

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 362 of 2015

[CRIMINAL JURISDICTION]

STATE

V

1. SEKOPE TODUADUA
2. JAMES NETANI
3. JOSESE RAINIMA TAWAKE
4. NETANI TAKELO
5. SEKOPE SIVODUADUA TODUADUA

Counsel : Ms. J. Fatiaki for the State
Ms. P. Lal for 1st Accused
Ms. C. Choy for 2nd Accused
Mr. P. Tawake for 3rd Accused
Ms. S. Prakash for 4th Accused
Ms. A. Prakash for 5th Accused

Hearing on : 8th - 17th May, 2017

Summing up on : 19th May 2017

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused are guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the judges of facts.

2. Evidence in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. As I have told you in the beginning of this trial, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
3. Please remember that I will not be reproducing the entire evidence in this summing up. I would only refer to the evidence which I consider important to explain the case and the applicable legal principles. If I do not refer to certain evidence which you consider as important, you should still consider that evidence and give it such weight you may think fit.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution and the defence are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only to the extent you would consider appropriate.
5. A statement made by a witness to the police can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
6. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by

emotion. You should put aside all feeling of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.

7. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
8. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes we honestly forget things or make mistakes regarding what we remember.
9. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
10. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence

given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.

11. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
12. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
13. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that that inference is the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused person's guilt.
15. In order to prove that an accused is guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you

have a reasonable doubt on whether the prosecution has proved a particular element of the offence against a particular accused, then you must find that accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in a short while.

16. You are not required to decide every point raised by lawyers in this case. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge is proved against each accused.
17. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused persons for the following offence;

Statement of Offence

MANSLAUGHTER: contrary to section 239 of the Crimes Decree 2009.

Particulars of Offence

SEKOPE TODUADUA, JAMES NETANI, JOSESE RAINIMA TAWAKE, NETANI TAKELO AND SEKOPE SIVODUADUA TODUADUA on the 26th of November 2014 at Nadonumai, Lami in the Central Division unlawfully killed Savenaca Masi.

19. Though there are five accused persons in this case, you should remember to consider the evidence against each accused separately. In the event you find one accused guilty of the charge, you must not simply assume that the other accused persons must be guilty as well.

Evidence

20. First witness for the prosecution was Iliakimi Mumu;
 - a) On 25/09/14 between 1pm and 2pm he saw the 1st accused, 2nd accused, 3rd accused and 5th accused chasing the deceased. They were chasing the deceased from the 4th accused's house. The 1st accused kicked the deceased's leg and then the deceased fell

down. Then he saw the 2nd accused and the 3rd accused punching and kicking the deceased and the 1st accused stopping the others from punching and kicking the deceased. Then Sikeli stopped them. When he saw the deceased being chased, he heard the 4th accused saying from behind, "dou vaka matea" ('you people kill').

- b) After Sikeli stopped them, he saw the 1st accused holding the deceased's hand and coming out from the driveway. He thought everything is settled. The 1st accused, 2nd accused, 3rd accused, 4th accused and the 5th accused were there. After they came out, he heard the deceased saying to the 2nd accused that he will punch the 2nd accused one day. Then the 4th accused said "if you punch him you are punching the whole village". Then the deceased swore. The 1st accused told the deceased not to swear and punched on the deceased's chin. Then the deceased fell backwards. The others were just standing there when the 1st accused punched. Then he saw the 1st accused holding the deceased and massaging the deceased. After that the 1st accused carried the deceased, made the deceased sit down and then massaged the deceased.
- c) He said nothing was blocking his view when he saw the 1st accused kick the deceased and when the 1st accused punched the deceased.
- d) He said, when the 1st accused kicked the deceased and then when the deceased was attacked, the 5th accused was standing beside the 1st accused. He did not see the 5th accused do anything.
- e) During cross examination on behalf of the 1st accused, he said the deceased Savenaca Masi is his cousin. He admitted that the deceased was heavily intoxicated on that day and was not able to walk properly. He also agreed that the 1st accused assisted the deceased to control the balance because the deceased was not able to walk properly. He denied the suggestion that the 1st accused accidentally tripped the deceased when the deceased was trying to free himself from the 1st accused's grip. After the deceased fell down the first time, he saw the 1st accused stop others from attacking the deceased and the 1st accused assisting the deceased to stand. He denied that it was Sikeli who dragged the deceased up the drive way. He agreed that when he saw the incident where the deceased fell on the drive way, he was standing 3 to 4 metres behind the 1st accused.
- f) During cross examination on behalf of the 2nd accused when it was suggested to him that the 2nd accused and another left as they were told to leave by the 1st accused, he

said he does not know. Then when it was suggested that the 2nd accused did not go up the driveway because he was told to leave, the witness said 'he was there'.

- g) During cross examination on behalf of the 3rd accused, he said both he and the deceased are from Kadavu. He said the last time he saw the deceased was when the deceased was under the breadfruit tree. He admitted the suggestion that the 3rd accused was one of the boys who attended to the deceased by massaging the deceased and cleaning the face. When it was suggested to him that he was mistaken that the 3rd accused was part of the group that assaulted the deceased because he saw the 3rd accused attending to the deceased under the breadfruit tree the same afternoon, he said 'yes'.
- h) During the cross examination on behalf of the counsel for the 4th accused he agreed that the chase was happening about 10 to 15 metres away from where he was standing. He agreed that the 4th accused was standing about 5 to 6 metres away from where the deceased fell.
- i) During the cross examination on behalf of the 5th accused, when it was suggested that the 5th accused was not there when the deceased was escorted up to the driveway, he said 'he was there'. Then he said 'can't remember' when it was suggested that the 5th accused left the place and was on his way home. Again when it was suggested that he is not sure whether the 5th accused was present at that time he said 'yes'.
- j) During re-examination he said the 3rd accused was one of the boys who punched and kicked the deceased when the deceased fell on the ground. He said when the 1st accused punched the deceased, the 5th accused was standing behind the 1st accused.

21. Second witness for the prosecution was Kilisai Toroca;

- a) Around 2pm on 25/09/14 he saw the 1st accused following the deceased and the boys were following the 1st accused. When he said 'boys', he referred to the 2nd, 3rd and the 5th accused. He said the 4th accused was the last person who was following them. He said they were having a fight with the deceased and he heard swear words being exchanged and they were yelling at each other. He heard the 4th accused saying 'vamatea'.
- b) The deceased was trying to run and the 1st accused followed him. Then the 1st accused kicked the deceased's leg and the deceased fell onto the ground. Then the three boys tried to punch the deceased and the 1st accused held the deceased trying to protect the deceased from the three boys. This lasted less than a minute. Then Sikeli came to the

- scene and he also stopped the three boys and told them to move away. He said he saw the three boys assault the deceased by punching him. After Sikeli managed to stop the fight the three boys went away and the 1st accused started massaging the deceased.
- c) While this was happening the 4th accused was just standing there. He said the 4th accused said the word 'vamatea' two times.
- d) After the 1st accused massaged the deceased, they came up together to the place where he was standing. He said when they arrived there, everything was settled. Then the deceased challenged the 2nd accused again by saying 'watch out when I'm ok, I will challenge you again to fight'. Then the 4th accused told the deceased 'if you are going to touch my son, you are touching the whole village'. The deceased then swore at the 4th accused and at his village.
- e) After that he saw the deceased fall backwards on to the ground. It was a concrete surface. When the deceased fell, the 1st accused was next to the deceased. Sikeli and some other people were also at the scene. He said when the deceased fell down the three boys and the 4th accused were also standing there. The 1st accused then lifted the deceased up and made him sit. The witness went home after that.
- f) During cross examination on behalf of the 1st accused he said the 1st accused and the deceased are related. He admitted that when he saw the deceased that day the deceased was heavily drunk and could not walk properly. He also agreed that the 1st accused tried to help the deceased to maintain his balance and the deceased was trying to run away. He agreed that the deceased put his leg between the 1st accused's legs and as a result the deceased fell. When it was suggested that the 1st accused did not kick the deceased's leg he agreed and said that the 1st accused tripped the deceased. Then again when it was suggested that the 1st accused did not kick the deceased he said 'he also kick[ed]'.
- g) During the cross examination on behalf of the 2nd accused, when it was suggested that the punch the 2nd accused threw landed on the 1st accused and not on the deceased, he said the only thing he saw was that the 2nd accused throwing a punch, but he does not know whether it landed on the 1st accused or the deceased.
- h) During the cross examination on behalf of the 3rd accused he said he assisted the deceased to sit after the deceased fell and thereafter he went home.
- i) During cross examination on behalf of the 4th accused he said that he heard the 4th accused say 'vakamatea' only when the deceased was being followed by others. When it

was suggested that he was mistaken about the words he heard from the 4th accused he said 'no'.

- j) During cross examination on behalf of the 5th accused he said the 5th accused did not throw any punches. He said the 5th accused came and stood there. He agreed that the only way for the 5th accused to go home was up the hill.

22. Third prosecution witness was Ema Tuakaya;

- a) Around 2pm on 25/09/14 she went outside her house as she heard someone shouting. She saw the deceased being punched and kicked when she peeped through the corrugated iron placed beneath her neighbour's house. The deceased was lying on the ground and she could not see the upper body of those who were punching and kicking. She then went inside the house to check on her daughter.
- b) She again went near her neighbour's house. There she saw the 1st accused, 2nd accused and the 5th accused with the deceased in front of Sikeli's house and going towards the cement driveway on top. She couldn't remember whether there was anyone else. Once they reached the driveway, the deceased couldn't stand steadily because he was drunk. Then she ran back to her house to check on the dalo she was cooking. Again she came out and she stood between her house and her neighbour's house. From there she saw the deceased being punched by the 1st accused. She said while they were at the driveway the 4th accused was a bit far away from the driveway beside the road and he was saying 'vamatea'.
- c) During cross examination on behalf of the 1st accused she agreed that there is a slight bend in the driveway towards her house. She denied the suggestion that her view was obstructed and that she did not see the 1st accused punching the deceased. When she was asked whether it is possible that she could have been mistaken about the 1st accused punching the deceased when in fact the 1st accused was just raising his arm in self-defense, she said she saw the 1st accused throw one punch. She said she was standing about 10metres away from where the incident took place.
- d) During the cross examination on behalf of the 2nd accused she was asked whether she agrees that the 2nd accused was not walking up the driveway but he was walking towards his house and she said 'yes maybe. I can't remember'.
- e) During the cross examination on behalf of the 3rd accused she said she cannot remember whether the 3rd accused was with the group of boys who came from Sikeli's

compound. She agreed that she did not mention anything about the 3rd accused in her statement given to the police. When it was suggested to her that the 3rd accused was not present on that day, she said may be he was there but she can't remember.

- f) During cross examination on behalf of the 4th accused she agreed that she did not tell the police about the 4th accused saying 'vamatea'. She said she did hear it but forgot to mention in her statement.

23. Fourth witness was Sikeli Jokatama;

- a) On 25/09/14 around 2pm he heard a noise from 4th accused's house while he was at home. When he went up to the driveway he saw the 1st accused, 2nd accused and the 5th accused trying to take the deceased away as the deceased was drunk. Then he saw the 1st accused trying to cover the deceased from the 2nd accused and the 5th accused. He said the 2nd accused and the 5th accused were throwing punches towards the deceased but the 1st accused was covering the deceased. Then he went to help the 1st accused and pulled the deceased out and took the deceased up to the driveway. He left deceased at the driveway and went back home.
- b) During cross examination on behalf of the 2nd accused he agreed that the punches thrown by the 2nd accused landed on the 1st accused as the 1st accused was covering the deceased. He agreed that the deceased was standing when he saw the punches being thrown.
- c) During cross examination on behalf of the 3rd accused when he was asked whether he can say the 3rd accused was part of the group that came towards his house on that day, he said 'no'. He said 'yes' when he was asked whether he saw the deceased sitting under the breadfruit tree.
- d) During cross examination on behalf of the 5th accused he agreed that the punches thrown at the deceased landed on the 1st accused. When it was suggested that the 5th accused did not punch the deceased, he said 'can't recall'. He agreed that the 5th accused had left the scene by the time he escorted the deceased up the driveway.
- e) During re-examination he said he can't recall whether they had left or whether they were there while he took the deceased to the driveway.

24. Fifth witness was PC 5313 Metuisela Galuvakadua;

- a) *He said on 25/09/14 around 2pm he was informed to attend a complaint made by the 4th accused. The complaint was that the deceased was causing trouble at the 4th accused's residence. When he came to Nadonumai he saw the deceased lying at the breadfruit tree. He went to the 4th accused's residence to ask the 4th accused about the cause of the complaint. He was told by the 4th accused that everything is ok and they will talk to the deceased when he is sober. After that he went to the deceased. Then the deceased's wife arrived. On the deceased's wife's request he and two others carried the deceased to the deceased's residence. They left him at the porch.*
- b) *During the cross examination on behalf of the 1st accused he agreed that in his police statement dated 29/12/14 he had stated that the deceased was seated near the breadfruit tree. He said when he arrived, he saw other people at the driveway.*
- c) *During the cross examination on behalf of the 3rd accused he agreed that the 3rd accused assisted him to carry the deceased to the deceased's house.*
- d) *During re-examination he said the deceased was sitting down at the breadfruit tree. He said it took 3 months for the investigating officer to record his statement.*

25. Sixth witness was Salumi Waqavakatoga;

- a) *Around 2pm on 25/09/14 she heard a loud noise and came out of the house. She heard abusive language near their driveway. She saw the deceased coming from Taka's house towards the driveway. She was about 10 to 15 metres away from the driveway. She said, the deceased used abusive language and then the 1st accused punched the deceased on the face. The deceased fell down and his head touched the cement floor. Apart from the 1st accused no one she knew was there around the deceased. After that she went a bit closer and she saw that the deceased was not moving. She said the 1st accused, the 4th accused and Koto were standing there. She only knew those three.*
- b) *During cross examination on behalf of the 1st accused she said she had a clear view of what happened.*

26. Seventh witness was Meresiana Ligairi;

- a) *The deceased Savenaca Masi was her husband. On 25/09/14 she saw the deceased sitting down with two boys with blood all over the deceased's face. She said she does*

not know the names of the boys who carried the deceased home. She took the deceased to the hospital after 4pm because her aunt told her to take him to the hospital.

- b) During cross examination on behalf of the 1st accused, when it was suggested that the deceased had gone to Senikau Bar the previous night, she said she does not know which nightclub or bar the deceased went to. When it was suggested that she brought the deceased home around 1pm she said he came home by himself. When it was suggested that the deceased was heavily drunk, she said 'no'. She said he was drunk but not heavily drunk. Then she was shown her statement made to the police where it was stated that '... to see him at Senikau Bar'. When she was asked which version is correct, she said 'outside of Senikau Bar'. She admitted that in her statement to the police it is mentioned that the deceased was heavily drunk.
- c) When it was suggested that she is lying she said, because it is 3 years now she can't remember and she had forgotten everything. Again she was shown her statement where it was stated that 'I brought him home in a taxi'. When it was put to her that it is another different story, she said they came in two different taxis because the deceased didn't want to travel together with her.
- d) She agreed that the deceased was made to lie down on the porch after the boys carried him to the house. She said the deceased lay down there until he was taken to the hospital. She denied the suggestion that the 1st accused came to visit the deceased when the deceased was lying down on a bed inside the house. She denied the suggestion that the deceased fell inside the bathroom when he went to take a shower.
- e) During cross examination on behalf of the 3rd accused she agreed that the 3rd accused was one of the boys who were attending to the deceased while he was sitting beside the breadfruit tree. She also agreed that the 3rd accused carried the deceased to the house that day.

27. Eighth witness was Dr. James Kalougivaki;

- a) He said he performed the postmortem of Savenaca Masi on 28/11/14. He tendered the medical report as PE 5. He said the main cause of death was severe chest infection. He said that was associated with the deceased's immobilization. He mentioned 'severe traumatic head injuries' as an antecedent cause based on the history.
- b) When he conducted the post-mortem he noted that there had been a surgical intervention to reduce the pressure in the skull. He said the brain was severely

swollen. He said there was the presence of thick mucus in the wind pipes of the lungs and both lungs were quite hard. He said there was a lot of congestion and edema in the lungs and that was consistent with bilateral bronchopneumonia.

- c) During cross examination he said the injuries noted in the head according to the CT scan were less likely to be caused by a simple fall and it should include a high energy impact. He said the causes which are noted in the medical report are sequentially valuable to the overall cause of death.

28. Ninth witness was Dr. Alan Barbo;

- a) On 25/09/14 one Savenaca Masi (deceased) was brought to the emergency department in a comatose condition. The deceased was scheduled for an emergency surgery on the same night because according to the initial assessment there was bleeding inside the brain. He said they had to make an opening in the skull to access the brain and its contents.
- b) Following the surgery, the deceased was taken to the intensive care unit and was ventilated. On 29th September, a CT scan was done and it showed a recollection of blood. Thereafter another surgery was conducted by re-opening the previous surgical wound. However the deceased remained comatose and was dependent on the ventilator for breathing after that surgery. The deceased passed away due to the brain injuries after three months.
- c) When he first saw the deceased, it was clear to him that the deceased had sustained some form of blunt trauma to his head. There were bruises around the face, shoulders and eyes and bleeding from the left ear. He said blunt trauma can be an assault from a weapon or with a hand or as a result from a fall.
- d) During cross examination on behalf of the 1st accused he said he cannot recall the time the deceased was brought to his care but he remembered that it was in the night. He said he cannot comment on whether the injury was caused by a single fall or two falls.

29. That was the case for the prosecution. At the end of the prosecution case you heard me explain several options to the accused persons. They had those options because they do not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times.

The accused persons chose to give evidence on oath and the 1st accused called one witness.

30. The 1st accused said in his evidence that;

- a) *He was at home around midday on 25/09/14. His son came and told him that the deceased is drunk and swearing inside the 4th accused's house. The deceased is his wife's uncle. He went outside and stood in front of the Methodist church. He saw the deceased in front of the 4th accused's house. He called the deceased and asked him to come home. He said he asked him to come home because the deceased was drunk and was swearing. He went down towards the 4th accused's house because the deceased did not respond.*
- b) *He wrapped his arms around the deceased's waist from the back. He wanted to take the deceased home because the deceased is his relative from his wife's side. He tried to take him through the path way up to the road but when he reached the back of the 4th accused's house he was tired because the deceased was bigger than him and because the deceased couldn't walk properly. Therefore he called his son the 5th accused who was standing in front of the church, for his assistance. He also called the 2nd accused.*
- c) *The 2nd accused and the 5th accused held the deceased from both sides and took the deceased up. He followed them. After they went few steps forward, he saw the 2nd accused and the 5th accused covering themselves because the deceased was swinging his arms and was challenging them for a fight. Then the deceased went down the hill towards Sikeli's house and then he also went towards the deceased. The deceased was swearing and challenging the two boys. He asked the deceased not to swear and just come home with him. He said he was holding the deceased from his trousers from behind at this point. The deceased continued to challenge the two boys and the whole village.*
- d) *Then the deceased looked up and he saw that the two boys started to challenge the deceased back as they were angry. Then the deceased started running, with him holding onto the deceased's trousers. Then accidentally the deceased tripped over his right leg and fell. He is not sure whether he put his legs between the deceased's legs or whether the deceased put his legs between his. He lifted the deceased up. They then walked a few steps in front of Sikeli's house. He put the deceased against the wall and told the deceased not to run because he is drunk and he might get hurt.*

- e) Then he heard someone approaching from his left side and the deceased pulled him and put the deceased's head in between his chest. He covered the deceased with his hands. Then he felt some punches on his back. When he looked back, he saw the 2nd accused and the 5th accused standing behind him. He chased them away and told them to go home.
- f) Then Sikeli came and took the deceased up the driveway. He followed Sikeli and the deceased. He said the 2nd accused and the 5th accused had to follow the same road up the driveway in order for them to go to their respective houses. Then the deceased stood beside one Eroni's house and Sikeli came back.
- g) The deceased kept on swearing and challenging the whole village. He said there was lot of yelling, but his focus was on taking the deceased home safely. He managed to wrap his arms around the deceased's waist and they walked for about 10metres. As they reached the road, the deceased pushed his hands away. He tried to hold the deceased again and then he saw the deceased swinging the left hand trying to punch him. He lifted his left hand up to block that punch and then his right hand to cover his face. Then he could see the deceased trying to throw another punch on him. He looked back and took a step backwards. When he turned again to look at the deceased, he saw the deceased's legs up in the air and the deceased was falling down on the slope between the road and the edge of the driveway.
- h) He tried to move forward to hold the deceased. But he was late and he only managed to hold the deceased's head after the head hit the driveway. He asked the deceased to get up, but he noted that the deceased was unconscious. Then a lady told him to make the deceased sit upright. Because the deceased was heavy, he called Joape Biudole who was the only one in front and then the 3rd accused who just arrived at the scene to assist him to carry the deceased and then to make the deceased to rest his back. Then they had to take the deceased across the driveway to the breadfruit tree because a car arrived to go down the driveway. They made the deceased sit upright against the breadfruit tree.
- i) He saw blood coming out from the deceased's left ear. He told one Kilifi to call the ambulance as he wanted to take the deceased to the hospital. He asked another gentleman called 'Pei' to get a bucket of water. He poured the water onto the deceased and tried to revive the deceased. Then a police officer arrived with some boys. He asked the police officer whether he can bring the deceased later to the police station after he take the deceased to the hospital first because the ambulance is coming. He said the

wife of the deceased wanted the deceased to be taken home. Because the wife of the deceased persuaded the police officer to have the deceased taken home, the police officer, the 3rd accused, Biudole and Pei took the deceased home. He went to Toroca's house as Kilifi who called the ambulance was there and asked Kilifi to cancel the ambulance.

- j) After that he went home. He went to see the deceased in the evening as he was really concerned. He said the deceased's father and the deceased's wife were sitting outside the porch. He was told that the deceased is lying inside the house. When he told the wife to send the deceased to the hospital, she told him that she wants to wait till the deceased regain consciousness. He then went back home. The following morning he went to the deceased's house with a staff nurse and then he was told by the deceased's father that the deceased was taken to the hospital the previous night because the deceased was about to die.
- k) During cross examination on behalf of the 2nd accused, he agreed that all the punches landed on his back because he was covering the deceased. He also agreed that the 2nd accused and the 5th accused went home after he told them to go home.
- l) During cross examination on behalf of the 3rd accused he said that the 3rd accused was not part of the group that confronted the deceased in front of Sikeli's house. He said he saw the 3rd accused near the breadfruit tree when he looked around after the lady told him to make the deceased sit.
- m) During cross examination on behalf of the 5th accused he said the 5th accused was not there when the deceased fell and hit his head and that the 5th accused was on his way home.
- n) During the cross examination on behalf of the prosecution he said he saw the 4th accused only when he was coming up the driveway and the 4th accused was there under the breadfruit tree. He agreed that the deceased started swearing at the 2nd accused when the deceased was at the driveway. At that time the 2nd accused was going towards the breadfruit tree to go home. When it was suggested that the 4th accused then told the deceased that if the deceased touches his son the deceased is touching all the people of Ketei, he said he was just focusing on the deceased and not on what had been said on that day.

31. The second witness for the 1st accused was Joape Biudole.

- a) *He said he was with the 3rd accused on 25/09/14. Around 2pm they came to buy coconuts from the canteen. On their way to the canteen he heard the deceased swearing. He saw the deceased trying to punch. The same time he saw the 1st accused trying to block that punch. He was about 5metres away from them and he had a clear view. Then he saw the deceased threw a left punch. The 1st accused blocked that. At that same moment the deceased slipped and landed on his head on the driveway pavement. He said the 3rd accused was behind him when this happened. He said Ema was at the house down below.*
- b) *After the deceased fell on the driveway the 1st accused called him to assist the deceased. They made the deceased sit at an upright sitting position. While they were doing that a car was trying to enter the driveway. Then they took the deceased and made him sit beside the breadfruit tree. Thereafter he poured water onto the deceased with the 3rd accused. They washed off the blood on the deceased's face and the ears. Then one Pei came. He said the 1st accused told them that he is going to change to take the deceased to the hospital. He said the police officer told him to take the deceased to the deceased's house. He took the deceased to the house with the 3rd accused, the police officer and Pei. They left the deceased at the porch.*
- c) *During cross examination on behalf of the 2nd accused he said he can't recall seeing the 2nd accused at the driveway on that day. He said he saw the 2nd accused in front of the church.*
- d) *During cross examination on behalf of the 4th accused he said no one was saying anything to the deceased or the 1st accused when the deceased was swearing.*
- e) *During cross examination on behalf of the 5th accused he said the 5th accused went past him when he saw the deceased and the 1st accused talking. He said the 5th accused was on his way home.*
- f) *During cross examination on behalf of the prosecution he said he did not discuss with others in the village about what he saw that day.*

32. The 2nd accused said in his evidence that;

- a) *On 25/09/14 after lunch he was at home and was sleeping. He woke up when he heard someone screaming and swearing. When he came out of the house he saw the deceased swearing. He also saw the 1st accused calling the deceased. He said the 1st accused was*

- on top of the slope in front of the Methodist church. Then the 1st accused came down towards the deceased and told the deceased not to swear. The 1st accused was trying to take the deceased away, but the deceased was struggling. Then the 1st accused sought assistance from him and from the 5th accused. So they went there and held the deceased from the shoulders and took the deceased up the driveway.
- b) After they went a few steps ahead the deceased started swearing and threw punches at them. So they let go of him. Then the deceased challenged them for a fight. When the deceased realized that they wanted to retaliate the deceased jumped down the slope and ran towards Sikeli's compound. The 1st accused ran after the deceased and they followed the 1st accused. Then he saw the 1st accused pulling the deceased from the trousers from behind. After a while he saw the deceased slip and fall on to the ground. The deceased stood up again. They kept on following each other until they reached Sikeli's house.
- c) When the deceased and the 1st accused were standing near Sikeli's house, he threw a punch. The punch did not land on the deceased but on the 1st accused. He said when he punched, the deceased was facing the 1st accused. Then the 1st accused told them to go home. Sikeli came down at this point and got hold of the deceased and took the deceased up the driveway. He said he followed them up the driveway in order to go home because that is the route he used to take to go home.
- d) He went through a shortcut and went to the church because a person who was standing in front of the church called him. While he was talking to that person he saw the deceased lying down on the driveway.
- e) He said he did not punch or kick the deceased that day. The punch he threw landed on the 1st accused.
- f) During cross examination on behalf of the 3rd accused he said the 3rd accused was not there when he confronted the deceased in front of Sikeli's house.
- g) During cross examination on behalf of the 4th accused he said he did not hear the 4th accused say anything when he was assisting the deceased at the driveway near Sikeli's house or when he was on his way home.
- h) During cross examination on behalf of the prosecution he agreed that his punch was aimed at the deceased and not at the 1st accused. He agreed that the 5th accused also threw a punch at the deceased. He denied the suggestion that the 4th accused was also

present there saying 'dou vakamatea'. He said the deceased was swearing at him when he was on his way home.

33. The 3rd accused said in his evidence that;

- a) *Around 2pm on 25/09/14 he heard someone swearing when he was on his way to buy coconuts with one Biudole. He said Biudole was in front and he followed. He saw the deceased lying down on the footpath. The 1st accused asked his assistance to take the deceased to the side of the driveway because a car entered the driveway. He assisted the 1st accused with Biudole and Pei to take the deceased to the breadfruit tree. After that they splashed water on the deceased to clean the blood and he was also massaging the deceased. Then the deceased's wife arrived and also the police officer, Metui. Then he carried the deceased to the deceased's house with the 1st accused and Biudole.*
- b) *During cross examination on behalf of the 1st accused he agreed that the 1st accused did not carry the deceased home and it was him, the police officer and Biudole that carried the deceased home.*

34. The 4th accused said in his evidence that;

- a) *On 25/09/14 between 1pm and 2pm he woke up when he heard someone talking to his wife. When he stood up, he saw the deceased. He said the deceased was swearing at the whole family. He then opened the door and told the deceased to go home. Since the deceased continued to swear, he called 919. After that he went outside and then he could see the deceased at the back of Sikeli's house. Then he saw the deceased run and the 1st accused, 2nd accused and 5th accused were following the deceased.*
- c) *He went up the pathway and told them to catch the deceased. According to him, he said 'dou vesuki koya'. He said these words to the 1st accused, 2nd accused and the 5th accused because he had already called the police and because he wanted the deceased to be taken home. He said he felt sorry because the deceased's sister is married to his family. Then he went near the breadfruit tree. He saw the deceased, Sikeli and the boys coming up towards where he was standing. He said he told the 1st accused to put the deceased on the driveway.*
- d) *Then the deceased started to challenge them one by one by swinging his fist. He said the deceased was swearing at him and his village. He told the 1st accused to take the deceased home and he told the deceased not to swear at him and his village. Then his*

wife called him as his two grandchildren were crying and coming towards him. He carried one of his grandchildren and held the hand of the other and went towards his house. He heard that something fell on the footpath and then he saw the deceased lying down on the ground. When he went closer, he saw blood coming out from the deceased's ears. About one hour later the police officer who came to give evidence arrived. He told the police officer that everything is ok now and he will talk to the deceased's family when the 'deceased is feeling ok'.

- e) He said, after he told them to catch the deceased he followed them to see whether they had caught him. He wanted the deceased to be caught in order to take the deceased home and to wait for the police officer. He said he did not encourage the others to assault the deceased.
- f) During cross examination on behalf of the 3rd accused he said the 3rd accused was not part of the group that followed the deceased to Sikeli's compound that day.
- g) During cross examination on behalf of the prosecution he said he did not follow the deceased and he went up the hill. He agreed that he heard the deceased swore at the 2nd accused but he denied telling the deceased that if the deceased punches the 2nd accused the deceased is punching the whole Ketei village.
- h) During re-examination he said, in order to go up the hill, he came out of the house went to the back of his house and then went up the pathway.

35. The 5th accused said in his evidence that;

- a) On 25/09/14 after lunch, he heard someone swearing. Then he told his father. His father is the 1st accused. At that time he could not say who was swearing. The 1st accused went outside and he followed. He stood in front of the church and he saw the 1st accused trying to take the deceased home. He called the deceased 'grandfather'. He said the deceased was drunk and was swearing at the 4th accused's family. Then the 1st accused asked for his assistance to take the deceased home. He went down with the 2nd accused towards the 4th accused's house. He held the deceased from one side and the 2nd accused from the other side and went a few steps ahead.
- b) Then the deceased tried to free himself and started to swing the arms at them. He got angry when the deceased did that and they moved away from the deceased. Then the deceased ran towards Sikeli's house and challenged them for a fight. The 1st accused went after the deceased and they followed the 1st accused. He said when the 1st accused

was holding the deceased in front of Sikeli's house, he tried to punch the deceased. He threw two punches where one missed and the other one did not reach the deceased because the 1st accused was covering the deceased. The 1st accused then turned back and chased him and the 2nd accused. Then Sikeli came and took the deceased up to the driveway. He also went up the driveway with the 2nd accused to go home. He said that is the proper route that he always take to go home. On his way home he could hear the deceased swearing. When he turned he saw the deceased throwing a punch to the 1st accused. The 1st accused blocked that punch. Then he saw the deceased slip when he was trying to punch the 1st accused. He stood there for about 20 seconds and then went home.

- c) During cross examination on behalf of the 3rd accused he said the 3rd accused was not there with him and the 2nd accused when he confronted the deceased in front of Sikeli's compound.*
- d) During cross examination on behalf of the 4th accused he said he can't recall whether he heard the 4th accused say anything in front of Sikeli's house. He also said he can't recall whether he heard the 4th accused say anything when he was at the driveway.*
- e) During cross examination on behalf of the prosecution he agreed that the punches he and the 2nd accused threw were aimed at the deceased.*

36. That is a summary of the evidence. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.

Analysis

- 37. The prosecution says that the offence of manslaughter was committed by joint offenders in prosecution of a common purpose.
- 38. It is the prosecution case that, all five accused chased the deceased; the 2nd, 3rd and the 5th accused persons kicked and punched the deceased when the deceased fell after the 1st accused kicked the deceased's leg; the 4th accused was encouraging the others to assault the deceased by saying 'dou vakamatea';

thereafter the 1st accused punched the deceased as a result of which the deceased fell on the ground and hit his head while the other accused persons were present and the 1st accused's punch was a substantial contribution to the death of the deceased.

39. In order to prove the case against the accused persons, the prosecution should prove beyond reasonable doubt that;
- a) the 1st, 2nd, 3rd, 4th and 5th accused persons formed a common intention to engage in an unlawful purpose,
 - b) in the process of performing that unlawful purpose the 1st accused committed the offence of manslaughter, and
 - c) the commission of the offence of manslaughter was an offence of such a nature that its commission was a probable consequence of carrying out that unlawful purpose.

Whether there was a joint criminal enterprise

40. You have to consider the case against each accused separately and decide whether each accused formed a common intention with one another to perform a criminal or an unlawful purpose. The accused persons' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.
41. The first accused says he wanted to take the deceased who was drunk, home. He says that he called the 2nd accused and the 5th accused to assist him as he could not handle the deceased by himself, but he chased the duo away when their punches landed on him while he was covering the deceased from them. Then Sikeli took the deceased up the drive way and he followed. When Sikeli left the deceased near Eroni's house, he again tried to assist the deceased.
42. The second accused says that he assisted the deceased on the request of the 2nd accused along with the 5th accused. He says he got angry with the deceased and let go of him when the deceased started to swear at them and started

challenging them. After the punch he aimed at the deceased landed on the 1st accused, the 1st accused chased him and then he left to go home. While he was talking to a person near the church, he saw the deceased lying down on the driveway.

43. The 3rd accused says that he was not there with the group that confronted the deceased near Sikeli's house and he only attended to the deceased after the deceased fell on the driveway.
44. The 4th accused says that he did not encourage the others to assault the deceased. He says that he did not say 'dou vakamatea' but he said 'dou vesuki koya' which means "to catch him" because he had already called the police and because he wanted the deceased to be taken home as the deceased was drunk. He says he was attending to his grandchildren when the deceased fell on the driveway.
45. The 5th accused says that he assisted the deceased on the request of the 1st accused along with the 2nd accused. However, he got angry with the deceased and moved away from him when the deceased started to swear at them and started challenging them. He says that he was chased away by the 1st accused when his punch landed on the 1st accused when he was trying to punch the deceased. Then he left to go home.
46. When you consider the issue whether there was a joint enterprise to prosecute an unlawful purpose and in the event you decide that in fact there was a joint enterprise, it may also be relevant to consider whether an accused clearly and effectively withdrew from that joint enterprise at a particular stage before the alleged offence was committed.

Whether the 1st accused committed the offence of manslaughter as a joint offender

47. Then you have to consider whether the 1st accused committed the offence of manslaughter and he committed that offence in the prosecution of the unlawful purpose which he and others agreed to perform.

48. To prove the offence of manslaughter, the following elements must be proved beyond reasonable doubt by the prosecution;
- a) the accused;
 - b) engaged in a conduct;
 - c) that conduct caused the death of another person;
 - d) the accused intended that the conduct will cause serious harm to the another person;
- or
- the accused was reckless as to a risk that the conduct will cause serious harm to the another person.
49. The prosecution says that the death of the deceased was caused by the conduct of the 1st accused and the 1st accused intended that his conduct will cause serious harm to the deceased or the 1st accused was reckless as to the risk that his conduct will cause serious harm to the deceased.
50. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.
51. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the 1st accused is deliberate and not accidental.
52. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, at law, the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the 1st accused's conduct substantially contributed to the death of the deceased, that is sufficient to satisfy the element that the 'conduct caused the death of the deceased'.

53. With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, the accused intended to cause serious harm to the deceased or that the accused was reckless as to a risk of causing serious harm to the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
54. In order for you to conclude that the 1st accused intended to cause serious harm to the deceased, you should be sure that he meant to bring about serious harm or that he was aware that serious harm will occur on the deceased in the ordinary course of events as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause serious harm to the deceased.
55. In the event you find that the accused did not have the intention to cause serious harm to the deceased or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to a risk of causing serious harm to the deceased. An accused will be reckless with respect of a risk of causing serious harm to the deceased, if;
- a) He was aware of a substantial risk that serious harm will occur due to his conduct; and
 - b) Having regard to the circumstances known to him, it was unjustifiable for him to take the risk.
56. There is no dispute that Savanaca Masi died. The 1st accused had admitted that Savanaca Masi ("deceased") was pronounced dead on 26/11/14. There is no dispute that the deceased fell and hit his head on the driveway on 25/09/14. According to the prosecution, the deceased died due to the head injury he sustained when the deceased fell down and hit his head on the driveway on 25/09/14 as a result of the 1st accused's punch delivered on the deceased.

Prosecution says that the 1st accused intended or was reckless as to the risk that his conduct will cause serious harm.

57. The 1st accused denies punching the deceased. He says that all he wanted was to take the deceased home safely as the deceased was drunk. The deceased could not walk properly, was swearing and was challenging others to fight with him. The 1st accused says that he shielded the deceased when the 2nd accused and the 5th accused tried to punch the deceased. He says that he was simply blocking the punches delivered by the deceased towards him when the deceased fell and hit the head on the driveway. He tried to hold the deceased but was late. He immediately took steps to call an ambulance and he tried to revive the deceased.
58. When you consider the case against the 1st accused please remember not to take into account the evidence given by the fifth prosecution witness to the effect that the 1st accused told him that 'he just gave one punch to the deceased in order to calm him down'. The fifth prosecution witness is a police officer. Apart from the fact that the 1st accused denies making the above statement to the fifth prosecution witness and the fact that the fifth prosecution witness' police statement was recorded 3 months after the incident as highlighted by the defence; at law, an admission made by an accused against his interests to a police officer cannot be used against that accused unless certain conditions are met. In this case, the prosecution is not relying on that evidence against the 1st accused.
59. The eighth and the ninth prosecution witnesses gave their medical opinions based on what they had observed and their experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. Remember that the said witnesses have only dealt with particular parts of the case whereas you have heard all the evidence in this case. Therefore, it is on all the evidence that you must make your final decision. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by each doctor. Evaluating their

evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinions.

Whether manslaughter is an offence of such nature that its commission was a probable consequence of the unlawful purpose

60. Next issue you have to consider is, considering the nature of the offence of manslaughter, is it an offence within the scope of the criminal enterprise which each accused joined. You have to ask yourself whether each accused realised when they took part in the criminal enterprise that there was a real possibility that one of the participants would cause serious harm to the deceased with the intention or being reckless as to the risk that the conduct will cause serious harm.
61. The defence says that there are inconsistencies in the evidence presented by the prosecution. You should follow my direction on inconsistencies if you come across inconsistencies in the evidence of a particular witness, or inconsistencies between the evidence of witnesses.
62. You must remember to assess the evidence for the prosecution and defence using the same yardstick but bearing in mind that always the prosecution should prove the case against each accused beyond reasonable doubt.
63. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
64. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
 - (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.

- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty of the offence charged. The situation would then be the same as if he had not given any evidence at all. You should still consider whether prosecution has proved all the elements beyond reasonable doubt. If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

65. Any re-directions?

66. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against each accused. You may peruse the exhibits if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

67. Your possible opinion should be as follows;

1st accused- guilty or not guilty

2nd accused- guilty or not guilty

3rd accused- guilty or not guilty

4th accused- guilty or not guilty

5th accused- guilty or not guilty



Vinsent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecution, Suva.
Solicitors for the Accused : Legal Aid Commission, Suva.