

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 26 of 2016**

**STATE**

**V**

**JONE TAHA SENICEVA**

**MOSESE VUVANUA**

**AND**

**VILIAME SIGANIQAVOKA**

**Counsel** : Ms. Susan Serukai, Mr. Yogesh Prasad and Mr. Taitusi Tuenuku for the  
State  
Mr. Kevueli Tunidau for the Accused

**Dates of Trial** : 12-13, 15-16 & 19-21 June 2017

**Date Summing Up** : 23 June 2017

### **SUMMING UP**

Madam Assessor and Gentlemen Assessors,

**[1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box, the documents, the things received as prosecution or defence exhibits and any admissions made by the parties.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since

this trial began. Ensure that no external influence plays any part in your deliberations.

- [10]** A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by both Counsels are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
- [11]** As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12]** Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13]** You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting. Consider also the likelihood or probability of the witness's account.
- [14]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or 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. 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
- [15]** 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 that witness is for you to decide. 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 his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.

- [16] You may also have to consider whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [17] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the three accused are guilty or not of the charge against them. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or

heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.

- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [25] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [26] This is because the accused are presumed to be innocent. They may be convicted only if the prosecution establishes that they are guilty of the offence charged. The fact that the three accused have given evidence does not imply any burden upon them to prove their innocence. It is not their task to prove their innocence.
- [27] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [28] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.

- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, in order to find the three accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the three accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the three accused guilty.
- [30] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the deceased or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [31] Let us now look at the charge contained in the information.
- [32] There is one charge preferred by DPP, against the three accused:

### **FIRST COUNT**

#### ***Statement of offence***

**MANSLAUGHTER** : Contrary to Section 239 of the Crimes Act No. 44 of 2009.

#### ***Particulars of the Offence***

**JONE TAHA SENICEVA, MOSESE VUVANUA AND VILIAME SIGANIQAVOKA** on the 11<sup>th</sup> of December 2015 at Vusuya, Raralevu, Nausori in the Central Division, unlawfully killed **ALBERT TURUSI ALIPATE VAKADEWAVOSA**.

- [33] In order to prove the count of Manslaughter, the prosecution must establish beyond reasonable doubt that;
- (i) the three accused;
  - (ii) on the specified day (in this case the 11<sup>th</sup> day of December 2015);
  - (iii) at Vusuya, Raralevu, Nausori in the Central Division;
  - (iv) engaged in a conduct; and
  - (v) the said conduct caused the death of Albert Turusi Alipate Vakadewavosa (the deceased); and
  - (vi) the three accused persons intended the conduct will cause serious harm to the deceased; or

the three accused persons were reckless as to the risk that the conduct will cause serious harm to the deceased.

- [34] The first element is concerned with the identity of the persons who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.
- [35] The fourth element relates to the conduct of the three accused persons. 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 three accused was deliberate and not accidental.
- [36] When dealing with the fifth element, whether the said 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 deceased's death. Therefore, if you are satisfied beyond reasonable doubt that the conduct of the three accused substantially contributed to the death of the deceased, that is sufficient to satisfy the element that the 'conduct caused the death of the deceased'.
- [37] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause serious harm to the deceased or that the accused were 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 the three accused from the facts and circumstances you would consider as proved.
- [38] In order for you to conclude that the three accused intended to cause serious harm to the deceased, you should be sure that they meant to bring about serious harm or that they were aware that serious harm will occur on the deceased in the ordinary course of events as a result of their conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the three accused had the intention to cause serious harm to the deceased.
- [39] 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 they had that intention, you should then consider whether the accused were 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. They were aware of a substantial risk that serious harm will occur due to their conduct; and
- b. Having regard to the circumstances known to them, it was unjustifiable for them to take that risk.

**[40]** If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the three accused guilty of Manslaughter.

**[41]** If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the three accused not guilty of Manslaughter.

**[42]** The prosecution says that the offence of Manslaughter was committed by joint offenders in prosecution of a common purpose.

**[43]** In terms of Section 46 of the Crimes Act it is stated: *“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.”*

**[44]** In order to prove the case against the accused persons, the prosecution should prove beyond reasonable doubt that;

- a. the three accused persons formed a common intention to prosecute or engage in an unlawful purpose, and
- b. in the process of performing that unlawful purpose the three 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.

**[45]** 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 at the spur of the moment. Their agreement can be inferred from the circumstances.

**[46]** Then you have to consider whether any one of the three accused committed the offence of Manslaughter in the prosecution of that unlawful purpose.

**[47]** 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 that the conduct will cause serious harm to the deceased or were reckless as to the risk that the conduct will cause serious harm to the deceased.

**[48]** In this case, the three accused have stated that they acted in self-defence. Section 42(1) of the Crimes Act sets out: *“A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.”*

**[49]** In terms of Section 42(2) of the Crimes Act:

*“A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:*

- (a) to defend himself or herself or another person; or*
- (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*
- (c) to protect property from unlawful appropriation, destruction, damage or interference; or*
- (d) to prevent criminal trespass to any land or premises; or*
- (e) to remove from any land or premises a person who is committing criminal trespass —*

*and the conduct is a reasonable response in the circumstances as he or she perceives them.”*

**[50]** The position of the Prosecution is that excessive force was used by the three accused on the deceased. The Prosecution also submits that none of the three accused sustained any injuries during the incident. As such the injuries caused on the deceased were excessive and not proportionate.

**[51]** This is matter for you to decide based on all the facts and circumstances of the case. It is for you to decide whether the conduct of the accused, in the given circumstances was necessary and a reasonable response to the circumstances as perceived by them.

**[52]** These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

**[53]** In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009, the State and the Defence have consented to treat the following facts as *“agreed facts”* without placing necessary evidence to prove them:

1. *That the deceased in this matter is Albert Turusi Alipate Vakadewavosa who was 48 years old at the time of the alleged offence.*
2. *That the deceased was married to Litiana Tanomata who was 47 years old at the time of the offence.*
3. *That the first accused in this matter is Jone Taha Seniceva who was 33 at the time of the alleged offence.*
4. *That the second accused in this matter is Mosese Vuvanua who was 32 at the time of the alleged offence.*
5. *That the third accused in this matter is Viliame Siganiqavoka who was 29 at the time of the alleged offence.*
6. *That the three accused in this matter were all residing in Vusuya, Raralevu, Tailevu at the time of the alleged offence.*
7. *That the three accused resided in the same house at the time of the offence.*
8. *That the three accused are related.*
9. *That the second accused is married to Leba Tuifagalele.*
10. *That the first accused asked the wife to call the Police.*
11. *That the following documents are to be tendered in by consent:*
  - (i) *Caution Interview of all the 3 accused;*
  - (ii) *Charge Statement of all the 3 accused;*
  - (iii) *Photograph booklet of the Crime Scene (Photos 1-10); and*
  - (iv) *Medical Report of all the 3 accused.*

**[54]** You must therefore, treat the above facts as proved.

### **Case for the Prosecution**

**[55]** It must be stated at the very outset that there are no eye witnesses in this case. The prosecution case is based primarily on the caution interview statements made by the three accused. In support of their case the prosecution led the evidence of the

investigating officer and the pathologist who conducted the post mortem examination on the deceased person.

**[56] Evidence of W/D/CPL Anjaleen Kumar**

- (i) *She testified that she had been in the police service for 21 years. Currently she is based at the Nausori Police Station. She is the Investigation Officer in this case.*
- (ii) *As the Investigating Officer she described her duties and responsibilities as follows: to listen to instructions of the Crime Officer, to record statements of witnesses, to assist crime scene personnel, to assist in the compilation of the dockets, to attend to the post mortem examination of the deceased and any other work that is relevant to the case.*
- (iii) *The witness testified that on the 11 December 2015 she had gone to the crime scene around 9.00 a.m. she had seen the body of the deceased lying on a stack of timber. Photos of the crime scene had been taken by the crime scene officer, Detective Corporal 1928 Sakenasa Loganimoce.*
- (iv) *The post mortem examination on the deceased had been conducted by Dr. James J.V. Kalougivaki at the Colonial War Memorial (CWM) Hospital.*
- (v) *On receipt of the post mortem report, the Police formally charged the accused persons. Before they were charged, a caution interview was recorded from each of the accused.*
- (vi) *The caution interview statement of the first accused was tendered to Court as **Prosecution Exhibit P1A**.*
- (vii) *The caution interview statement of the second accused was tendered to Court as **Prosecution Exhibit P1B**.*
- (viii) *The caution interview statement of the third accused was tendered to Court as **Prosecution Exhibit P1C**.*
- (ix) *The charge statements of the three accused were tendered to Court as **Prosecution Exhibits P2A (first accused); P2B (second accused) and P2C (third accused)**.*
- (x) *The photographs taken at the crime scene contained in a photo booklet was tendered to Court as **Prosecution Exhibit P3**. The booklet contained ten photographs marked from 1-10.*
- (xi) *As part of further investigations the three accused were produced for medical examination. The medical reports of the three accused*

were tendered to Court as **Prosecution Exhibits P4A (first accused); P4B (second accused) and P4C (third accused)**.

(xii) In cross examination certain items recovered from the crime scene were tendered to Court as follows:

- A pinch bar tendered as **Defence Exhibit D1**;
- A screw driver tendered as **Defence Exhibit D2**;
- A plier tendered as **Defence Exhibit D3**;
- A mask tendered as **Defence Exhibit D4** (the witness did not agree that it was a mask but said it looks like a bag)

**[57] Evidence of Dr. James J.V. Kalougivaki**

- (i) The Doctor is a Forensic Pathologist and Head of the Forensic Pathology Unit within the Fiji Police Force (The Doctor's curriculum vitae was handed over to Court).
- (ii) The Doctor recalls conducting the post mortem examination on the deceased and issuing the post mortem report. The post mortem report was tendered to Court as **Prosecution Exhibit P5**.
- (iii) The post mortem examination was conducted at the CWM Hospital on 11 December 2015, at around 12.30 p.m.
- (iv) The Doctor said that the estimated time of death was around 3.00 a.m. on 11 December 2015.
- (v) The Doctor explained in detail the external and internal injuries suffered by the deceased.
- (vi) The face of the deceased showed an 8mm x 2mm contusive linear abrasion at the right upper aspect. Infra-orbital contusion and swelling of the left lower eye lid with contusive swelling of the nasal bridge were also noted. The Left eye showed conjunctival swelling and congestion. The right eye also showed conjunctival congestion. An 8mm x 2mm contusive abrasion was noted over the right malar aspect (right cheek area).
- (vii) Further multiple contusions and contusive lacerations of varying dimensions were shown over the internal surfaces of the lower and upper lips respectively. Contusive tooth indentations were also noted over the internal surfaces throughout the lower and upper lips.
- (viii) The Doctor was of the opinion that these injuries could have been caused by multiple blunt force trauma to the mouth and facial region. Blunt force trauma basically means trauma that is inflicted or caused by a blunt object, an object that is rounded and solid in nature. This can range from a fist, a knee, feet or to a well-rounded stick or club.

- (ix) *The left shoulder of the deceased, showed a 15mm x 4mm contusive abrasion over the interior aspect.*
- (x) *Multiple linear contusive abrasions of varying degrees and dimensions were shown over the antero-lateral aspect of the neck on the right side.*
- (xi) *The Doctor opined that these injuries could have been caused by something that causes friction on the skin. Something that causes a graze not a cut. Having the neck to move over a rough surface could cause such injuries since they are multiple.*
- (xii) *A 25mm x 5mm contusive abrasion was shown over the antero-lateral aspect of the chest on the right. This injury could have been caused by contact of the skin on a rough surface.*
- (xiii) *Multiple linear contusive abrasions of varying dimensions were found over the antero-lateral aspect of the right lower limb surrounding the right knee joint. These injuries could have been caused by the deceased running and falling or by falling into a drain. It was also possible for such injuries to be caused when the person is dragged.*
- (xiv) *A 60mm x 7mm curved railway track-like contusive abrasion were found over the antero-lateral aspect of the upper abdomen on the left. The Doctor testified that this injury could have been caused due an impact on the abdomen, sometimes by a solid object. This is called a tram line bruise. It is caused by a very solid object that lands on the skin. Because of the forceful impact it pushes the blood vessel within the skin from the point of impact towards the side.*
- (xv) *The Doctor said that it was possible that such injuries could have been caused by the curve aspect of the pinch bar.*
- (xvi) *The Doctor was of the view that these injuries were caused due to moderate or high force impact.*
- (xvii) *Thereafter, the Doctor described the internal examination conducted by him on the scalp, skull, face, dura, lepto-meninges, the brain, spinal cord and spinal column of the deceased. In Prosecution Exhibit P5, the said injuries are described in the following terms:*

“Head

Scalp

*Reflection of the scalp skin a 40mm x 35mm and a 20mm x 15mm sub-cutaneous contusive haemorrhage over the left temporo-malar aspect.*

*The examination of the Occipitalis muscle on the left showed a 15mm x 20mm contusion accordingly.*

### Skull

*The skull comprises the bones of the head and includes the vault which is the dome like top, sides and back of the head, the facial skeleton which includes the bones of the face and the upper jaw, the floor of the skull which articulates or hinges with the top of the spine and the lower jaw also called the mandible. The cranial vault showed no evidence of bony injury. The thickness of the cranial vault was unremarkable. The facial skeleton showed no evidence of bony injury. The floor of the skull showed no evidence of bony injury. The Mandible or lower jaw showed no evidence of bony injury. The thickness of the vault was unremarkable.*

### Face

*Further dissection and reflection of the facial skin revealed extensive sub-cutaneous soft tissue contusion and intra-muscular haemorrhage of varying sizes markedly over the upper neck and sides of the face bilaterally. Further dissection of the face and examination also showed sub-cutaneous soft tissue contusions and intra-muscular haemorrhage of varying sizes surrounding or with vicinity of the mouth.*

### Dura

*The Dura, the thick outer membrane around the Brain appeared intact. There was no evidence of any extra-dural haemorrhage. There was no evidence of any sub-dural haemorrhage.*

### Lepto-meninges

*The Lepto-meninges, the thin inner membrane around the Brain showed bilateral extensive sub-arachnoid haemorrhage at the parieto-occipital aspect of the Brain and also extending inferiorly below the level of the Basal cisterns. There was no evidence of any purulent material over the Brain.*

### Brain 1560g

*Sections of the Brain revealed multiple areas of cerebral contusions of varying dimensions throughout. Also seen was haemorrhage filled sulci were noted throughout.*

Spinal Cord

*The upper part of the cervical spinal cord showed the presence of sub-arachnoid haemorrhage. The remainder of the spinal cord was not examined.*

Spinal Column

*The spinal column, the bone of the spine surrounding the spinal cord, appeared unremarkable.”*

(xviii) *The Doctor has given the cause of death as:*

- (a) *Severe Traumatic Brain Injury and Subarachnoid Haemorrhage ;*
- (b) *Severe Extensive Head Injury;*
- (c) *Multiple Traumatic Injuries;*
- (d) *Blunt Force Trauma.*

[58] The Prosecution is also relying on the caution interview statements made by the three accused. Since the accused are not challenging the admissibility of the said caution interview statements, the statements have been tendered to Court by consent of both the prosecution and the defence. As referred to earlier these caution interview statements have been tendered to Court ***Prosecution Exhibits P1A (first accused); P1B (second accused) and P1C (third accused).***

[59] In his caution interview statement, the first accused, *inter-alia* states as follows:

.....

Q : *What time did you wake up after you slept last night (10/12/15) at about 10.30 p.m.?*

A : *I woke up this morning when my cousin namely Mosese Vuvanua was calling me.*

Q : *Can you recall what time it was that Mosese Vuvanua was calling you?*

A : *It was probably after 3.00 a.m. in the morning.*

Q : *Why was Mosese Vuvanua calling you?*

A : *He called me to and see some thieves.*

Q : *Where was Mosese Vuvanua calling you from?*

A : *He was just beside my bed where I was sleeping.*

Q : *What exactly was Mosese Vuvanua saying at the time he was calling you?*

A : *He was saying in i-Taukei language “Tavale, duri mada daru lai raica na dau butako ya” (cousin, stand up we go and see the thief).*

Q : *What did you do when Mosese Vuvanua called you?*

- A : *I woke up and came with Mosese Vuvanua to see the thief.*
- Q : *Where was the thief when you came with Mosese Vuvanua?*
- A : *The thief was inside the house.*
- Q : *Whose house was the thief in?*
- A : *It is the house of the Military Captain.*
- Q : *How far was the house of this Military Captain from where you are staying?*
- A : *Probably about 50 meters away from where I was staying.*
- .....
- Q : *What was the thief doing inside the house when you and Mosese Vuvanua approached the house?*
- A : *The thief was carrying some items out from the house towards the road and upon returning back to the house, Mosese Vuvanua approached the thief beside the house.*
- Q : *What did the thief do when Mosese Vuvanua approached him?*
- A : *He came towards the main door where I was approaching and he took out a pinch bar and hit me in which I raised my hand to block it and it landed on my head. The thief then continuously swung the pinch bar which also hit my right palm and at that time we struggled together as the thief was very huge we started throwing punches on him to overcome him but the thief was physically fit, we kept struggling together with the thief and kept punching to overcome him.*
- Q : *Did you manage to overcome the thief?*
- A : *Yes*
- Q : *How did you manage to overcome the thief?*
- A : *We just punching the thief until he fell on the ground and at that time another cousin of mine namely Viliame came and assisted us by tiring (tying) the thief so he cannot escape and at the same time Leba who is Mosese's wife yelled and shouted that another person has run beside our house into the bush. I left Mosese and Viliame there and ran towards the place which Leba had said that this person ran to into the bush.*
- Q : *What happened after you returned from chasing after the other person mentioned by Leba?*



A : *I came back and saw the thief being tied and lying on top of the timbers beside the house and I informed my wife to call the police.*

.....

Q : *What was being used in tying the thief?*

A : *The wire.*

Q : *Did you know that the thief was lying on top of the timbers dead?*

A : *No, I came to know that he is dead when Police arrived.*

Q : *When did the Police arrive?*

A : *I don't exactly know the time.*

Q : *For how long did you with Mosese Vuvanua and the thief started the commotion did the time the Police arrive?*

A : *It was roughly about 15 minutes that we had the commotion and the thief fell on the ground and then after about 20 to 30 minutes the Police arrived.*

Q : *Did you hit the thief again with anything after he fell on the ground and been tied?*

A : *No*

.....

Q : *Which part of the thief's body did you punch as you have stated to overcome him?*

A : *I can only recall that my punch landed along his chest, ribs and stomach.*

Q : *Did you ever punched the thief's head?*

A : *No.*

**[60]** In his caution interview statement, the second accused, *inter-alia* states as follows:

.....

Q : *What time did you finish drinking grog?*

A : *Before 3.00 a.m.*

Q : *Did anything happen whilst you were drinking your kava?*

A : *Yes. I sitting on the door overlooking the road when I saw a man walked past my house on the road. I decided to follow him but later lost track because it was dark so I went home to finish my grog.*

Q : *Why did you want to follow that man?*

A : *A Military Officer who just bought a land four blocks away from mine had just started building his house requested me to keep a look out for his storage house as it was broken into on Wednesday night and some of his tools were stolen.*

Q : *What is the name of this Military Officer?*

A : *Vula Marawai*

Q : *What did you do after finishing your grog?*

A : *I decided to go and check Vula's storage room.*

Q : *What time was this?*

A : *Just a little bit after 3.00 a.m. this morning*

Q : *What happened when you went to Vula Marawai's storage place?*

A : *As I went near I heard clicking sound coming from inside the house so I went back home to get my brother-in-law namely Jone Taha who was sleeping at home.*

Q : *Did you manage to get him?*

A : *Yes I woke him up from home and I told him that someone is in the Vula's storage room.*

Q : *What did you two do after this?*

A : *We went back to the storage room and I told Jone Taha to cover the back of the storage room while I approach from the front.*

Q : *What did you do after taking up your postings?*

A : *I (was) standing on the corner of the house when I saw a figure of a male person coming from the house carrying a box of nails and put by the drain beside the road. I signaled to my brother-in-law to wait and after his fourth trip with the box of nails I told my brother-in-law to move in.*

Q : *Who else was with you and your brother-in-law?*

A : *Just me and him.*

Q : *What was this person wearing?*

A : *It was too dark but he was wearing a black short and blue or black t-shirts.*

Q : *What happened when you approached him?*

A : *I told him that he was one who has been stealing from our area. He then threw the box of nails at me. I evaded it and threw a punch which landed on his mouth. This person then ran and got the pinch bar.*

Q : *What happened then?*

A : *This guy swung the pinch bar at me and I managed to grab it. We tussled and I tried to pull the pinch bar from him but couldn't. I lost grip of it and shoved the pinch bar at my brother-in-law Jone and injured Jone's hand and at the same time he hit Jone's head with the pinch bar and injured his head. I managed to grab the pinch bar and pulled it from his hand.*

Q : *What did you do with the pinch bar?*

A : *I threw it away and we had a fist fight with this man. Both me and Jone tried to take him down but he was too big so we continued exchanging fists.*

Q : *Did you manage to take him down?*

A : *Yes. We were pulling each other and me and this man fell in between two piles of timber. I wrestled him and then he began to tire so I called my brother Viliame who was just arriving to tie this man up.*

Q : *Who was fighting with this man?*

A : *Me and Jone. We both were exchanging fists with him because he was big bloke.*

Q : *What else did you use to assault this man with?*

A : *Nothing. It was just a fist fight. We did not use anything.*

Q : *Did you know this man?*

A : *No. Just that he is iTaukei.*

Q : *Who tied him up?*

A : *My brother Viliame tied him whilst me and Jone held him down.*

.....

Q : *Why did you tie him up?*

A : *We were worried that he might regain his breath and start fighting with us.*

.....

Q : *Did you punch him after he was tied up?*

A : *No*

.....

Q : *Which part of his body did you punch?*

A : *Mostly his face and body.*

Q : *What happened when the Police arrived?*

A : *They checked him and told us that he is dead.*

.....

Q : *Did you intend to kill this iTaukei man?*

A : *No. It was never our intention. We just tried succumb and restrain him. That was all.*

[61] In his caution interview statement, the third accused, *inter-alia* states as follows:

.....

Q : *Can you tell me what actually happened?*

A : *I was asleep when the two ladies woke me up.*

Q : *Can you recall what time was that?*

A : *3.00 a.m. in the morning.*

Q : *Who are these two ladies that woke you up in the morning?*

A : *Leba and Sainimere.*

.....

Q : *Why did they wake you up?*

A : *The thief had been caught.*

.....

Q : *Which place was the thief caught?*

A : *Newly built house belong to one Army Captain name Maraiwai.*

Q : *When you reached to the said place who all are (were) there?*

A : *Only Mosese and Jone.*

Q : *Where was the thief that was caught?*

A : *They were fighting outside.*

Q : *What happened when you reached to Mosese and Jone?*

A : *Same time I punch.*

Q : *Who did you punch?*

A : *The thief.*

Q : *Did you know the thief's name?*

A : *No.*

Q : *Which part of his body did you punch?*

A : *Chin.*

Q : *How many punches (did) you throw?*

A : *Three*

Q : *Where were Jone and Mosese when you punched the thief?*

A : *They were there.*

Q : *What were you doing?*

A : *They trying to hold the thief.*

Q : *What was the position of the thief when you punched him?*

A : *Sitting down on the stack of timber.*

.....

Q : *You stated that you threw three punches to the thief did these punches land on the chin or somewhere else?*

A : *Two punches landed on the chin and one at the back.*

Q : *Apart from the punches did you do anything else?*

A : *No.*

.....

Q : *Who all planned this?*

A : *Me, Jone, Mosese and others.*

**[62]** That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to them that they could give sworn evidence and call witnesses on their behalf. They could also address Court. The accused could have even remained silent. They were given these options as those were their legal rights. They need not prove anything. The burden of proving their guilt rests entirely on the prosecution at all times. However, all three accused opted to offer evidence under oath.

**[63] Evidence of the First Accused - Jone Taha Seniceva**

(i) *He is a carpenter by profession. In December 2015, he was residing at Vusuya. The second and third accused are his brothers-in-law. He was staying with his wife, the second and third accused and their wives.*

(ii) *He said that he was a member of the community neighbor-hood watchman. His role was to look after the community in collaboration with the Police.*

(iii) *On 11 December 2015, he was sleeping at home. Around 3.00a.m. The second accused came and woke him up. The second accused had said "BIL stand up we go and see the thief."*

- (iv) *The second accused had said that the thief was in the lean-to house owned by an Army Officer named Vunivueti Maraiwai. The house is located about 50 meters from his house.*
- (v) *He had then left home with the second accused. It was dark at the time there was no moonlight.*
- (vi) *When they arrived at Maraiwai's house, he had come around the back of the house to the front. The thief had come running towards him. He had bend down to take something. The thief had said "move or I will kill you". Then the thief had struck him with the pinch bar. He was struck on the top of his head and his right hand/right palm. Thereafter, he had a fist fight with the thief. He and the thief had exchanged fists several time over.*
- (vii) *He says at the time he was having the fist fight, the second accused was also present and they both were trying to take the pinch bar away from the thief.*
- (viii) *The witness testified that the thief and Mosese were pulling each other, while Mosese was trying to take the pinch bar away from the thief.*
- (ix) *Thereafter, Mosese's wife Leba had called him. He had left while Mosese was still wrestling with the thief. He testifies that at stage, the pinch bar was still in the possession of the thief.*
- (x) *When he was leaving, he saw Viliame coming towards the scene.*

**[64] Evidence of the Second Accused – Mosese Vuvanua**

- (i) *He is a carpenter by profession. In December 2015, he was residing at Vusuya. The first and third accused are his brothers-in-law.*
- (ii) *He said that he was a member of the community neighbor-hood watchman. His role was to look after the community in collaboration with the Police.*
- (iii) *The witness testified that he had been told to look after the house belonging to Army Officer, Vuni Maraiwai.*
- (iv) *On 11 December 2015, he had been at home drinking grog. The first accused and third accused and their wives were also at home, and they were sleeping.*
- (v) *Around 3.00 a.m. he saw a person go past his house. He had followed the person about 200 meters. However, that person had disappeared. So he had come back home to finish his grog.*
- (vi) *After finishing his grog, he had gone to check on Maraiwai's house. He explained in detail how he approached the house and the location and description of the said house. Inside Maraiwai's house were carpentry tools and various types of machines.*

- (vii) *When he came close to Maraiwai's house he heard a "clicking sound". It was the sound of the clicking of tools inside the house. He heard footsteps as well. He thought that the person he followed earlier and had disappeared, was inside the house.*
- (viii) *He had then returned home and woken up Jone. He had told Jone that there is a person in the army officer's house. He together with Jone had gone back to Maraiwai's house.*
- (ix) *The witness explained to Court the exact positions he and Jone took at the house. Initially, both were at the back of the house. He had seen the deceased carrying a box of nails and putting it by the drain beside the house. He had been observing this for about 5 minutes. The deceased had made four trips back and forth to the house. He had then signaled to Jone to go towards the front of the house.*
- (x) *At this point, the witness had approached the deceased. He had told him that he was the one who was stealing from the area. The deceased had then thrown the carton of nails at him. He had evaded it, and then punched the deceased. The punch had landed on the deceased shoulder. Later the witness said that the punch had landed on the deceased mouth.*
- (xi) *The deceased ran and got a pinch bar, which was at the front door of the house. The deceased had then swung the pinch bar several times at him. However, he had evaded being hit. The first time he got hold of the pinch bar, the deceased had pulled it back. So he kept punching at the deceased. The said punches had struck the deceased mouth and shoulder. He and the deceased had continued wrestling with each other.*
- (xii) *The witness testified that Jone came to the scene when the deceased went to get the pinch bar from the front of the house.*
- (xiii) *He had managed to grab the pinch bar from the deceased and throw it away.*
- (xiv) *He testified further that both he and Jone tried to take the deceased down but the deceased was too big. So they continued exchanging fists. The deceased was pulling at his T-shirt. Then he and the deceased fell between the two piles of timber. He had fallen on top of the deceased because the deceased was pulling him. After he fell on the deceased, they continued to wrestle with each other. At that stage the deceased grabbed onto his balls. Then the witness had jumped up. At this point in time Viliame had arrived at the scene.*
- (xv) *He also said that when they were punching each other, the deceased had tripped on a heap of soil as the area was uneven.*
- (xvi) *The witness said that the deceased, fell backwards and landed his head on the posts that were placed between the stacks of timber.*

**[65] Evidence of the Third Accused – Viliame Siganaqavoka**

- (i) *The witness is a Panel Beater by profession. Currently he is working at GM Motors.*
- (ii) *He said that he too was a member of the community neighborhood watchman. His role was to look after the community in collaboration with the Police.*
- (iii) *On 11 December 2015, he had been sleeping at home. Whilst he was sleeping, around 3.00 a.m. Leba (the wife of the second accused) and Sainimere (the wife of the first accused) had come and woken him up. They had told him that the thief had been caught at the army officer's house. He had then run to where the thief was.*
- (iv) *When he was running on the road, he had seen the second accused and the thief punching each other. The first accused ran towards him and told him that he was going to see another thief.*
- (v) *Once he reached he saw the second accused and the thief pulling each other. They were exchanging fists and moving around. They were pulling each other's T-shirt. When they were pulling each other the thief tripped and fell into a heap of soil. The thief pulled the second accused along with him. They tripped together.*
- (vi) *The thief fell backwards on the stack of timber. The thief overturned and slammed the side of his face.*
- (vii) *The thief and the second accused wrestled with each other whilst lying down. Suddenly the second accused jumped up holding onto his balls. The thief wanted to stand up and flee. The witness was in front of him. The thief had punched him. He had evaded the punches and punched the thief on his chin.*
- (viii) *When the thief had punched him again he had tackled him on top of the timber. He and Mosese had wrestled with the thief. Then they looked for wire to tie the thief up.*
- (ix) *The witness says that he had punched the thief twice on his chin.*
- (x) *The second accused was holding onto the thief whilst the witness went to find rope. Since they couldn't find any rope, they brought wire and tied the thief up.*

**Analysis**

**[66]** The above is a brief summary of the evidence led at this trial.

**[67]** Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge of Manslaughter, since the



prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Manslaughter against the three accused, beyond reasonable doubt.

- [68] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability of the prosecution evidence, also when you are assessing the evidence of the three accused. You must consider their evidence also for its consistency and also the probability of his version. If you find the evidence of the three accused are truthful and reliable, then you must find the accused not guilty of charges, since the prosecution has failed to prove its case. However, I must caution you that if you reject the evidence of the three accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [69] In this case the prosecution is also relying on the admissions made by the three accused in their caution interview statements. Any admission made by these accused in their caution statements are admissible and sufficient evidence to prove their guilt to a charge. However, please bear in mind that the caution interview statement of one accused cannot be used against the other accused.
- [70] Since the accused are not challenging the admissibility of the said caution interview statements, the statements have been tendered to Court by consent of both the prosecution and the defence. The accused also admit to making the statements. However, the truthfulness of the statements and the question of what weight you can put on the admissions made in the said statements is a matter of fact for you to decide.
- [71] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you accept the three accused version, then you must find the accused not guilty of the charge;*
  - ii. *If you reject the version of the three accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
  - iii. *If you find the prosecution evidence is not truthful and or not reliable then you must find the three accused not guilty of the charge;*

iv. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of manslaughter has been established beyond reasonable doubt. If so you must find the three accused guilty. If not you must find the three accused not guilty.*

[72] If you have any reasonable doubt about the prosecution case as a whole or an element of the offence, then you must find the three accused not guilty of the charge.

[73] Any re directions the parties may request?

[74] Madam and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately against the three accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[75] Your possible opinions should be as follows:

First Count-Manslaughter- Guilty or Not Guilty

[76] I thank you for your patient hearing.



**Riyaz Hamza**  
**JUDGE**  
**HIGH COURT OF FIJI**

AT SUVA

Dated this 23<sup>rd</sup> Day of June 2017

**Solicitor for the State** : **Office of the Director of Public Prosecutions, Suva.**  
**Solicitor for the Accused** : **Messrs. Kevueli Tunidau Lawyers, Lautoka.**

