

IN THE HIGH COURT OF FIJI
AT LABASA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 42 of 2016

STATE

V

WILLIAM MCPHERSON

Counsel : Mr. Lisiate Fotofili for the State
Ms. Christina Choy for the Accused

Dates of Trial : 23-25 October 2017

Date Summing Up : 27 October 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 charge 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 charge 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 assure you, that 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 tendered as prosecution exhibits and any admissions made by the parties by way of admitted facts.
- [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 submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel 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.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is 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.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. 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.
- [16] 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.

- [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 accused is 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 morning, 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] 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.
- [25] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not his task to prove his innocence.
- [26] 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?
- [27] 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 any reasonable doubt 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.
- [28] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [29] 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 making. 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.
- [30] Let us now look at the charge contained in the Amended Information.
- [31] There is one charge preferred by DPP, against the accused:

FIRST COUNT

Statement of offence

MANSLAUGHTER : Contrary to Section 239 (a), (b) & (c) (ii) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

WILLIAM MCPHERSON, on the 10th day of February 2015 at Savusavu, in the Northern Division, unlawfully assaulted **PARMA NAND**, which caused the death of the said **PARMA NAND** and at the time of the assault was reckless as to the risk that his conduct would cause serious harm to **PARMA NAND**.

[32] Section 239 of the Crimes Act No. 44 of 2009 ("Crimes Act") stipulates as follows:

"A person commits an indictable offence if—

(a) the person engages in conduct; and

(b) the conduct causes the death of another person; and

(c) the first-mentioned person—

(i) intends that the conduct will cause serious harm; or

(ii) is reckless as to a risk that the conduct will cause serious harm to the other person."

[33] It is clear from the Information that in this case the prosecution is only relying on Section 239 (a), (b) & (c) (ii) of the Crimes Act.

[34] Therefore, in order to prove the count of Manslaughter, the prosecution must establish beyond any reasonable doubt that;

(i) the accused;

(ii) on the specified day (in this case the 10th day of February 2015);

(iii) at Savusavu, in the Northern Division;

(iv) engaged in a conduct (which in this case was unlawfully assaulting Parma Nand); and

(v) the said conduct caused the death of Parma Nand (the deceased); and

(vi) (at the time of the assault) the accused was reckless as to the risk that his conduct will cause serious harm to the deceased.

- [35] The first element is concerned with the identity of the person 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 any reasonable doubt. In this case the prosecution and the defence have consented to treat these facts as agreed facts and, as such, you must treat these facts as proved.
- [36] The fourth element relates to the conduct of the accused person. 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 any reasonable doubt that the conduct of the accused, which in this case was unlawfully assaulting Parma Nand, was deliberate and not accidental.
- [37] 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 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'.
- [38] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, that the accused was reckless as to a risk that his conduct will cause serious harm to the deceased. 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 accused from the facts and circumstances you would consider as proved.
- [39] You should consider all the evidence and draw appropriate inferences in order for you to conclude whether that 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 that risk.
- [40] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the 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 accused not guilty of Manslaughter.
- [42] However, if you find that the prosecution has failed to establish any of these elements in relation to the offence of Manslaughter beyond any reasonable doubt; as an alternative, you are then allowed to look at the lesser offence of 'Assault Causing Actual Bodily Harm' to Parma Nand, though the accused is not formally charged in the Information for that offence.
- [43] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an assault occasioning actual bodily harm."
- [44] In order to prove the offence of Assault Causing Actual Bodily Harm, the prosecution must establish beyond any reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 10th day of February 2015);
 - (iii) at Savusavu, in the Northern Division;
 - (iv) assaulted Parma Nand; and
 - (v) thereby caused actual bodily harm to the said Parma Nand.
- [45] The first element is concerned with the identity of the person 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 any reasonable doubt. As stated before, in this case the prosecution and the defence have consented to treat these facts as agreed facts and, as such, you must treat these facts as proved.
- [46] The fourth element relates to the actual assault. It is admitted by both the prosecution and the defence that the deceased was punched several times by the defendant.
- [47] With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to the said Parma Nand, as a result of the assault.
- [48] The term 'harm' has been defined at Section 4(1) of the Crimes Act to mean: "*any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).*"

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

[50] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*agreed facts*" without placing necessary evidence to prove them:

1. Parma Nand is now deceased.
2. The deceased was punched several times by the defendant at Savusavu Town, on the 10th day of February 2015, at around mid-day.
3. The defendant was later questioned by police in relation to the incident. The defendant gave his answers in his interview voluntarily.
4. On the 11th of February 2015, during a break in the course of his police interview, the defendant voluntarily showed police where at Savusavu Town he had punched the deceased and photos were taken of the defendant.

These photos taken on the 11th of February 2015 [although the time stamp on these photos reflect 2013.8.29] can be tendered by consent during trial.

5. On the 11th of February 2015 a sketch of the scene at Savusavu Town surrounding the area where the defendant had punched the deceased was prepared by police. The sketch can be tendered by consent during trial.

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

Case for the Prosecution

[52] In support of their case, the prosecution called Dewa Nand, Dominiko Wainiu, Dr. Praneel Kumar (a Forensic Pathologist) and Detective Inspector Beiatau Enota.

[53] The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **P1**- Post Mortem Examination Report of the deceased.

Prosecution Exhibit **P2(a)**- Caution interview statement of the accused (the hand written version).

Prosecution Exhibit **P2(b)**- Caution interview statement of the accused (the typed version).

Prosecution Exhibits **P3(a), P3(b) and P3(c)**- Photographs taken, on 11 February 2015, at the scene of crime (as shown by the accused).

Prosecution Exhibit **P4**- Rough sketch plan of the scene of crime as shown by the accused.

[54] Evidence of Dewa Nand

- (i) He testified that the deceased was his older brother. The deceased was two years older than him. The deceased was a shop keeper at Nakama, in Savusavu. He had a grocery and a liquor shop named R. C. Nand. The deceased was married and has two sons and one daughter.
- (ii) On the 10 February 2015, around mid-day he was driving past the town. He saw a crowd had gathered in front of Bargain Box. So he had parked his vehicle and turned around to see what was happening. He had seen the accused (whom he referred to as Mr. Billy) was punching his brother.
- (iii) Then he had run across the road and pulled his brother out from where he was being punched. By the time he had caught or held onto his brother the deceased had been very weak. He could not walk. He started collapsing and the witness was holding him. The witness demonstrated in court how he was holding on to the deceased. The witness had then stopped a taxi and rushed the deceased to hospital.
- (iv) While on the way to hospital the deceased had not spoken, although his eyes had been open. His breathing was going very low. The witness could feel this due to the weakness in the deceased's body. The deceased had been forcing himself to breath.
- (v) The witness testified that he had seen the accused punching the deceased with his hands. At that time (the time he first saw the incident) the accused had been using one hand. The witness could not say as to how many times he saw the punching. But he testified that the incident was going on for long. It had been going on for 5-10 minutes. The punching had been happening before he had parked his vehicle. He had not been there when it began.
- (vi) The punches had landed on both sides of the deceased's stomach.
- (vii) The witness testified that the deceased had an open heart surgery a year before he was punched. He went to India for the surgery. Later he said it was a by-pass surgery.
- (viii) Before the surgery he was an active person. He was a plumber.
- (ix) When asked whether he knew as to whether the deceased was taking any medication after the surgery the witness answered that the deceased used an asthma pump to help him breath.
- (x) The deceased was taken to the Savusavu Hospital immediately after the incident. He had accompanied the deceased to the hospital. He was then transferred to the Labasa Hospital the same day by ambulance. He was in Savusavu Hospital for about 1 ½ hours. They

pumped him – pressed the heart and all that and then brought to Labasa Hospital.

- (xi) He was at Labasa Hospital for 10 days until he passed away.*
- (xii) During the time he was at Savusavu and later at Labasa Hospital the deceased never spoke. The deceased was not moving and his eyes were also not moving. He was on oxygen.*
- (xiii) The witness answered the following questions as follows:*

Q : What exactly did you see from the car?

A : He was punching my brother.

Q : When you say punching?

A : He was using both fists and the punches were landing on the side of his stomach area. I parked my car and I ran to the scene.

Q : From the car to the scene did you observe anything?

A : He was still punching. At that time also he was punching the sides.

Q : Then you intervened and pulled your brother away?

A : Yes.

[55] Evidence of Dominiko Wainiu

- (i) He testified that on 10 February 2015 he had been working at Pacific Energy Service Station at Savusavu.*
- (ii) He had known the accused prior to the incident and refers to him as Billy Boxer.*
- (iii) The witness testified that the incident took place around midday or closer to lunch time. He was in Savusavu town and was going to ANZ bank to deposit the money from the company where he was working. He had been walking to the bank.*
- (iv) He testified that he saw Billy Boxer throwing punches as if he is throwing something. He had been about 30 or 40 metres away at the time. From there he could see Billy Boxer moving his hands. But he couldn't see the person in front of him because of the vehicle's parked on the footpath. His view of the person in front of Billy Boxer was blocked by the car.*
- (v) Then he had moved faster towards that place. He had increased his pace. As he was moving towards the place, they were also moving*

towards his direction. When asked as to how they were moving towards him, the witness answered that gentleman Parma was trying to escape, but punches kept on landing on him. Parma evaded some punches, some punches he couldn't (evade). Sometimes he was crawling and also he was leaning towards some vehicles that were there.

- (vi) Some punches landed on the bottom of the rib side, while some punches on the stomach and likewise on his back.
- (vii) At one point he saw the deceased dropping. This happened on the side of the road. The deceased was not punched when he was on the ground. The accused had then lifted the deceased up by pulling him by the collar of his t-shirt. The witness had then called out to the accused telling him "tavale (cousin) that's enough" and intervened.
- (viii) While he was talking to Billy Boxer the deceased went a couple of steps away and then Billy Boxer managed to force himself free from him. The accused had then run towards the deceased and punched him again. The punches landed on his back. Straight after that he had reached them and tried to stop Billy Boxer from punching the deceased. Around about the same time Parma Nand's brother came there. Then they helped to stop the fight.
- (ix) During cross-examination the Defence Counsel referred to the following omissions in the witness's statement to the police.

Q : So would you agree with me that there is no mention of Mr. Nand crawling?

A : It is not in my statement. But I'm telling this court today what I saw and what I can remember.

Q : So would you agree with me that in your statement there is no mention that Mr. Nand was leaning on a vehicle?

A : Yes.

Q : There is also no mention you seeing Mr. Nand falling down (dropping down)?

A : Yes.

Q : You agree that there is no mention that Billy lifted him up?

A : Yes.

[56] Evidence of Dr. Praneel Kumar

- (i) *The Doctor is a Forensic Pathologist attached to the Forensic Pathology Unit within the Fiji Police Force.*
- (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 P1**.*
- (iii) *The post mortem examination was conducted at the Labasa Hospital Mortuary, on 28 February 2015, at 10.15 hours.*
- (iv) *The Doctor said that the estimated time of death was on 20 February 2015, at 14.30 hours. This had been told to him by the Investigating Officer (Detective Inspector Beiatou Enota).*
- (v) *The Doctor explained that the external examination of the deceased was unremarkable.*
- (vi) *In terms of the internal examination the doctor explained the condition of the various parts of the thoracic cavity, namely the pleural cavities, lungs and the heart.*
- (vii) *The pleural cavities – there was serous fluid found in both pleural cavities measuring 900mls in total. The pleural cavity is the empty space between the ribs and the lungs. Under normal circumstances, there should be no fluid in the cavity (only normal amount of fluid for lubrication).*
- (viii) *The Doctor explained that from the history it is known that the deceased was a cardiac patient and had a by-pass surgery. When a patient has cardiac failure it is a natural disease process to have fluid in the pleural cavity.*
- (ix) *Even kidney failure or problems with the liver can cause such fluid overload. However, knowing the history of the patient the most likely cause was due to cardiac failure.*
- (x) *There was bilateral pulmonary oedema in the lungs. The witness explained that this means fluid overload to the lungs, which is a common finding in heart failure. When a heart is not pumping to its full potential sometimes there is venous congestion – increase fluid in the veins causing it to leak into the alveoli (which is part of the lung).*
- (xi) *Sections of the heart reveal white area of infarct on the posterior and lateral portion of the left ventricular wall. In other words dead heart tissues. In layman's terms it is a heart attack. When the heart muscle*

is dead and turns white due to scarring. In this instance this was visible on the posterior (meaning the rear) and lateral (meaning the side) portion of the left ventricular wall. The left ventricular is one of the four chambers of the heart.

- (xii) All these factors further confirmed that this was a cardiac patient. The infarct was found on the left ventricle. That is the most common site for infarcts or heart attacks.
- (xiii) When posed the question as to whether the Doctor was able to tell how long before the post mortem that would have happened? The Doctor explained that from a gross examination (from the naked eye) it is hard to tell how recent the myocardial infarction was. This could only be confirmed by a histology, which was also done in this case.
- (iv) Moderate atheromas formation was noted in the aorta. The aorta is the major blood vessel coming from the heart. Atheromas formation basically means fatty plaques. This signifies that a patient might have a heart condition in the coronary arteries that supply blood to the heart. If there are fatty plaques in the aorta it indicates that the person could have similar type of deposits (plaques) in the coronary artery.
- (xv) Under histology the Doctor has noted the following in his report. Fibrosis seen in between muscle fibres. Haemorrhages also noted in between muscles fibres. There is loss of striations in muscle fibres with disintegration of nucleus. There is infiltration of neutrophils in between muscle fibres. There is also hyper eosinophilia noted in between muscle fibres. This is suggestive of an acute myocardial infarction.
- (xvi) The pathologist explained that the histology is done by taking sections of the tissue from the patient's heart and slicing it into thin pieces. Then there is a machine which prepares slides. The slides are put under microscopes (microscopic slides).
- (xvii) Acute myocardial infarction means death of the heart muscle fibres because of reduced blood supply or diminished/lack of oxygen going to the heart muscles. This is a heart attack.
- (xviii) The Doctor testified that the presence of fibrosis, haemorrhages, loss of striations in muscle fibres with disintegration of nucleus, infiltration of neutrophils in between muscle fibres and hyper eosinophilia meant that the person suffered a recent heart attack. The presence of fibrosis also meant that there was an old infarct and a recent one as well. If there is fibrosis present it usually happens after two months,

so you cannot differentiate between two months or even ten years.
You cannot age the scar.

- (xix) In the Doctor's opinion the cause of death was:
- (a) Disease or condition directly leading to death – acute inferior myocardial infarction.
 - (b) Antecedent causes - coronary artery disease (by-pass)
 - history of assault
- (xx) The witness testified that the condition directly leading to the death was acute inferior myocardial infarction. The antecedent causes or contributing factors were coronary artery disease and history of assault. In simple words, the Doctor said the patient died of heart attack because he had a heart problem and because of the assault.
- (xxi) Dr. Kumar further testified that a heart attack can usually be caused due to lack or reduced blood supply to the heart muscle because of coronary artery disease. So when there is reduced blood supply, the heart muscles don't get enough oxygen. No tissue can live without oxygen. The term used for the death of a cell in a human body is necrosis. However, when the cell dies due to a reduce blood supply it means infarction.
- (xxii) The Doctor was specifically posed the question if a known heart patient is exposed to a strenuous activity, like being punched hard several times in the stomach/rib area, can that cause a heart attack? The Doctor answered yes it can cause a heart attack.
- (xxiii) The Doctor further explained that where a person has a pre-existing illness, coronary artery disease, if that person gets startled or is assaulted, a fight or flight response kicks in. It prepares the body to avoid danger. So the heart rate will increase. Therefore, in an already compromised heart, in which oxygen supply is not that great, it can cause myocardial ischaemia or a heart attack.
- (xxiv) When posed the question whether a 57 year old person, suffering a severe heart attack, would be able to stand up on his own? The Doctor replied he would not be able to stand up because the pain would be so severe.
- (xxv) The Doctor explained the reason as to the delay (of 8 days) in conducting the post mortem examination. He stated that in relation to the condition of the heart (of a deceased person), his findings

would be no different even if the examination had been conducted 1 to 2 days after the person passed away.

- (xxvi) The Doctor was asked whether he could give an opinion as to when the myocardial infarction in relation to the deceased occurred. The Doctor explained that it was difficult to provide the exact date but it would be recent. However, the presence of fibrosis meant it could be a minimum of 2 months prior to the death. The presence of haemorrhages, loss of striations in muscle fibres with disintegration of nucleus, infiltration of neutrophils in between muscle fibres and hyper eosinophilia, meant that the myocardial infarction is within 5 to 7 days old.
- (xxvii) When asked whether it was possible that the deceased suffered the heart attack on the day he died, the Doctor answered that it was not possible. If that was the case, there would have been no time for the aforesaid changes to take place.
- (xxviii) When questioned as to whether any of the changes noted during his examination could have taken place between the time of death (20 February 2015) and the time he conducted the post mortem examination (28 February 2015), the Doctor said it was not possible. It could have taken place closer to the time of admission to the hospital.
- (xxix) In cross-examination the Doctor testified that he did not have a look at the medical history or the medical folder of the deceased at the time he conducted his examination. Therefore, he could not specifically comment on the past medical history of the deceased.
- (xxx) The witness confirmed that a person having an asthma attack could have shortness of breath plus wheezing.
- (xxxi) He also agreed that if a patient who has undergone a by-pass surgery does not change his lifestyle, he would be putting himself of a higher risk of getting another heart attack.
- (xxxii) It was further put in cross-examination that considering the deceased, who had coronary artery disease, and if he did not changed his lifestyle, that any small event (like being startled), that death could have occurred at any time (he was a ticking bomb)? The Doctor responded that even after by-pass surgery it is not 100% certain. You are still at a risk of dying.

[57] Evidence of Detective Inspector Beiatou Enota

- (i) He testified that he is currently the Crimes officer at the Savusavu Police Station.
- (ii) He had been the Investigating Officer in this case.
- (iii) He had also recorded the caution interview statement of the accused.
- (iv) During the caution interview statement the accused had stated that he could point out the place where the incident took place. He had taken photographs at the scene of the incident.
- (v) He had also drawn a rough sketch plan of the scene of the incident.
- (vi) He had been present when the post mortem examination of the deceased had been conducted by Doctor Kumar at the Labasa Hospital Mortuary.

[58] The Prosecution is also relying on the caution interview statement made by the accused. Since the accused is not challenging the admissibility of the said caution interview statement, the statement has been tendered to Court by consent of both the prosecution and the defence. As referred to earlier this caution interview statement has been tendered to Court as Prosecution Exhibit **P2(a)**- the hand written statement and **P2(b)**- the typed statement.

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

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- Q : Where did you go from after your medical checkup?
- A : I boarded a taxi and I came to town and I handed my sick sheet to the Manager at Exotic (Exotic Fiji Limited).
- Q : Where did you go after that?
- A : I was going home and I was walking near a pedestrian crossing next to Umesh shop. I saw Parma's maroon twin cab coming from the wharf side and park near to the Value Phone Shop. So I went to MOFO boys handicrafts shop and handed my phone and I-pod tablet to the brothers inside.
- Q : Why did you give your items to them?
- A : I wanted to see Mr. Parma.
- Q : What happened next?
- A : I went and searched for him inside the shops.
- Q : Which shops?
- A : Country kitchen, Bargain Box, Gospel Tree and Savusavu Pharmacy.
- Q : Did you manage to locate him?
- A : I saw him inside the Pharmacy.

- Q : Then what happened next?
- A : I went and hid in a passage towards a Barber shop.
- Q : Then what happened next?
- A : When he came out I went and tap his back and when he looked at me, I told him "you f....d my wife?" He turned and replied "so what" and he also laughed.
- Q : Then what happened?
- A : I was filled with anger so I punched him and slapped his face. He turned and covered his face so I punched his ribs from the back.
- Q : Then what happened after that?
- A : His younger brother came and stopped me.
- Q : Where exactly the assault did took place?
- A : Where the cars normally parks at the side of the road between Bargain Box and Savusavu Pharmacy.
- Q : Can you show us the place where the incident took place?
- A : Yes of course.
-
- Q : Why did you punch him?
- A : He has been going around with my wife and he has done this on numerous occasions.
- Q : Do you know Mr. Parma well?
- A : Yes he has been my friend and we used to go booze together.
- Q : Can you recall how many punches you gave him that day?
- A : 3 on the face and the rest (10 or more) on his back.
- Q : Did you punch his stomach?
- A : No.
- Q : Do you know that Mr. Parma had surgical before?
- A : No.
- Q : Did he mention to you whilst you too were still friends that he had aⁿ operation?
- A : No.
- Q : After assaulting him, did you see him being escorted away?
- A : Yes, I saw him being escorted to a taxi and before reaching this taxi he collapsed on the road.
- Q : Do you know that Mr. Parma has collapsed and is still in coma till today due to the assault that you gave him on that day (10.02.15)?
- A : Yes.
- Q : Do you know that what you did is a serious offence and can cause his death?
- A : No, I did not mean to hurt him.

[60] 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 him that he could give sworn evidence and call witnesses on

his behalf. He could also address Court. The accused could have even remained silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to remain silent. You must not draw any adverse inference against the accused due to his choice to remain silent.

Analysis

- [61] The above is a brief summary of the evidence led at this trial. In support of their case, the prosecution led the evidence of Dewa Nand, Dominiko Wainiu, Dr. Praneel Kumar and Detective Inspector Beiatau Enota.
- [62] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [63] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [64] 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 accused, beyond reasonable doubt.
- [65] In this case the prosecution is also relying on the admissions made by the accused in his caution interview statement. Any admission made by the accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge.
- [66] In the admitted facts it is stated that the defendant gave his answers during his caution interview voluntarily. Since the accused is not challenging the admissibility of the said caution interview statement, the statement has been tendered to Court by consent of both the prosecution and the defence. The accused also admits to making the statement. However, the truthfulness of the statements and the question of what weight you can put on the admissions made in the said statement is a matter of fact for you to decide.
- [67] In this case it is admitted facts, and as such proved, that the accused, on the 10 February 2015, at Savusavu Town (in the Northern Division), punched the deceased Parma Nand several times. What is most crucial for you, as Assessors, to decide is whether the said conduct of the accused, caused the death of Parma Nand; and

whether at the time of the assault the accused was reckless as to the risk that his conduct will cause serious harm to the deceased Parma Nand.

[68] In the pathologist Dr. Kumar's opinion the disease or condition directly leading to death or the primary cause of death was acute inferior myocardial infarction. The antecedent causes or contributing factors were coronary artery disease (by-pass) and history of assault. What you have to decide, from the totality of the evidence, is whether the several punches given by the accused substantially contributed to the deceased suffering an acute inferior myocardial infarction and thereby his death.

[69] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge;*
- ii. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Manslaughter has been established beyond any reasonable doubt. If so you must find the accused guilty of Manslaughter. If not you must find the accused not guilty of Manslaughter.*
- iii. *As an alternative to Manslaughter, you may consider whether the accused is guilty or not guilty of the lesser offence of Assault Causing Actual Bodily Harm..*

[70] Any re directions the parties may request?

[71] 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 accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[72] Your possible opinions should be as follows:

First Count

Manslaughter- Guilty or Not Guilty

If not guilty,

In the alternative

Assault Causing Actual Bodily Harm- Guilty or Not Guilty

[73] I thank you for your patient hearing.



A handwritten signature in blue ink, appearing to read "Riyaz Hamza".

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LABASA

Dated this 27th Day of October 2017

Solicitor for the State : Office of the Director of Public Prosecutions, Labasa.
Solicitor for the Accused : Office of the Legal Aid Commission, Labasa.