

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 139 of 2016

[CRIMINAL JURISDICTION]

STATE

V

AISAKE VANA JUNIOR

Counsel : Ms. J. Fatiaki and Ms. S. Tivao for State  
Mr. N. Tuifagalele for accused

Hearing on : 17<sup>th</sup> to 19<sup>th</sup> July 2017

Summing up on : 19<sup>th</sup> July 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 is 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

my opening address, 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. 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.
4. 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.
5. 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 feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. 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.

7. 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.
8. 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.
9. 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.
10. 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.

11. 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.
12. 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/her favour based on the same set of proved facts, then you should not draw the adverse inference.
13. 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.
14. 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, then you must find the 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.
15. You are not required to decide every point the lawyers in this case have raised. 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 the accused.

16. 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.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

**MANSLAUGHTER:** contrary to section 239 of the Crimes Act 2009,

*Particulars of Offence*

**AISAKE VANA JUNIOR** on the 5<sup>th</sup> of April 2016 at Nasinu in the Central Division, unlawfully killed Suliasi Veisere.

18. 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.
19. The first element involves the identity of the offender. In this case there is no dispute regarding this element.
20. To engage in a conduct is to do an act which is the product of the will of the accused. The prosecution has to prove beyond reasonable doubt that the conduct of the accused is deliberate and not accidental.

21. 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 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'.
22. In this case it is admitted that a single stab wound on the left back measuring 26mmx22mm and 150mm in depth was noted during the postmortem examination. It is further admitted that the cause of death was noted as (a) Severe haemo-thorax, (b) Ruptured thoracic aorta (c) Traumatic chest stab injury and (d) Sharp force trauma.
23. 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.
24. In order for you to conclude that the 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.

25. 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.
26. You should note that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence. At law, a person carries out conduct in self defence if he or she believes that the conduct is necessary to defend himself or herself and the conduct is a reasonable response in the circumstances as he or she perceives them.
27. Now let me direct you on how to deal with the cautioned interview statement that was tendered as an exhibit. It is a matter for you to decide whether the accused made the admissions in the cautioned interview statement and whether those admissions are true. The accused says that he did not tell the police certain things that are recorded in his cautioned interview. If you are sure that the admissions in the cautioned interview were made by the accused, then you should consider whether those admissions are true and what weight you should give to those admissions. Which means that you should assess the cautioned interview statement the same way you would assess the evidence given by a witness. You may accept the entire statement to be true or that a part of it is true or you may decide that the entire statement is not true. You may rely only on what you would consider to be true.
28. Circumstantial evidence is evidence of various circumstances that may lead to the conclusion that an accused committed a particular offence, when taken together. It must not be mere speculation or guesswork. It is not sufficient that

the proved circumstances are merely consistent with the accused person's guilt. To find an accused guilty on circumstantial evidence, you must be satisfied beyond reasonable doubt that the inference of guilt is the only rational conclusion to be drawn from the circumstances you consider as proven when taken together. Before you draw any inference you must first be satisfied beyond reasonable doubt that the evidence given by witnesses relating to the circumstances is credible and truthful.

29. It is important that you examine circumstantial evidence with care as with all evidence and consider whether the evidence upon which the prosecution relies on to prove its case is reliable and whether it does prove the guilt of the accused, or whether on the other hand it reveals any other circumstances which cast doubt upon or destroy the prosecution case.

#### *Evidence*

30. First witness was Salanieta Divolivoli. She said that;
- a) *On 05/04/16 she was watching TV with her sister-in-law Laka in the sitting room. Her father-in-law Aisake Vana Snr was sleeping in his room. The deceased was in another room and the accused was cooking in the kitchen. Because the TV was not that clear, she requested the deceased to check the antenna. The deceased came and checked. She was falling off to sleep and at one point she heard the deceased and the accused arguing.*
  - b) *The accused was standing beside a table in the kitchen and the deceased was standing next to the TV. They were six to eight footsteps apart. She said they were arguing about a bowl of dhal. The deceased asked the accused why the accused ate his dhal. She asked them to stop fighting because it was about a bowl of dhal. Laka who was lying beside her, went to the toilet.*
  - c) *She said the deceased was swearing at the accused and the accused got angry. Then the accused came inside the sitting room and they started punching each other with their hands. Five to ten seconds after they started fighting, she went to Laka to ask her help to stop the accused and the deceased.*
  - d) *Whilst she was telling Laka what was happening, she lit a cigarette. She heard the deceased telling the accused not to get hold of the knife. She heard this when she*



*was in the toilet passage. She threw the cigarette away and came inside the sitting room. When she came inside, she saw the deceased lying on the floor and the accused went out of the house. She ran to the deceased and asked him what happened but there was no response.*

- e) When she was coming to the living room Aisake Vana Snr was inside his room. When she held the deceased's hand she saw blood on the hands and then she called Laka to come and help her. Thereafter the deceased was taken to the Valelevu Health Centre.*
- f) During cross examination she admitted that she saw the two brothers arguing before she went to the passage way where she smoked the cigarette. She said both of them were throwing punches. She agreed that the fight started when the deceased swore at the accused. She recalled two swearwords used by the deceased and said the deceased used plenty of swearwords which she can't recall. She could not recall the swearwords used by the accused during the fight.*
- g) It was pointed out that in her statement given to the police it is stated that when she came back to the sitting room she saw the deceased lying on her uncle. She said her father-in-law came after she yelled at Laka. She denied the suggestion that her father-in-law was already there where the two were fighting while she was smoking.*

31. The second witness was Ruci Vece. She said that;

- a) Her house is located one house next to Aisake Vana Snr's house. To walk from the front door of her house to the front door of Aisake Vana Snr's house it takes about 10 footsteps.*
- b) On 5/04/16 around lunch time there was noise coming from a neighbouring house. Then the accused came and stood in front of her house. When she asked the accused what he did, the accused told her that he stabbed the deceased. Then the accused went and sat on the steps at the back of her house. She remained standing in the front. She asked him about the knife he used. At that time she was holding on to a kitchen knife. The accused said that he used the same kind of knife. When she asked the accused what happened, the accused told her that there was an argument and then he picked up the knife and stabbed the deceased.*

- c) *During cross examination she said she was standing about 5 footsteps away from where the accused was sitting. When she was asked whether she believed what the accused told her she said yes.*
  - d) *She denied the suggestion that the accused did not tell her that he stabbed the deceased with the knife. She said she was standing inside the house beside the door when she had the conversation with the accused. She also said that after the accused came in front of her house they had a conversation for a while, and then the accused went to the doorsteps at the back where she followed him to ask him what kind of knife he used. After she asked him about the knife she came back and stood in front of the door where she saw the deceased being taken in a taxi.*
32. Third prosecution witness was Detective Sergeant Vinod Chand. He said that;
- a) *He was the investigating officer in this case and was also the officer who interviewed the accused. He commenced the interview on 06/04/16 at 2.30pm. He tendered the cautioned interview statement of the accused as PE 20. He read the caution interview statement and also identified the kitchen knife that was mentioned in the caution interview. The kitchen knife was tendered as exhibit PE 21.*
33. Fourth prosecution witness was Detective Constable Binay Kumar. He said that;
- a) *He formally charged the accused on 07/04/16. He read the charged statement in court. The charge statement was tendered as PE 22.*
34. That was the case for the prosecution. At the end of the prosecution case you heard me explain several options to the accused. He had those options because he does 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 chose to give evidence on oath.
35. The accused said in his evidence that;

- a) *On 05/04/16, in the morning he was cooking rice and dhal. He started chopping onion for the dhal he was frying. His father was sleeping in his room, his sister-in-law Salanieta was outside and his sister Lakalaka was inside the washroom.*
- b) *After he chopped the ingredients, the deceased came to the sitting room and fixed the TV. When the deceased saw the dhal he got angry and started swearing. Though the deceased swore at him, he never swore back at the deceased. He told the deceased to stop swearing but the deceased kept on swearing.*
- c) *After that the deceased ran towards him and started punching him. He said the deceased threw four punches and when the deceased kept on punching, he wanted to punch back. He did not know that he had a knife in his hand. They started punching each other inside the sitting room and his father woke up. When the father told them to stop fighting he stopped fighting and tried to go outside.*
- d) *Then the deceased started pulling him from his T-shirt. When he managed to free himself and was forcing himself to go out of the house through the door, the deceased knocked himself on the door and fell.*
- e) *He went towards his neighbor Ruci's house and sat at the back of the house where there was a septic tank. He sat there because he was shocked. He said the only thing he knows is that he asked the owner of the house about his father and she told him that they went in a taxi.*
- f) *Then he went to one of his friends' house. While he was at his friend's house his sister came in the afternoon and told him that the deceased had passed away. He couldn't believe and he started crying.*
- g) *He was taken to the police station on 06/04/16 in the afternoon. At the police station he was just asked questions and he just answered. He said he can't believe that the deceased would die.*
- h) *During cross-examination he said he got angry when the deceased came to him and started punching. When it was suggested that he told the police what actually happened, he said no. He said he did not tell certain things that were readout in court the day before. He admitted that it was the first time he is saying that the police made things up. When he was asked what the deceased was doing in the living room, he said the deceased came to change the channel. He said only himself and the deceased were there inside the sitting room.*
- i) *He said he never left the kitchen and it was the deceased who ran towards the kitchen where he was standing. When it was pointed out that he had told the police during his caution interview which he had signed that he ran towards the deceased from the kitchen, he denied. He denied that the deceased told him not to hold the knife. He admitted that the first person he met after he left the house was Ruci. He denied informing Ruci that he stabbed the deceased.*
- j) *When it was suggested that what happened to the deceased was no accident he said he did not mean it and he did not know what was happening on that day. He was shocked that the knife hurt the deceased and he didn't know that the deceased will die. He said he don't know how he punched back because he was angry. When it*

*was suggested to him that considerable force would have been required for the knife tendered as PE 22 to penetrate 15cm, he said he does not know.*

36. That is a brief summary of the evidence. You may have noticed that I have not reproduced the entire evidence that was led. I have reproduced the evidence which I consider necessary to explain the case and the applicable legal principles to you. If I did not refer to any evidence which you consider important, you should still consider that evidence and give it such weight you may think fit. As I have already explained, which evidence you would accept and do not accept is a matter for you to decide.
  
37. 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 that those facts are proven beyond reasonable doubt. The admitted facts in this case are;
  1. *Aisake Vana Junior (hereinafter referred to as "the accused") was born on 25 May 1979.*
  2. *The accused was 37 years of age in 2016.*
  3. *The accused resided at Lot 29, Block 4 of Jale Street in Kalabu with his father Aisake Vana Senior and 3 brothers namely; Isoa Valu, Suliasi Veisere (hereinafter referred to as "the deceased"), Isikeli Vueti and 3 sisters namely; Maria Vana, Laka Vana and Asena Tavo.*
  4. *On 5 April 2016 between 11am and 12pm the accused's father, Aisake Vana Senior, the deceased and his sister Laka Vana and his sister-in-law Salanieta Bakana were at home. The accused was cooking in the kitchen while the deceased was repairing the television antenna.*
  5. *Aisake Vana Senior was sleeping in the bedroom.*
  6. *Lakalaka Biu (sister) was washing clothes in the wash room whilst Salanieta Bakana was watching television in the sitting room.*
  7. *Lakalaka Biu heard the deceased telling someone 'why are you frying my dhal?'*

8. *The accused and the deceased were arguing about the dhal in the sitting room when Salanieta Bakana heard the deceased telling the accused not to get a hold of the knife.*
9. *Salanieta Bakana stood up from the sitting room and went outside and on her way out she informed Lakalaka Biu who was in the toilet that the accused and the deceased were arguing.*
10. *Aisake Vana Senior had woken up and heard the sound of banging on the floor and he saw the accused and the deceased fighting in front of the main door.*
11. *Salanieta Bakana went to the sitting room and saw a pool of blood. She saw the deceased injured and was lying on top of Aisake Vana Senior.*
12. *Ruci Vere is a neighbor of the accused and has lived at Lot 5 Flat 2 Jale Street, Kalabu for the past 10 years.*
13. *On the same day Nurse Emalina received the deceased at the Valelevu Health Centre and she checked his pulse and heart beat and the same was not responding.*
14. *Doctor Shahanam Venkataiya of Valelevu Health Centre pronounced the deceased dead on that same day.*
15. *The accused was arrested by police officer Freddy Cassidy on 6 April 2016 and he was interviewed under caution on the same date at 2.30pm. The interview concluded on 7 April 2016 at 10.20am.*
16. *The accused was then charged under caution at 11.30am by DC 4255 Binay.*
17. *A post mortem examination was conducted on the deceased at the CWM hospital mortuary by Dr. James Kalougivaki at 10.40am and also present during the post mortem examination was Corporal 2659 Kaumaitotoya.*
18. *Upon examination Dr. James Kalougivaki noted a single stab wound on the left back measuring 26mmx22mm and 150mm in depth.*
19. *The cause of death as noted by Dr. James Kalougivaki was as follows:*
  - a. *Severe haemo-thorax*
  - b. *Ruptured thoracic aorta*
  - c. *Traumatic chest stab injury*
  - d. *Sharp force trauma*
20. *The body of the deceased was identified by his brother Isoa Valu on the day of the post mortem examination at the CWM hospital mortuary.*

21. *A/Sgt 4485 Viliame Naupoto based at the Forensic Science Services at the Fiji Police Academy Complex in Nasova, Suva on 5 April 2016 took nineteen photographs with respect to this matter and the same was compiled in a photograph booklet on 14 April 2016 which is attached herewith.*
22. *Cpl. 4026 Jieni Sefeti based at the Forensic Science Services at the Fiji Police Academy Complex in Nasova, Suva on 5 April 2016 drew a Fair Sketch Plan of the Crime Scene at Block 4 at Jale Street in Kalabu.*
23. *Detective Sergeant 3075 Sakiusa Jitoko based at the Forensic Science services at the Fiji Police Academy Complex in Nasova, Suva on 5 April 2016 at around 2pm attended to the scene of crime at Block 4 at Jale Street in Kalabu and there he conducted a visual examination of the scene. He found a wooden kitchen knife lying on the grass beside the wooden step on the front main door. This was uplifted and exhibited.*

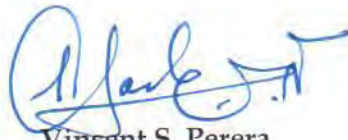
### *Analysis*

38. The prosecution case is that, the accused wilfully stabbed the deceased and the accused either intended or was reckless as to the risk that the said conduct will cause serious harm to the deceased. According to the prosecution the accused came to the sitting room where the deceased was standing and then they started punching each other. The first prosecution witness heard the deceased telling the accused not to hold the knife. There was no witness who saw the accused stab the deceased. Thereafter, the first prosecution witness saw the deceased lying on the ground and she did not see the accused inside the house. The second prosecution witness said that the accused told her that he stabbed the deceased. The prosecution is also relying on the cautioned interview statement and the charge statement of the accused.
39. The accused says that he got angry when the deceased started punching him and then he also punched the deceased back to protect himself. According to the accused the deceased ran towards him and started punching him. The accused says that he did not realise at that moment that he was having a knife in his hand. According to the defence, the accused did not wilfully stab the deceased

and it was an accident. The accused also said that certain statements in the cautioned interview were not made by him.

40. 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 the accused beyond reasonable doubt.
41. 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.
42. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
  - (i) You may believe the explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
  - (ii) Without necessarily believing 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 the accused's evidence. But if you disbelieve the accused, that itself does not make him guilty of the offence charged. The situation would then be the same as if the accused 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.
43. Any re-directions?

44. 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 the 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.
45. Your opinion should be whether the accused is guilty or not guilty.



Vincent S. Perera

JUDGE

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitor for the Accused : Tuifagalele Legal, Barrister and Solicitor Suva.