

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 318 OF 2016S

**STATE**

**VS**

**SANAILA NOKE**

**Counsels** : **Mr. T. Tuenuku for State**  
**Mr. A. Qetaki and Mr. A. Chand for Accused**

**Hearings** : **12, 13, 16 and 17 April, 2018**

**Summing Up** : **18 April, 2018**

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**SUMMING UP**

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**A. ROLE OF JUDGE AND ASSESSORS**

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my 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 fact.
2. State and Defence Counsels 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 Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

**B. THE BURDEN AND STANDARD OF PROOF**

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

**C. THE INFORMATION**

7. You have a copy of the information with you, and I will now read the same to you:

*"... [read from the information]...."*

**D. THE MAIN ISSUE**

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:

- (i) Did the accused, on 5 July 2016, at Nausori in the Eastern Division, commit manslaughter against Joseva Rokotuitavuki, when he punch and stomp on him, and which later led to his death?

**E. THE OFFENCE AND IT'S ELEMENTS**

9. The accused was charged with manslaughter, contrary to section 239 of the Crimes Act 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (a) the accused engages in conduct; and
  - (b) the conduct causes the death of the deceased; and
  - (c) the accused was reckless as to a risk that the conduct will cause serious harm to the deceased.
10. The phrase “engages in conduct” in paragraph 9(a) above means “to do an act or omit to perform an act”. For example, if you hit someone with a stick, or assault someone, that is, to “engage in conduct” because you have “performed an act”. Similarly, if you hit someone with a stick and the victim is seriously injured, and you fail or omit to take him to hospital, that is, to “engage in conduct” by “omitting to take him to hospital” for medical treatment. The above is the first element of manslaughter.
11. “The conduct must cause the death of the deceased” means “the conduct must be a substantial cause of the deceased's death”. For example, if you hit someone with a stick or assaulted someone (engages in conduct), and the person suffered serious injuries to his body, which later led to his death, then “your conduct caused the death of the deceased”. The assault set in motion a chain of events that lead to the deceased's death. Without the assault, the deceased would not have died. So the assault was a major and/or substantial cause of the deceased's death. That is the second element of manslaughter.
12. The third element of manslaughter involved its fault element. The accused must be shown beyond reasonable doubt “to be reckless as to a risk that his conduct will cause serious harm to the deceased”. A person is reckless with respect to a result if – (a) he is aware of a substantial risk

that the result will occur; and (b) having regard to the circumstances known to him, it is unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact for you. You must consider the parties' conduct, and the surrounding circumstances, to decide whether or not the accused was reckless. Was he reckless to the risk that his conduct will cause serious harm to the deceased? Was he aware of a substantial risk that the deceased would suffer serious harm, as a result of his conduct? If so, was it justifiable for him to take the risk? If it was not justifiable to take the risk, then he would be reckless. If it was otherwise, he would not be reckless. If you find him reckless, then the third element of manslaughter is satisfied. If it's otherwise, then the third element of manslaughter is not satisfied.

13. If you find that all the three elements of manslaughter were satisfied by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged. If you find that some of the element of manslaughter are not satisfied by the prosecution beyond reasonable doubt, then you must find the accused not guilty as charged. It is a matter entirely for you.

**F. THE PROSECUTION'S CASE**

14. The prosecution's case were as follows. On 5 July 2016, the accused (DW1) was 29 years old. The deceased, Jovesa Rokotuitavuki, was 32 years old. The accused reached Form 4 level education and was unemployed at the time. He resided at Delaidamanu Village, Naitasiri with his parents and was single. According to the prosecution, the accused and the deceased were members of the "Samurai rugby club", and had known each other for the previous two months.
15. According to the prosecution, the "Samurai rugby club" team members met at Syria Park ground for a training session at 10 am on 5 July 2016 (Tuesday). The accused and the deceased were part of the training session. After the training session, the accused and the deceased went to Nausori town to play billiard. Thereafter, they had lunch at a Chinese restaurant at about 2 pm. After lunch, the two went separate ways. According to the prosecution, the accused went to Nausori Club. He allegedly met some of his friends from his village, and they started drinking liquor there.
16. At about 4 pm, the accused went to the Bank of South Pacific ATM machine. He met the deceased there. The accused and the deceased later went to Nausori club and joined the accused's friends

to drink liquor there. They drank until 5 pm, when they decided to go to the whistling Duck Night Club. At the night club, the accused, his friends and the deceased continued drinking. They were drinking rum and coke.

17. According to the prosecution, an argument erupted between the accused, his friends and the deceased. According to the prosecution, the accused allegedly punched the deceased on the chin, whereupon he fell on the concrete floor of the night club, allegedly hitting his head on the same. According to the prosecution, the accused later allegedly stomped on his forehead twice when he was lying unconscious on the floor. The deceased was later taken out of the night club. According to the prosecution, the deceased's condition allegedly deteriorated in the next two days. He was taken to CWM Hospital on 7 July 2016 for medical treatment.
18. According to the prosecution, the deceased was hospitalized for more than 30 days. He died on 13 August 2016 as a result of massive head injuries. The matter was reported to police. An investigation was carried out. On 16 August 2016, the accused appeared in the Nausori Magistrate Court charged with killing the accused. Because of the above, the prosecution is asking you as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASE**

19. On 12 April 2018, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence, and called a witness, in his defence. That was his right.
20. The accused's case was very simple. On oath, he admitted, he was drinking liquor with the deceased and others, at the Whistling Duck Night Club, at the material time. He said, he was serving the drinks to the deceased and his friends at the time. He said, he was talking to the deceased about his rugby playing days in the Netherlands, when he suddenly noticed the deceased fall to the floor. He denied ever punching or stomping on the deceased, at the material

time. Of what he did on 5 July 2016, he told the police the same when he was caution interviewed on 14 and 15 August 2016 at Nausori Police Station. His caution interview statements were tendered in evidence as Prosecution Exhibit No. 3. In his sworn and caution interview statements, he denied the allegation against him.

21. Because of the above, the accused is asking you, as assessors and judges of fact, to find him not guilty as charged. That was the case for the defence.

#### **H. ANALYSIS OF THE EVIDENCE**

##### **(a) Introduction:**

22. In analyzing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the State's case against the accused. Then we will discuss the accused's case. Then we will consider the need to look at all the evidence.

##### **(b) The State's Case Against the Accused:**

23. In discussing the State's case against the accused, please take on board the directions I gave you in paragraphs 9, 10, 11, 12 and 13 hereof on the offence of "manslaughter" and its elements. On the first element of "manslaughter" as described in paragraph 9(a) hereof, that is, "the accused engages in conduct", it was the prosecution's case that the accused punched the deceased on the chin, whereupon he fell on the concrete floor of the night club, hitting his back and head on the same. In addition to that, it was the prosecution's case that the accused then stomped twice on the deceased's forehead, while he was lying unconscious on the concrete floor. The prosecution must prove its theory on the first element of manslaughter first, before it can move on to prove its case on the second and third element of manslaughter, as described in paragraphs 9(b) and 9(c) hereof.
24. In proving its case on the first element of manslaughter, as discussed above, the prosecution relied substantially on the evidence of Jone Leweni (PW2). PW2 was, according to the prosecution, an eye witness, who allegedly saw the accused punched the deceased on the chin, whereupon he fell

on the night club concrete floor, and hitting his head on the same. PW2, according to the prosecution, also saw the accused stomping the deceased's forehead twice, while he lay unconscious on the night club floor.

25. PW2 said, on 5 July 2016, after 8.30 pm, he arrived at the Whistling Duck night club. He said, he was with five others from Nakaile Village. He said, they bought a carton of Fiji beer and started drinking the same. He said they were drinking in one corner of the night club, while the accused, the deceased and others were drinking at another corner of the night club. PW2 said, the floor of the night club was tiled concrete floor. PW2 said, he knew the deceased, as they were at Lelean Memorial School together for one year. PW2 said, the deceased's girlfriend was from his village. PW2 said, the lights in the night club were bright. PW2 said, after a while, he saw the accused, the deceased and others began to pull each other. PW2 said, they were four footsteps away from him. PW2 said, he saw the accused throw a right hand punch at the deceased's chin. PW2 said, he saw the deceased fall backwards and landed with his back and head on the concrete floor. PW2 said, the deceased became unconscious. The landing, according to PW2, made a big noise. PW2 said, by this time, he was one foot step away from the deceased.
26. PW2 said, he next saw the accused stomped the deceased's forehead twice with his left leg. PW2 said, he observed the accused for one minute, and he was one footstep away from the accused. PW2 said, there were lights in the night club and this enabled him to see the accused. PW2 said, there was nothing to block his view when seeing the accused. PW2 said, this was the first time he saw the accused. PW2 said, because of what he did that day, he can never forget his face. PW2, identified the accused in court as the person he saw punching and stomping on the deceased on 5 July 2016. When cross-examined by defence PW2 admitted, he did not attend a police identification parade.
27. When considering PW2's above identification evidence, I must direct you as follows, as a matter of law. First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleged to be mistaken, I must warn you of the special need for caution before convicting in reliance on the correctness of the identification because an honest and convincing witness could be mistaken. Second, you must

closely examine the circumstances in which the witness made the identification. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Has the witness ever seen the accused before? If so, how often? Has the witness any special reasons for remembering the accused? Was a police identification parade held? Thirdly, are there any specific weaknesses in the identification evidence? The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may rely on it. If it's otherwise, you must reject it.

28. PW2 said, he saw the accused throw a right hand punch at the deceased's chin, and he fell down and landed on the concrete floor with his back and head. PW2 said, he observed the accused for one minute. PW2 said, he was one footstep away. PW2 said, there were lights in the night club. PW2 said, there was no impediment in viewing the accused. PW2 said, it was the first time he saw the accused. PW2 said, he couldn't forget the accused's face, because of what he did to the deceased that day. In my view, PW2's identification evidence appears solid, but for one major defect. He was not given a police identification parade so soon after the incident to test the veracity of his identification evidence. Had this been done and he identified the accused in a police identification parade, his identification evidence would really have been solid. To wait for 1 year 9 months 11 days to identify the accused while sitting in the dock, was highly prejudicial to the accused, because he was already sitting in the dock, as opposed to a line of men similar to his features in a police identification parade. The above defect was a major weakness in PW2's identification evidence. In any event, how you treat PW2's identification evidence is entirely a matter for you.
29. If you reject PW2's identification evidence, you must find the accused not guilty as charged. If you accept his identification evidence, then you have to move on to consider the second element of manslaughter, as discussed in paragraphs 9(b) and 11 hereof.
30. The evidence of Doctor James Kalougivaki (PW1) as to the cause of the deceased's death, and the matters mentioned in the post mortem report of the deceased and tendered as Prosecution Exhibit No. 2, was not disputed by the parties. PW1 said, "The deceased was noted to have been assaulted and then hospitalized for more than 30 days before death". PW1 said, the cause of the

deceased's death was the "severe presence of pus over the coverings of the brain and also within the brain" as a result of "severe traumatic head injuries" due to his been allegedly assaulted. PW1 said, while referring to the last page of the post-mortem report as to the cause of death, that the history of the alleged assault in (c), was a substantial cause to the conditions mentioned in (a) and (b) of the last page of the post –mortem report.

31. If you accept that the accused punched the deceased on the chin, as alleged by the prosecution, and then stomped him twice on the forehead, and that cause him to have traumatic head injuries, leading to his death; then you move on to consider the third element of manslaughter, as discussed in paragraph 9(c) and 12 hereof, that is, the accused was reckless as to a risk that his conduct will cause serious harm to the deceased.
32. When discussing the above issue, please take on board the directions I gave you in paragraphs 9(c) and 12 hereof. A person is reckless with respect to a result if – (a) he is 'aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him, it is unjustifiable to take the risk. You have heard the accused's police caution interview statements [Prosecution Exhibit No. 3] on how he and the deceased spent their day on 5 July 2016. They attended rugby training in the morning, played billiard, had lunch and went drinking liquor with friends at Nausori Club. You have heard what the accused said in his verbal evidence, which basically reflected what he told the police, when cautioned interviewed. The accused, the deceased and others went to Whistling Duck and continued drinking rum and coke. The night club floor was tiled concrete. Jone Leweni (PW2) said, the accused, the deceased and the others were very drunk. If you accept that the accused punched the deceased on the chin and he fell and bang his head on the concrete floor, and then later stomped on his forehead twice, was he reckless as to a risk that his conduct will cause serious harm to the deceased. If your answer is yes, the accused would have been reckless. If otherwise, he would not be reckless.
33. If you find the prosecution had proven all elements of manslaughter beyond a reasonable doubt, you must find the accused guilty as charged. If otherwise, you must find him not guilty as charged. It is a matter entirely for you.

(c) The Accused's Case:

34. I have summarized the accused's case to you in paragraphs 19, 20 and 21 hereof. Basically, on oath, the accused denied punching or stomping on the deceased, at the material time.
35. You will notice in the information that the accused was jointly charged with "BAI DURUIMATA". Mr Bai Duruimata was Accused No. 1, while the accused was Accused No. 2. On 12 April 2018, before the trial of the accused, Mr. Bai Duruimata pleaded guilty to the charge, in the presence of his counsel. He admitted the following summary of facts, read to the court, by the prosecutor:

On the 5<sup>th</sup> of July, 2016, the accused Bai Duruimata, 37 years old, Farmer of Delaidamanu Village, was drinking beer together with the deceased, Joseva Rokotuitavuki, 32 years old, rugby player of Jittu Estate, at Whistling Duck Nightclub in Nausori.

While drinking beer together, the accused Bai Duruimata was annoyed by the fact that the deceased was not buying any beers for them.

Being annoyed by the fact that the deceased was not buying any beers, the accused Bai Duruimata, being reckless as to a risk that his conduct would cause serious harm to the deceased, threw a punch at the deceased landing on the deceased's mouth, causing the deceased to fall unconscious on the hard floor of Whistling Duck Nightclub. The deceased suffered Severe Traumatic Head injuries as a result of the punch of the accused and the deceased falling onto the hard floor of Whistling Duck nightclub. These Severe Traumatic Head injuries ultimately caused and led to the death of the deceased on the 13<sup>th</sup> of August, 2016 as per Post Mortem Report, dated 15<sup>th</sup> August, 2016.

36. I direct you to take judicial notice of the above. Mr. Bai Duruimata had been convicted of the manslaughter of the deceased on 12 April 2018. Defence Counsel argued that the accused is not guilty as charged because Mr. Bai Duruimata had admitted punching the deceased on the mouth at the material time, and thereafter causing the deceased to fall on the concrete floor.
37. If you accept the defence's case, then you must find the accused not guilty as charged. If otherwise, you will have to assess the strength of the prosecution's case, and decide accordingly. It is a matter entirely for you.

**(d) The Need To Consider All the Evidence:**

38. The prosecution called 6 witnesses:
- (i) Doctor James Kalougivaki (PW1);
  - (ii) Mr. Jone Leweni (PW2);
  - (iii) DC 3908 Emosi Nokonoko (PW3);
  - (iv) Mr. Sikeli Vusoni (PW4);
  - (v) Mr. Vilive Qio (PW5); and
  - (vi) Ms. Sainimelia Waqa (PW6)
39. The prosecution tendered three exhibits:
- (i) PW1's curriculum vitae - Prosecution Exhibit No. 1
  - (ii) Deceased's Post-Mortem Report - Prosecution Exhibit no. 2
  - (iii) Accused's Caution Interview Statement - Prosecution Exhibit No. 3
40. The defence called two witnesses:
- (i) Accused (DW1); and
  - (ii) Ms. Salote Kamunaga (DW2)
41. Altogether, you have a total of eight witnesses, on whose evidence, you will have to make a decision. You are to consider all the evidence together. Compare and analyze them together. If I have not mention a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitle to accept the whole or some of his or her evidence in your deliberation. If you find a witness not credible, you are entitle to reject the whole or some of his or her evidence in your deliberation. You are the judges of fact.

**I. SUMMARY**

42. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of

events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged.

43. Your possible opinions are as follows:

(i) Manslaughter : Accused : Guilty or Not Guilty

44. You may now retire to deliberate on the case, and once you've reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.



**Salesi Temo**  
**JUDGE**

**Solicitor for the State** : **Office of the Director of Public Prosecution, Nausori.**  
**Solicitor for the Accused** : **Legal Aid Commission, Nausori.**