

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 11 of 2013

STATE

V

- 1. ULAIASI GLEN RADIKE**
- 2. ANARE MARA**
- 3. KELEMEDI SEVURA**

Counsel : Ms. S. Kiran for the State.
: Ms. J. Singh for the First Accused.
: Second Accused Trial in Absentia.
: Ms. V. Narara for the Third Accused.

Dates of Hearing : 30 November, 3, 4, 5 December, 2018
Closing Speeches : 11 December, 2018
Date of Summing Up : 11 December, 2018

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to

accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused persons are guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
7. During the closing speeches the counsel for the third accused had asked you to consider the reason why other persons were not charged by the office of the Director of Public Prosecutions describing it as “selective prosecution”. I direct you to disregard this

submission. It is not for the defence or anyone to question who should be prosecuted the prerogative lies with the Director of Public Prosecutions. You are not to speculate on the powers of the Director of Public Prosecutions.

BURDEN OF PROOF AND STANDARD OF PROOF

8. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused persons to prove their innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
9. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused persons guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt about their guilt, then you must express an opinion that they are not guilty.
10. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
11. You must decide the facts without prejudice or sympathy for either the accused persons or the deceased. Your duty is to find the facts based on the evidence without fear, favour or ill will.
12. At this point in time I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinion. This case involves a loss of life this certainly shocks the conscience and feelings of our hearts.

13. It is quite natural given the inherent compassion and sympathy with which human beings are blessed. You may perhaps have your own personal, cultural, spiritual and moral thoughts about such an incident. You must not, however, be swayed by such emotions and/or emotive thinking. You act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to in the present day society that we live in.
14. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

15. The accused persons are charged with the following offence: (a copy of the amended information is with you).

COUNT 1

Statement of Offence

MURDER: contrary to section 237 of the Crimes Act No. 44 of 2009.

Particulars of Offence

ULAIASI GLEN RADIKE, ANARE MARA and KELEMEDI SEVURA, on the 29th of November, 2012 at Nadi in the Western Division murdered **JOSEVATA NAISALI**.

Ladies and Gentleman Assessors

16. You will notice that the amended information has three accused persons mentioned, however, only accused one and accused three

are present in court. The second accused Mr. Anare Mara is not present in court. The law provides for an accused to be tried in his absence known as *trial in absentia*. Although the second accused was not in court throughout the duration of the trial he is entitled to all the rights of an accused who is present in court that is a fair trial.

17. You are reminded not to take the absence of the second accused from this trial to his disadvantage or against him or his non-attendance negatively.
18. In order to prove the offence of murder the prosecution must prove beyond reasonable doubt the following:
 - (a) the accused persons;
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of Josevata Naisali; and
 - (d) the accused persons intended to cause the death; or
 - (e) were reckless as to causing the death of the deceased by their conduct. The accused persons are reckless with respect to causing the death of the deceased if;
 - (i) they were aware of a substantial risk that death will occur due to their conduct; and
 - (ii) having regard to the circumstances known to them, it was unjustifiable for them to take that risk.
19. What you will have to consider with regard to this particular state of mind is whether the accused persons were aware of a substantial risk that death will occur due to their conduct and having regard to the circumstances known to them, it was unjustifiable to take that risk.
20. The first element is concerned with the identity of the persons who committed the offence. This element of the offence is not in dispute.

You can therefore accept this element of the offence as proven beyond reasonable doubt.

21. The second element relates to the conduct of the accused persons. To engage in a conduct is to do an act which is a voluntary act by the accused persons or is a product of the will of the accused persons. Like the first element the defence agrees that it was the accused persons who had engaged in a conduct. This element of the offence is also not in dispute and you can accept this element of the offence as proven beyond reasonable doubt as well.
22. The third element is the conduct of the accused persons that caused the death of the deceased. Conduct means an act done by the accused it can be anything such as punching, kicking, stomping, stabbing, strangling etc. The law requires a link between the conduct of the accused persons and the death of the deceased. You must be sure that the conduct caused the death of the deceased.
23. In other words whether the punching, kicking and stepping by the accused persons on the face and head of the deceased while he was standing and then punching and stepping on his head when he was lying down caused the death of the deceased. You should remember that the act of the accused persons need not be the sole cause but the act of the accused persons should substantially contribute to the death of the deceased.
24. Like the other two elements the defence does not dispute this element of the offence as well so you are to accept this element of the offence as proven beyond reasonable doubt as well.
25. With regards to the final two elements of the offence which concerns the state of mind of the accused persons the prosecution must prove

beyond reasonable doubt either that the accused persons intended to cause the death of the deceased or that the accused persons were reckless as to causing the death of the deceased by their conduct.

26. The prosecution has to prove only one of the two limbs of this element. In this case the prosecution is alleging that the accused persons were reckless in causing the death of the deceased.
27. The prosecution is saying that the accused persons were not necessarily intending to kill the deceased but they say they were reckless in causing the death of the deceased. A person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him it was unjustifiable to take that risk.
28. What you have to consider with regard to this particular state of mind is whether the accused persons did foresee or realise that death was a probable consequence or the likely result of their conduct and yet they decided to go ahead and engage in the conduct regardless of that consequence.
29. The accused persons must foresee that death was a probable consequence or the likely result of their conduct and after realizing that, if they decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then they were reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved by the prosecution beyond reasonable doubt.
30. The prosecution says the accused persons had punched, kicked and stepped on the face and head of the deceased repeatedly while he was

standing and while he had fallen on the ground whilst wearing their boots. The prosecution further says all the accused persons knew that death was a probable consequence of their conduct yet they went ahead with their conduct.

INTOXICATION

31. The first and second accused persons according to their caution interviews are saying that they had consumed alcohol before the fight began therefore you should consider the effect of alcohol upon them. The arresting officer of the third accused Cpl. Gupta said he smelt liquor on the third accused. Intoxication by alcohol is a relevant matter to be taken into account in determining whether the accused persons had the knowledge that death was a probable consequence of their conduct and they decided to go ahead with the conduct, regardless of that consequence.
32. An intoxicated person may still be capable of forming the necessary state of mind to commit an offence. You should still ask yourselves the question, whether you are sure that all the accused persons decided to go ahead with their conduct, having realised that death was a probable consequence, although they were drunk.
33. It is a matter for you to decide whether the accused persons were affected by alcohol at that time and the extent of that intoxication. The caution interviews of both the accused persons should be of assistance to you in this regard including the evidence of Cpl. Gupta.
34. If you are satisfied that the prosecution has proved all the above elements of the offence of murder beyond reasonable doubt then you must find the accused persons guilty of murder.

35. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused persons not guilty of murder.
36. If you accept that the accused persons were not reckless in causing the death of the deceased or you are not sure whether they were reckless in their conduct you should then consider the offence of manslaughter which is a lesser charge than murder.
37. Manslaughter is the killing of someone by unlawful conduct. It has the first three elements of murder, that is to say that the accused persons engaged in a conduct which caused the death of the deceased but instead of being reckless as to causing death by their conduct they just have to be reckless as to whether their conduct will cause serious harm to the deceased.
38. If you consider that the accused persons were reckless in their conduct in respect of causing serious harm to the deceased then you must find the accused persons guilty of manslaughter. Moreover, the evidence of voluntary intoxication cannot be considered in determining the state of mind of an accused person in respect of the offence of manslaughter.
39. Whether the accused persons were reckless in causing the death of the deceased or were reckless in causing serious harm to the deceased is a matter entirely for you to decide on the basis of the facts and circumstances of the case.
40. The accused persons whilst denying the allegation state that on the evidence before the court they were not reckless in their conduct in causing the death of the deceased or were reckless in causing him serious harm.

JOINT ENTERPRISE

41. The prosecution is also alleging that the accused persons have acted together in committing the offence of murder and therefore all are liable as a group. This means the prosecution is relying on the concept of joint enterprise.
42. Joint enterprise is when an offence is committed not just by the person who actually does the act, but also by the person who assists him to commit the offence. Here all the accused persons have been jointly charged with the offence of murder.
43. When two or more persons get together and form a common intention to do something unlawful together (like assaulting the deceased) and in the course of carrying out that unlawful act, commit another offence which is a probable consequence of the unlawful purpose, then each of them who are part of the plan (no matter how big or small their role) is also guilty of the resulting offence, even if he or she did not do the act which actually constitutes the offence. The word “plan” does not mean there has to be any formality about it. A plan to commit an offence may arise on the spur of the moment nothing needs to be said at all. It can also be inferred from the behaviour of the parties.
44. If you find that there was a joint enterprise between the three accused persons, then you will decide if Josevata’s death was caused by any one of the accused and if so, then all three are guilty of either murder or manslaughter. It does not matter who’s punching, kicking or stepping killed Josevata. If one of them is responsible then they all are.

47. As a matter of law I have to inform you that what a person says in his interview or charge statement against the other accused person is not evidence against that other accused. Whatever someone says in a caution interview or charge statement is only evidence against that person alone and nobody else, so I ask that you ignore any reference made to any other accused person in the caution interviews or the charge statement of the accused that you are considering. Put simply the record of interviews and the charge statements are only evidence against the maker of those statements.
48. During the cross examination of the Police Officers in respect of the caution interview and charge statement of the first accused the counsel for the first accused had asked questions of these officers suggesting threat or assault on the first accused. This means counsel was putting to these witnesses that the admissions made by the first accused contained in both the documents were not voluntarily made by the first accused and therefore you should disregard those admissions.
49. It is for you to decide whether the first accused made those admissions and whether those admissions are the truth. If you are not sure whether the first accused made the admissions in his caution interview and the charge statement then you should disregard those admissions. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
50. Although the second accused was absent from this trial still you should consider the above directions when you are considering what weight you wish to give to the admissions contained in the caution interview and charge statement of this accused person.

FINAL ADMITTED FACTS

51. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as amended final admitted facts.
52. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
53. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds.
54. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

55. The prosecution called 16 witnesses to prove its case against all the accused persons.
56. The first prosecution witness was Maika Navuniyau on 29 November, 2012 at around 6.30 pm he was called by the deceased Josevata Naisali his cousin to come to Nadi Town. Both were having a few drinks at the Deep Sea Night Club when the deceased left the witness to go somewhere. After a while the witness came to know that

something was happening on the road one Mereani informed him that the deceased was lying on the ground.

57. The witness went and lifted Josevata, put him on his thighs, he saw blood coming out from the right side of Josevata's head. According to the witness Josevata was lying beside the fence like a dead dog.
58. Josevata was taken to the Nadi Hospital about half an hour later the doctors told the witness that Josevata had passed away. Apart from blood on the face of the deceased, the witness did not see any other injuries.
59. In cross examination by first accused counsel, the witness said he did not know how long his cousin brother was lying down before being taken to the hospital.
60. The second witness Naomi Raikadroka came to Nadi Town on 29 November 2012 at about 7.00 pm to 8.00 pm with Qoro, Mereani and Lusiana. Later they went to Deep Sea Night Club where they met Maika her brother in law.
61. After sometime she saw Maika and her sister Mereani and some boys going to buy cigarette from the bowser. From there all went and smoked beside the fence opposite the night club whilst they were smoking the witness saw Josevata her husband's cousin going to towards Mereani. At this time Josevata and some boys started to argue, the boys then started to punch and kick the deceased wearing boots, they were about four or five of them. They punched the deceased, when he fell on the ground they stepped on his head.
62. The witness and Mereani tried to stop them in the process Mereani also got punched. This witness demonstrated the punching and

stepping she had seen that night. After the boys left, the witness made Josevata sit and put his head on her chest he was bleeding from his head, snoring and losing a lot of blood.

63. The deceased was then rushed to the hospital. At the hospital, the witness came to know Josevata had passed away. When the deceased was carried to the hospital, he was limp according to the witness he may have passed away when being conveyed to the hospital.
64. The third witness Mereani Raikadroka on 29 November, 2012 at around 8.00 pm was in Nadi Town when she met Josevata whom she knew as Sali and Maika. All went to the Greenland Night Club. After drinking, Josevata asked the witness to accompany him to buy a packet of cigarette from the bowser. She followed the deceased after a while she heard people shouting, she ran to the sloppy area where she saw Josevata was being beaten by some people. She tried to stop them and in the process got punched. The bowser was about 8 to 10 meters from the slope.
65. Josevata was punched and stepped on, there were many people but according to her three were assaulting the deceased. She knew those people who were assaulting the deceased she stated she would be able to recognize them if she saw them.
66. The witness further stated that two of the boys were sitting in court and the third one was a tall one. She does not know the name of the tall boy. The witness was able to recognise the first accused as Dike and the other accused as Kele. She pointed to both the accused persons in court. According to the witness the punching and stepping was on the head of Josevata who was lying down bleeding from his head.

67. In cross examination by the first accused counsel, the witness agreed it was dark outside at the time she was standing near the bowser. She heard people shouting so she went towards the slope which was dark. There were a lot of people fighting and everything was happening fast.
68. The witness did not see the people punching the deceased, hence was unable to recognize them but agreed she will be able to recognize them if she saw them.
69. The witness was referred to the statement she had given to the police on 30 November, 2012 after the incident. The witness had informed the police *"I cannot recognize the itaukei boys who were punching Josevata."* The witness stated at the time she had given the statement to the police she was drunk. When it was suggested that the first accused was not there, the witness stated he was there.
70. In cross examination by the third accused counsel, the witness agreed the statement she had given to the police was true but she was drunk. The witness agreed the police statement was true to the best of her knowledge in which he had stated that she could not recognise the boys who were punching Josevata.
71. The witness explained the reason why she gave one version to the police and another version to court about the identity of both the accused persons. She stated that before the accused persons were arrested Kele had come to talk to her before her statement was taken by the police. When the accused persons were brought in she was asked to identify them. At this time, the third accused Kele, said to her *"you are like this now."*

72. The witness felt sorry for the accused persons so she told the police she did not know them. The witness agreed she lied to the Police Officer and also agreed the court could not be sure whether she lied or told the truth.

Ladies and Gentleman Assessors

73. The learned counsel for the first and third accused in this regard were cross examining this witness about some inconsistency in the statement she gave to the police immediately after the incident when facts were fresh in her mind with her evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with her evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
74. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
75. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.

76. In re-examination, the witness clarified that she told the truth in court and when she told the police she did not know the accused persons she was thinking about what the accused had said to her earlier and that they might do something to her since the third accused seemed angry and was saying *“you are going to be like this now.”* In respect of the slope area being dark, the witness said she was able to see since it was not that dark due to lights from the bowser and the night club.
77. The fourth witness Emma Batiluva informed the court that on 29 November, 2012 at around 7.00 pm, she was opposite Deep Sea Night Club at Nadi Town selling food parcels. In the evening she saw a fight at the back of Deep Sea Night Club she saw Tuks punching Josevata twice on the face at this time she was standing beside the toilet at the Mobil Service Station. The distance from where she was standing to the scene of the fight was about 15 to 20 meters away.
78. She only saw two punches when one Kinisimere asked the witness to get a bottle of water for Josevata since he was lying down. When she returned with the bottle of water she saw Josevata bleeding from his mouth.
79. The fifth witness Alice McGoan on 29th November, 2012 was attending the barrel night at Nasa Club with Tuks also called Anare Mara and a few others, after the barrel night finished the witness together with Anare Mara, Radike, Kelemedi and others went to Nadi Town.
80. The sixth witness Atunaisa Tauvoli in November, 2012 was a Police Officer based at Nadi Police Station. On 30 November, 2012 he was instructed to be the witnessing officer for the caution interview of the second accused Anare Mara, who was a suspect in a murder case.

81. The interviewing officer was Cpl. Yagavito. The interview was conducted at Nadi Police Station crime office in the itaukei language. The interview was recorded in question and answer format the answers recorded by the interviewing officer corresponded to what the suspect was saying and answering.
82. The suspect was given all his right to consult a lawyer, religious counselor and a family member but the suspect did not want to exercise this right at that time he had said he might exercise it later. The suspect was cautioned before the interview in the itaukei language and he had signed to acknowledge that he understood the caution. The suspect was also given breaks for meal, visiting toilet also the interview was suspended and when the interview recommenced he was reminded of the caution again.
83. The witness stated that before, during and after the caution interview including the reconstruction of the scene the suspect was not threatened, forced or assaulted or offered any inducement or made any promise by him or any other Police Officers.
84. At the conclusion of the interview the suspect was given his right to read the interview and to correct or alter anything in the interview but the suspect did not exercise this right. Before, during and after the interview the suspect did not make any complaints to the witness. The witness saw some injuries on the suspect on his left eye, mouth and fist but the suspect refused to go to the hospital. The interview commenced on 30th November, 2012 at about 5.45pm and concluded on 3rd December, 2012 at about 7.53pm.
85. The caution interview of the second accused in itaukei language was marked and tendered as prosecution exhibit no.1. According to the

witness the interview was suspended to commence on 3rd December since they were awaiting the post mortem report at this time the suspect was kept in custody.

86. The seventh witness Sgt. Wayne Tanu informed the court on 4th December, 2012 he received instructions to formally charge Ulaiasi Glen Radike for the offence of murder.
87. The charging took place at the crime office, Nadi Police Station. Police Constable Anil was present as a witnessing officer. The charging was conducted in the English language which the accused understood it was recorded in question and answer format.
88. Ulaiasi was given his right to consult a lawyer, a religious counselor and a family member. He exercised this right by meeting his father before the commencement of his charging. The suspect was cautioned before making a statement he understood the caution he was also explained about the charge which he understood.
89. Ulaiasi was not forced, threatened, assaulted, no promises were made or inducement offered to make a statement either by the witness or anyone else. The suspect Ulaiasi signed the original copy of the charge with carbon copies. The witness identified the carbon copy of the charge and was able to recognize his signature on all the pages. He does not know where the original charge statement was he had given the original and carbon copies to the first investigating officer. The charging commenced on 4rd December, 2012 at 8.30 am which concluded at 9.00 am the same day.
90. The carbon copy of the charge statement of Ulaiasi Glen Radike dated 4th December, 2012 was marked and tendered as prosecution exhibit no. 2. The witness recognized the first accused in court.

91. In cross examination by the first accused counsel the witness denied the accused was assaulted and verbally threatened that chillies will be put into his anus if he did not admit to the charge. The witness also denied the physical injuries sustained by the accused were as a result of the assaults by the police.
92. The eighth witness Apete Rokolui in 2012 was the officer in charge of the Nadi Police Station. This witness recalled arresting some suspects in this case from Kerebula he knew one of them namely Ulaiasi Glen Radike, the first accused. This witness recognized and identified Ulaiasi in court. He also recalled arresting Anare Mara, the second accused but could not recall arresting the third accused.
93. The witness also recalled cautioning both the accused persons at the time of their arrest. There was no force, threat, assault or promise or offer of inducement made to either Ulaiasi or Anare. From Kerebula both the suspects were brought to the Nadi Police Station the vehicle in which both the suspects were brought in did not stop anywhere from Kerebula to the Nadi Police Station.
94. Apart from cautioning both the suspects, the witness also told them the reason for their arrest which was for the case of assault. Both were arrested on 30 November, 2012 at about 2.30 am.
95. In cross examination by the first accused counsel the witness agreed the first accused was drunk at the time of his arrest but was able to understand what he was told.
96. The witness was referred to his police statement dated 29 October, 2018, the witness agreed that in his police statement he did not state that both the accused persons understood the rights that were given

to them, however, he maintained both understood what they were told.

97. The witness maintained the first accused was given his rights at the time of the arrest.
98. The ninth prosecution witness Seruvi Caqusau did not take the prosecution case any further he did not play any role in this case.

The tenth witness Cpl. Omendra Gupta on 29 November, 2012 was the night crime standby at the Nadi Police Station. He was informed by Sgt. Atunaisa that there was a fight in progress behind Khan's Service Station. Upon receipt of this information, the witness with driver Navin and one community worker Usa went to attend to the report.

99. As the vehicle entered the area where the fighting was taking place, one security officer of Greenland Night Club namely Josevata pointed to a group of people fighting. The witness saw three groups from the police vehicle lights, about 25 of them were there after getting out of the vehicle the witness went through the crowd trying to stop the fight.
100. At this time he saw Kelemedi coming out of the crowd. As he went further into the crowd, he saw some itaukei men lifting an itaukei man and putting him into a white van. The witness saw this man was badly injured and unconscious with a cut on his forehead.
101. The witness started to get more information at the scene about the suspects. Upon investigation the witness came to know that the fight had started in the night club where the third accused Kelemedi was blamed for stealing a packet of cigarette.

102. Since the third accused was about to flee from the crowd three girls went and grabbed him. At this time the witness with the help of Police Officer Navin and community worker Usa arrested the third accused and took him to the Nadi Police Station. The witness identified Kelemedi the third accused in court.
103. Upon questioning the third accused, the witness could smell liquor on the accused. He told the witness that he had been accused of stealing a packet of cigarette and the injured person taken to the hospital had punched him first and then he had retaliated with punches.
104. Before taking the third accused into the police van, the witness had told the accused the reason for his arrest and was also cautioned. At the hospital the witness was told by Dr. Liyakat Khan that the person brought to the hospital had died. After this the witness went back to the Police Station picked Sgt. Amol and went to the crime scene the area was cordoned and more information was gathered.
105. In cross examination by the third accused counsel, the witness was referred to his police statement dated 3rd December, 2012 and it was suggested that it was not written in the police statement that he had cautioned the third accused before arresting him. The witness stated that he had cautioned the accused but had forgotten to write it in his police statement.
106. The eleventh prosecution witness Cpl. Sairusi Nalevea informed the court he had interviewed the third accused, Kelemedi Sevura. This witness stated that he had not come into contact with Ulaiasi Radike at any time during the investigations.

107. In cross-examination by first accused counsel the witness denied assaulting and threatening the first accused Ulaiasi Radike during his caution interview.
108. The twelfth witness Cpl. Saiasi Matarugu had charged Anare Mara the second accused and was also part of the team that took Anare Mara for the reconstruction of the scene. The witness is also the current investigating officer since the earlier investigating officer has been transferred from this case.
109. The charging of the second accused took place at the crime office of the Nadi Police Station. There was no witnessing officer present only the two of them. The accused wanted to be charged in the itaukei language he was given his right to consult a lawyer, a religious leader such as a Pastor, a family member but he did not exercise this right.
110. The accused had signed to acknowledge that he did not wish to exercise these rights. The accused was charged for the offence of murder, the charge was explained to the accused who understood the allegation. Furthermore, he was also cautioned at the time of the allegation which he understood and signed.
111. The second accused made a statement in his charge statement, at the end of the charging the accused was given the opportunity to alter or amend his statement. The charge statement was recorded in the computer and the accused was able to see what was typed. At the end the charge statement was printed. The accused signed and the witness counter signed.
112. The witness was able to confirm his signature on the charge statement and also recognized the signature of the accused. The charging was conducted on 4th December, 2012 commencing at 9.30

am and concluded at 9.40 am. The witness had translated the charge statement in the English language to the best of his knowledge and ability.

113. After the signing of the charge statement in the itaukei language, it was given to the interviewing officer Sgt. Yagavito who was also the investigating officer. The original was given in the exhibit room. The witness had searched for the original but was unable to locate the same.
114. According to the witness the accused was not assaulted or threatened or made any promise or given any offer of inducement during his charging by the witness or any other Police Officer. The accused was fit, healthy and very cooperative. The same was accorded to the accused during reconstruction of the scene.
115. The witness stated the accused was treated with respect and dignity. The accused did not make any complaints. He did not know where the second accused was despite making all attempts he was unable to locate the second accused.
116. The copy of the charge statement of the second accused dated 4th December, 2012 in the itaukei language was marked and tendered as prosecution exhibit No.3. The English translation was marked and tendered as prosecution exhibit no. 3 (A).
117. Upon questioning by the court, the witness stated that despite mentioning the name of the witnessing officer in the charge statement, no witnessing officer was present during the charging.
118. The thirteenth witness Amol Prasad during November and December, 2012 was employed by the Fiji Police Force as a Sergeant, he was the

Acting Crime Officer based at Nadi Police Station. He was the witnessing officer when the first accused Ulaiasi Radike was caution interviewed by DC Arif Khan. The interview was conducted in the English language in the crime office of the Nadi Police Station.

119. DC Khan was typing the interview on the computer and Ulaiasi was able to see what was being typed. The format of the interview was, the interviewing officer was asking questions and Ulaiasi was answering. The answers given were typed at the same time. The witness remained throughout the interview during the interview Ulaiasi appeared normal and was cooperative.
120. As the witnessing officer, the witness ensured that all the rights of the suspect were given to him. Ulaiasi was given sufficient breaks to relieve himself and provided with meals he was informed of the allegation which he understood, also he was cautioned before the start of the questioning which was explained at the recommencement of the interview. During the reconstruction of the scene Ulaiasi was cautioned and he understood the caution.
121. All the rights were given to Ulaiasi, no force, threat or assault or promise or offer of inducement was made to him either by the witness or any other Police Officers. Ulaiasi did not make any complaints at the conclusion of the interview he was given his rights to read the interview which he exercised.
122. He was also given his right to add, amend or alter his interview notes the witness was unable to recall whether the accused had exercised this right or not. After approving the interview notes, the accused signed the interview on all the pages. The witness signed all the pages including the interviewing officer DC Khan.

123. Before, during and after the interview and the reconstruction of the scene, the interviewing officer or any other officer or the witness had not forced, threatened, assaulted or made any promise or offer any inducement to the accused.
124. The original record of interview had been handed over to the investigating officer. The photocopy of the record of interview of the first accused was marked and tendered as prosecution exhibit no. 4.
125. The interview commenced on 30th November, 2012 at 5.40pm and concluded on 3rd December, 2012 at 7.37pm. The interview was suspended awaiting the post mortem report of the deceased.
126. In cross-examination by first accused counsel, the witness denied the accused was slapped and beaten with a stick in his presence. The witness stated the accused was allowed to read his record of interview before he signed it.
127. The fourteenth witness Dr. Avikali Mate obtained her MBBS Degree from the Fiji School of Medicine in 2009. In 2014 she completed her Post Graduate Diploma in Pathology. Currently Dr. Mate is employed by the Fiji Police Force as Forensic Pathology Registrar.
128. Dr. Mate recalled conducting a post mortem of Josevata Naisali on 3rd December, 2012. The post mortem report of Josevata Naisali was marked and tendered as prosecution exhibit no. 5. The estimated time of death was about 10.30 pm on 29 November, 2012.
129. The doctor was able to see the following injuries on the deceased:

External Injuries

- Laceration or deep wound on the right side of the scalp also there was bruising on the right side of the forehead.
 - Bruises and abrasions seen. Bruises are when blood vessels under the skin are ruptured and blood comes out of the vessels. Abrasions are damage or injury to the superficial or the upper layer or the first layer of the skin. It's not deep just on top of the skin.
130. These injuries were noted on the right side of the forehead, right side of the cheek and the chin area. There was also bruises and abrasions noted on the left upper lip.
- There were two bruises present over the right side of the chest and there were also bruises on the right side of hip joint.
 - Bruises and abrasions also on the left wrist joint, finger joints and dorsal wrist joint (joints of the fist or hands) from 2nd to 4th joints.
 - Also bruises and abrasions on the right side of the arm and 3 bruises and abrasions on top of the forearm.

Internal Injuries

Head

- The scalp showed laceration or deep wound on the right side of the scalp, underneath the laceration were areas of hematoma. Hematoma was bleeding and clotting of blood on the right side and front of the scalp.

- The brain showed extensive subarachnoid hemorrhage in cerebral hemispheres the right and left side of the brain showed bleeding into the space between the brain and the brain surface.

Other notings

- In the trachea (wind pipe) there was blood and froth which meant at some point the deceased would have inhaled blood and when combined with air would have produced froth.
- Gastro Intestine Tract: Stomach and first part of the small intestine the outer surface showed bruising.

Cause of Death

131. According to the doctor, the cause of death was extensive subarachnoid hemorrhage due to blunt force trauma. The doctor explained hemorrhage of the brain can be caused by traumatic or non-traumatic causes.
132. In this case it was traumatic subarachnoid hemorrhage caused by any force or impact that is applied to any part of the body by a blunt object or surface, falling from considerable heights and assault such as repeated punching, kicking or stepping on the face or head.
133. The injuries to the head were extensive injuries and the injuries to the arms, chest on its own was unlikely to cause death. The injuries on the deceased suggested that he was punched, kicked, stomped or stepped on the head or face. According to the doctor the injuries were extensive on the head. The doctor also stated that photographs 6, 7, 9 and 10 in the agreed facts would have compounded the impact or the force on the head of the deceased because of the hard surface of

different sizes of rocks and stones and the trauma that was inflicted by punching and kicking increased the severity of the trauma since both sides are exerting force, trauma or pressure on whichever part of the body that was hit.

134. In cross examination by first accused counsel, the witness stated that the deceased smelt of liquor from stomach contents.
135. In cross examination by third accused counsel, the witness stated if there was repetitive trauma such as punches and kicks on the face, injury will be seen. The doctor had seen injuries to the mouth, the cheek area which was below the eyes and the forehead. She also agreed that the bigger part of the brain had extensive injuries and that the bleeding were on both sides of the brain. The doctor explained it is sometimes not apparent externally the severity of the injuries sustained internally.
136. The witness agreed falling was one of the causes of blunt force trauma including a hard fall when highly intoxicated.
137. In re-examination, the witness clarified when an intoxicated person falls over, the severity of the injuries as seen here would be seen if the fall was from a height of 1½ to 2 meters landing on the head or landing on the ground without bracing or stopping oneself.
138. Upon questioning by the court, the witness stated that the fall can be either head first or head coming into contact with the hard surface from the height of 1½ to 2 meters whichever way the head hit the hard surface, severe injury was likely from such a height.

Ladies and Gentleman Assessors

139. You have heard the evidence of Dr. Mate who was called as expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The post mortem report of the deceased is before you and what the doctor said in her evidence as a whole is to assist you.
140. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.
141. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
142. The fifteenth prosecution witness Inspector Opeti Lolo, charged the third accused Kelemedi Sevura. He did not play any role in investigating the first and second accused.
143. The final witness was Sgt. Yagavito, he was the former investigating officer, he interviewed the second accused Anare Mara in the interview room at the Nadi Police Station. The interview was conducted in the itaukei language which was handwritten in

question and answer format. The questions and answers were written at the same time.

144. The witnessing officer was Sgt. Atunaisa, the accused was given breaks to relieve himself, drink water and rest. He was provided with meals and informed of the reasons of the interview which he understood. The accused was also cautioned before questioning, he understood the caution.
145. There was a reconstruction of the scene at the conclusion of the interview. The accused was given his right to add, amend or alter anything in the interview. He did not exercise this right.
146. The witness signed all the pages of the caution interview, the witness signed and the accused signed voluntarily. The accused was given all his rights before, during and after the interview. The accused was not forced, threatened, assaulted, made a promise or offered any inducement by the witness or any other Police Officer. The accused did not make any complaints to the witness.
147. The witness saw some injuries on the face of the accused which was sustained by the accused during his fight with the deceased he refused to go for medical examination.
148. When prosecution exhibit 1 was shown to the witness, he recognized the copy of the caution interview which was in the itaukei language. He was able to recognize his signature on the document. The interview had commenced on 31st November, 2012 at 1745 hours, concluded on 3rd December, 2012 at 1953 hours. The witness had prepared an English translation of the record of interview to the best of his knowledge and ability which was marked and tendered as prosecution exhibit no. 1 (A).

149. The original record of interview in the itaukei language had been misplaced somewhere in the office with due diligence search it could not be located. The witness had made a photocopy of the original and attached it in the file. The interview was suspended for a long time due to long weekend and the unavailability of the post mortem report.
150. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

151. At the end of the prosecution case you heard me explain options to the first and third accused persons. They have those options because they do not have to prove anything. The burden of proving their guilt beyond reasonable doubt remains on the prosecution at all times and that burden never shifts. The accused persons chose to remain silent and not call any witnesses. That is their right. You should not draw any adverse inference from the fact that they decided to remain silent.

SECOND ACCUSED

152. On 2nd of May, 2013 the information was put to the second accused he had pleaded not guilty to the charge. When the information was read in court on the first day of the trial a not guilty plea was entered for this accused in his absence.
153. At the end of the prosecution case, a case to answer was ruled which required the second accused to open his defence although he was not

present in court the options that were made available to the other two accused persons was also made available to the second accused. The second accused was deemed to have exercised his right to remain silent.

154. All the accused persons take up the position that there was a fight between them and the deceased. The accused persons state that they had consumed alcohol and were drunk but they were not reckless in causing the death of the deceased.

ANALYSIS

Ladies and Gentleman Assessors

155. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
156. The prosecution alleges that at about 10.30 pm on 29th November, 2012, the deceased was badly assaulted by all the accused persons near the fence opposite the Deep Sea Night Club in Nadi Town. There are eye witnesses who saw all the accused persons punching and kicking on the head and face of the deceased while he was standing, punching and stepping on his head after he had fallen on the ground.
157. Mereani Raikadroka saw Josevata was assaulted by some people. She tried to stop them and in the process got punched. Josevata was punched and stepped on, there were many people around but three were assaulting the deceased. She knew those who were

assaulting the deceased and was able to recognize the first accused Dike and the other accused Kele. The punching and stepping was on the head of Josevata who was lying down bleeding from his head.

158. In respect of the second accused Anare Mara the prosecution says the fourth witness Emma Batiluva saw the fight at the back of Deep Sea Night Club she saw Tuks the second accused punching Josevata twice on the face. The second accused in his caution interview admits he is also known as Tuks.
159. Further the prosecution says the first and the second accused in their caution interviews and the charge statements admitted assaulting the deceased. Mereani also saw the third accused assaulting the deceased and when the third accused was arrested by Cpl. Gupta the accused had confessed that he had punched the deceased. The injuries on the deceased suggest severe assault on him by all the accused persons. The evidence of the doctor supports this, the deceased died as a result of the repeated assault on him. The prosecution says the three accused persons were fighting against one person the deceased and they were aware of the likelihood of death occurring by their conduct and yet there continued with their conduct regardless.
160. All the accused persons have denied committing the offence as alleged. All the accused persons say they were not reckless with respect to causing the death of the accused. They were not aware that death would occur by their conduct since they were intoxicated at the time. They did not foresee or realise that death was a probable consequence or the likely result of their conduct.

Ladies and Gentleman Assessors

161. As a guide first you can decide on the question of causation. Was it the assaults of all the accused persons together that caused the death of the deceased? If you decide no then you will find them not guilty of anything.
162. If you think that all the accused persons did cause the death of the deceased then you will go on to consider the question of their recklessness. If you think they were so reckless in their assaults that they knew that there was a substantial risk that the deceased would die and that they knew they were not justified in taking that risk you will find them guilty of murder.
163. If, however, you think they were reckless only to the extent of what they were doing would cause serious bodily harm to the deceased, then you will find them not guilty of murder, but guilty of manslaughter.

Ladies and Gentleman Assessors

164. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
165. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

166. In deciding the credibility of the witnesses and the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
167. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against all the accused persons have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence.
168. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
169. If you accept the version of the defence you must find the accused persons not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused persons guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
170. Once again I would like to state what I had said earlier that the absence of the second accused is not an admission of guilt which adds nothing to the prosecution case remember you are also not to

draw any negative inference against the second accused because he is not here to defend his case.

171. The accused persons are not required to prove their innocence they are presumed innocent until proven guilty.

172. In this case all the accused persons are charged with one count of murder, however, you are to also consider the offence of manslaughter in reaching your opinions.

173. Your possible opinions are:-

1. **MURDER - ACCUSED ONE - GUILTY OR NOT GUILTY.**

MURDER - ACCUSED TWO - GUILTY OR NOT GUILTY.

MURDER - ACCUSED THREE - GUILTY OR NOT GUILTY.

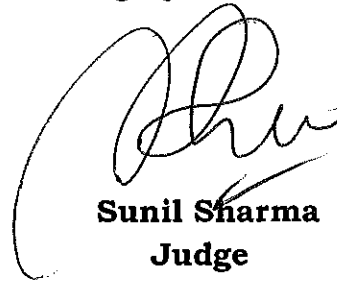
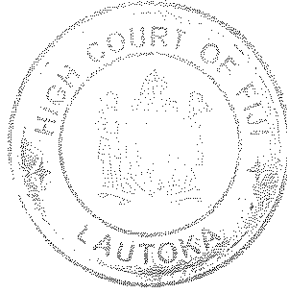
2. If you find the accused persons not guilty of murder then you are to consider whether all the accused persons are guilty or not guilty of **MANSLAUGHTER**.

3. If you find the accused persons guilty of murder then you are not to consider the offence of manslaughter.

Ladies and Gentleman Assessors

174. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.

175. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.



Sunil Sharma
Judge

At Lautoka

11 December, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the First and Third Accused.