (i) Count No. 1 : Murder: Accused No. 1 : Guilty or Not Guilty