

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 95 of 2016

STATE

v

ALIPATE NAIMOSO

SAIMONE TUCILA SNR

EPELI TUCILA

SAIMONE TUCILA JNR

**Counsel** : Mr. Meli Vosawale with Ms. Moira Konrote for the State  
Ms. Chantal Hazelman for the 1<sup>st</sup> Accused  
Ms. Vani Filipe for the 2<sup>nd</sup> Accused  
Ms. Talej Kean for the 3<sup>rd</sup> Accused  
Ms. Narmata Mishra for the 4<sup>th</sup> Accused

**Dates of Trial** : 5-9, 12-16, 19-23, 26-29 March and 3-6, 9 and 11 April 2018

**Summing Up** : 17 April 2018

### SUMMING UP

Madam Assessors and Gentleman Assessor,

[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 four 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 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] In this case, the evidence is what the witnesses said from the witness box, the documents tendered as prosecution exhibits and any admissions made by the parties. In addition there is the CCTV footage that was tendered as part of the prosecution case.

- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by Counsel for the State and the Counsel for the defence are also 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. 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] Ladies and Gentleman 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 are guilty or not of the charge against them. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.



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

element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.

- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, in order to find the 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.
- [30] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the deceased or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [31] Let us now look at the charge contained in the information.
- [32] There is one charge preferred by DPP, against the four accused:

#### COUNT ONE

##### *Statement of Offence*

**MURDER** : Contrary to Section 237 of the Crimes Act No. 44 of 2009.

##### *Particulars of the Offence*

**ALIPATE NAIMOSO, SAIMONE TUCILA SNR, EPELI TUCILA, SAIMONE TUCILA JNR** on the 17<sup>th</sup> day of February 2016 at Nasinu, in the Central Division, murdered **SITIVENI JAMIE QALI**.

- [33] Section 237 of the Crimes Act No. 44 of 2009 ("Crimes Act") states:

*"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 intends to cause, or is reckless as to causing, the death of the other person by the conduct."*

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

- (i) the four accused;

- (ii) on the specified day (in this case the 17<sup>th</sup> day of February 2016);
- (iii) at Nasinu, in the Central Division;
- (iv) engaged in a conduct; and
- (v) the said conduct caused the death of Sitiveni Jamie Qali (the deceased);  
and
- (vi) the accused intended to cause the death of Sitiveni Jamie Qali; or  
the accused were reckless as to causing the death of Sitiveni Jamie Qali  
by their conduct.

[35] The first element is concerned with the identity of the person or persons who committed the offence. The prosecution should prove beyond reasonable doubt that the four accused committed the offence. In this case the prosecution and the defence have consented to treat the fact that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused are accused in this matter, as an agreed fact and, as such, you must treat this fact as proved.

[36] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[37] The fourth element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the four accused was deliberate and not accidental.

[38] 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 four 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'.

[39] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause the death of the deceased or that the accused were reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of the accused from the facts and circumstances you would consider as proved.

[40] In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that they meant to bring about the death or that they

were aware that death will occur in the ordinary course of events as a result of their conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.

[41] In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether they had that intention, you should then consider whether the accused were reckless as to causing the death of the deceased. An accused will be reckless with respect to causing the death of the deceased, if;

- a. They were aware of a substantial risk that death will occur due to their conduct; and
- b. Having regard to the circumstances known to them, it was unjustifiable for them to take that risk.

[42] What you have to consider with regard to this particular state of mind is whether the accused 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. The accused must foresee that death was a probable consequence or the likely result of their conduct and after realising that, if they decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then they would be 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 beyond reasonable doubt.

[43] In this case, the prosecution says that the offence of Murder was committed by joint offenders in prosecution of a common purpose, what is commonly known as the principle of joint enterprise.

[44] In terms of Section 46 of the Crimes Act it is stated: *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*

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

- a. the four accused persons formed a common intention to prosecute or engage in an unlawful purpose, and
- b. in the process of performing that unlawful purpose the accused committed the offence of Murder, and
- c. the commission of the offence of Murder was an offence of such a nature that its commission was a probable consequence of carrying out that unlawful purpose.



- [46] You have to consider the case against each accused separately and decide whether each accused formed a common intention with one another to perform a criminal or an unlawful purpose. The accused persons' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them at the spur of the moment. Their agreement can be inferred from the circumstances.
- [47] Then you have to consider whether any one of the four accused committed the offence of Murder in the prosecution of that unlawful purpose.
- [48] Next issue you have to consider is, considering the nature of the offence of Murder, is it an offence within the scope of the criminal enterprise which each accused joined. You have to ask yourself whether each accused realised when they took part in the criminal enterprise that there was a real possibility that one of the participants intended to cause the death of the deceased by his conduct or that he was reckless as to causing the death of the deceased by that conduct.
- [49] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the four accused guilty of Murder.
- [50] 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 four accused not guilty of Murder.
- [51] In this case the 1<sup>st</sup> Accused is taking up the defence of provocation. Section 242 of the Crimes Act which is titled "Killing with Provocation" is reproduced below:

*"(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.*

*(2) The term "provocation" means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when—*

*(a) done to an ordinary person; or*

*(b) done in the presence of an ordinary person to another person —*

*(i) who is under his or her immediate care; or*

*(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person*

*—to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.*

*(3) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as stated in subsection (2), the former is said to give to the latter provocation for an assault.*

*(4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.*

*(5) .....*

[52] If you accept from the evidence available that the deceased by his actions provoked the 1<sup>st</sup> Accused and deprived him of his power of self-control and thereby induced the 1<sup>st</sup> Accused to commit an assault on the deceased which causes his death, in the heat of passion and before there is time for the passion to cool, then the 1<sup>st</sup> Accused can only be found guilty of the lesser offence of Manslaughter.

[53] Likewise, if you find that the prosecution has failed to establish any of these elements in relation to the offence of Murder beyond any reasonable doubt; as an alternative, you may consider whether the accused are guilty or not guilty of the lesser offence of Manslaughter, contrary to Section 239 of the Crimes Act, though the accused are not formally charged in the Information for that offence.

[54] Section 239 of the 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.”*

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

- (i) the four accused;
  - (ii) on the specified day (in this case the 17<sup>th</sup> day of February 2016);
  - (iii) at Nasinu, in the Central Division;
  - (iv) engaged in a conduct; and
  - (v) the said conduct caused the death of Sitiveni Jamie Qali (the deceased);  
and
  - (vi) the four accused persons intended the conduct will cause serious harm to the deceased; or
- the four accused persons were reckless as to the risk that the conduct will cause serious harm to the deceased.

- [56] The first element is concerned with the identity of the person or persons who committed the offence. The prosecution should prove beyond reasonable doubt that the four accused committed the offence. In this case the prosecution and the defence have consented to treat the fact that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused are accused in this matter, as an agreed fact and, as such, you must treat this fact as proved.
- [57] 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.
- [58] 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 four accused was deliberate and not accidental.
- [59] 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 four 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'.
- [60] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause serious harm to the deceased or that the accused were reckless as to a risk of causing serious harm to the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of

mind of the four accused from the facts and circumstances you would consider as proved.

- [61] In order for you to conclude that the four accused intended to cause serious harm to the deceased, you should be sure that they meant to bring about serious harm or that they were aware that serious harm will occur on the deceased in the ordinary course of events as a result of their conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the four accused had the intention to cause serious harm to the deceased.
- [62] In the event you find that the accused did not have the intention to cause serious harm to the deceased or you are not sure whether they had that intention, you should then consider whether the accused were reckless as to a risk of causing serious harm to the deceased. An accused will be reckless with respect of a risk of causing serious harm to the deceased, if;
- a. They were aware of a substantial risk that serious harm will occur due to their conduct; and
  - b. Having regard to the circumstances known to them, it was unjustifiable for them to take that risk.
- [63] What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that serious harm 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. The accused must foresee that serious harm was a probable consequence or the likely result of their conduct and after realising that, if they decided to go ahead and engage in that conduct regardless of the likelihood of serious harm resulting, then they would be reckless as to causing serious harm to the deceased. In order to constitute the offence of Manslaughter by recklessness, actual awareness of the likelihood of serious harm occurring must be proved beyond reasonable doubt.
- [64] You will also have to consider whether the offence of Manslaughter was committed by joint offenders in prosecution of a common purpose.
- [65] As I have stated before, in terms of Section 46 of the Crimes Act it is stated: *"When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence."*
- [66] In order to prove the case against the accused persons, the prosecution should prove beyond reasonable doubt that;



- a. the four accused persons formed a common intention to prosecute or engage in an unlawful purpose, and
- b. in the process of performing that unlawful purpose the accused committed the offence of Manslaughter, and
- c. the commission of the offence of Manslaughter was an offence of such a nature that its commission was a probable consequence of carrying out that unlawful purpose.

[67] You have to consider the case against each accused separately and decide whether each accused formed a common intention with one another to perform a criminal or an unlawful purpose. The accused persons' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them at the spur of the moment. Their agreement can be inferred from the circumstances.

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

[69] Next issue you have to consider is, considering the nature of the offence of Manslaughter, is it an offence within the scope of the criminal enterprise which each accused joined. You have to ask yourself whether each accused realised when they took part in the criminal enterprise that there was a real possibility that one of the participants would cause serious harm to the deceased, with the intention that the conduct will cause serious harm to the deceased or were reckless as to the risk that the conduct will cause serious harm to the deceased.

[70] 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.

[71] 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.

[72] I wish to reiterate once again that you need to go in this direction ONLY if you find that the prosecution has failed to establish any of elements constituting the offence of Murder beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Murder beyond reasonable doubt, then you must find the accused guilty of Murder as charged.

[73] It is also appropriate that I direct you on the principle of withdrawal or abandonment of the joint enterprise. The law is quite clear that any withdrawal from participation must be effective before further offences are committed.

[74] The classic test of withdrawal may be understood from the following passage: "After a crime has been committed and before a prior abandonment of the common

enterprise may be found ..... there must be, ..... something more than a mere mental change of intention and physical change of place by those associates who wish to dissociate themselves from the consequences attendant upon their willing assistance up to the moment of the actual commission of that crime. Where practicable and reasonable there must be timely communication of the intention to abandon the common purpose from those who wish to dissociate from the contemplated crime to those who desire to continue in it. What is "timely communication" must be determined by the facts of each case but where practicable and reasonable it ought to be such communication, verbal or otherwise, that it will serve unequivocal notice upon the other party to the common unlawful cause that if he proceeds upon it he does so without the further aid and assistance of those who withdraw."

- [75] In your opinion if you find that one or more of the accused withdrew or abandoned the joint enterprise, then he would be responsible or liable only for his individual acts.
- [76] In determining what offence, if any at all, that accused would be responsible for committing, as an alternative, you are then allowed to look at the lesser offence of 'Assault Causing Actual Bodily Harm' to Sitiveni Jamie Qali, though the accused is not formally charged in the Information for that offence.
- [77] 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.*"
- [78] 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 17<sup>th</sup> day of February 2016);
  - (iii) at Nasinu, in the Central Division;
  - (iv) assaulted Sitiveni Jamie Qali; and
  - (v) thereby caused actual bodily harm to the said Sitiveni Jamie Qali.
- [79] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the relevant accused who committed the offence. In this case the prosecution and the defence have consented to treat the fact that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> accused are accused in this matter, as an agreed fact and, as such, you must treat this fact as proved.
- [80] 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.

- [81] The fourth element relates to the actual assault caused to Sitiveni Jamie Qali.
- [82] With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to the said Sitiveni Jamie Qali, as a result of the assault.
- [83] 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)."*
- [84] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

#### **Admitted Facts**

- [85] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009, the State and the Defence have consented to treat the following facts as *"Admitted Facts"* without placing necessary evidence to prove them:

#### **Admitted Facts for Alipate Naimoso (1<sup>st</sup> Accused)**

1. Alipate Naimoso is the accused in this matter.
2. Sitiveni Jamie Qali is the deceased in this matter.
3. Alipate Naimoso was residing in Nakasi in February 2016.
4. Alipate Naimoso was working as a Bowser attendant at Mobil Service Station, Nakasi in February 2016.

#### **Admitted Facts for Saimone Tucila Senior (2<sup>nd</sup> Accused)**

1. Saimone Tucila Senior is the accused in this matter.
2. Sitiveni Jamie Qali is the deceased in this matter.
3. Saimone Tucila Senior is the father of Saimone Tucila Junior and Epeli Tucila.
4. Saimone Tucila Senior was caution interviewed by Detective Corporal Alikei at Nakasi Police Station on the 18<sup>th</sup> February 2016.

5. Saimone Tucila Senior was medically examined at Nausori Health Centre on 18<sup>th</sup> February 2016 at 11.20 a.m.
6. Saimone Tucila Senior was medically examined at Nausori Health Centre again on the 19<sup>th</sup> of February 2016 at 9.19 a.m.

**Admitted Facts for Epeli Tucila (3<sup>rd</sup> Accused)**

1. Epeli Tucila is the accused in this matter.
2. Sitiveni Jamie Qali is the deceased in this matter.
3. Epeli Tucila and Sitiveni Jamie Qali knew each other as friends since Primary School.
4. Epeli Tucila was residing in Nakasi in February 2016.
5. Sitiveni Jamie Qali resided in Nakasi as well.
6. Epeli Tucila is the son of Saimone Tucila Senior.
7. Epeli Tucila is the brother of Saimone Tucila Junior.

**Admitted Facts for Saimone Tucila Junior (4<sup>th</sup> Accused)**

1. Saimone Tucila Junior is the accused in this matter.
2. Sitiveni Jamie Qali is the deceased in this matter.
3. Saimone Tucila Junior and Sitiveni Jamie Qali knew each other as friends.
4. Sitiveni Jamie Qali resided in Nakasi as well.
5. Saimone Tucila Junior is the brother of Epeli Tucila.
6. Saimone Tucila Junior is the son of Saimone Tucila Senior.
7. Saimone Tucila Junior was caution interviewed by DC Jone Tupua in Nakasi Police on the 18<sup>th</sup> of February 2016.
8. Saimone Tucila Junior was medically examined at Nausori Health Centre on the 18<sup>th</sup> of February 2016 at 10.42 a.m.
9. Saimone Tucila Junior was medically examined again at Nausori Health Centre on the 19<sup>th</sup> of February 2016 at 11.02 a.m.



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

**Case for the Prosecution**

[87] In support of their case, the prosecution led the evidence of the following witnesses:

1. Abjit Singh
2. Detective Sergeant (Sgt) Jemesa Lave
3. Waisea Nasili Waqatabu
4. Taniela Tadulala
5. Detective Constable 4232 Raj Avinesh Prasad
6. Dr. Josese Rakuita
7. Detective Constable 4344 Amani Bosenawal
8. Detective Constable 3751 Isoa Vakaciwa
9. Detective Corporal 3154 Aliko Taria
10. Detective Constable 3372 Ame Raogo
11. Detective Constable 4509 Mesulame Narawa
12. Dr. James Kalougivaki
13. Woman Detective Constable 4234 Vani
14. Detective Constable 4791 Jone Tupua
15. Corporal 3464 Vilikesa Gasaudra
16. Dr. Losena Natuva
17. Dorotea Davele

[88] The Prosecution tendered the following exhibits:

- PE 1 - CCTV footage of the Nakasi Mobil Service Station copied on a DVD (titled CR 26/2/2016).
- PE 2A - Report of the Medical Examination conducted on the 2<sup>nd</sup> Accused on 18 February 2016.
- PE 2B - Report of the Medical Examination conducted on the 2<sup>nd</sup> Accused on 19 February 2016.
- PE 3A - Report of the Medical Examination conducted on the 3<sup>rd</sup> Accused on 18 February 2016.
- PE 3B - Report of the Medical Examination conducted on the 3<sup>rd</sup> Accused on 19 February 2016.
- PE 4A - Report of the Medical Examination conducted on the 1<sup>st</sup> Accused on 18 February 2016.

- PE 4B - Report of the Medical Examination conducted on the 1<sup>st</sup> Accused on 19 February 2016.
- PE 5A - The hand written caution interview statement made by the 1<sup>st</sup> Accused in the English language.
- PE 5B - The typed caution interview statement made by the 1<sup>st</sup> Accused in the English language.
- PE 6A - The hand written caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language.
- PE 6B - The hand written English translation of the caution interview statement made by the 2<sup>nd</sup> Accused.
- PE 6C - The typed English translation of the caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language.
- PE 6D - The typed caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language.
- PE 7A - The hand written caution interview statement made by the 3<sup>rd</sup> Accused in the English language.
- PE 7B - The typed caution interview statement made by the 3<sup>rd</sup> Accused in the English language.
- PE 8 - The Post Mortem Examination Report of the deceased, Sitiveni Jamie Qali.
- PE 9 - The typed caution interview statement made by the 4<sup>th</sup> Accused in the English language.
- PE 10 - CCTV footage of the Nakasi Mobil Service Station copied on a DVD-USB Copy.

[89] Prosecution Exhibits PE 2A, PE 2B, PE 3A and PE 3B were tendered to Court by consent of parties.

[90] Evidence of Abjit Singh

- (i) *He testified that he is the IT Supervisor for Central Region for Tappoo Group of Companies. He has been an IT Supervisor for 25 years. The Central Region of the Tappoo Group of Companies includes several subsidiaries. The Mobil On The Go Limited is one such subsidiary.*
- (ii) *He supervisors all IT technical user support, including networking, CCTV and cross-point scanner systems.*

- (iii) *On 18 February 2016, around mid-day, he was instructed to take CCTV footage of the Nakasi Mobil Service Station and provide to the Nakasi Police Officers.*
- (iv) *The witness then explained how he downloaded or extracted the CCTV footage. He had gone onto the DVR system, found the timeframe of the incident, and then located the 2 cameras which had the footage. Once, he found the actual footage, he was able to copy the footage to the USB provided by the Police. He had then reviewed the whole footage in the presence of Police Officers from the Nakasi Police Station. The Police Officers were happy about the beginning/starting point of the footage. Then they had reviewed the end of the footage where the scene went out of frame. Then the footage ended. He had then handed over the said USB copy to the Nakasi Police Officers.*
- (v) *The footage was taken from 2 different camera angles. The cameras were analog cameras. These 2 cameras were facing the pumps at the service station.*
- (vi) *For the purpose of extracting the footage, he said there is built-in DVR software. When you are extracting the footage, it automatically downloads onto a USB or a recorder.*
- (vii) *The footage available, which is presently copied onto a DVD, was played in Court. The witness identified that it was exactly the same footage that he extracted from the CCTV cameras on 18 February 2016. He said the footage has not been tampered with in any way. He also testified that there was no extension to the footage from what he extracted and saw in Court.*
- (viii) *For camera 4, the first footage is of 5 minutes duration (7.55.00 – 8.00.00 on 17 February 2016). For camera 4, the second footage is of 15 minutes and 6 seconds duration (8.00.00 – 8.15.06 on 17 February 2016).*
- (ix) *For camera 5, the first footage is of 5 minutes and 1 second duration (7.55.00 – 8.00.01 on 17 February 2016). For camera 5, the second footage is 15 minutes and 5 seconds duration (8.00.00 – 8.15.05 on 17 February 2016).*
- (x) *In cross-examination, it was put to the witness that the DVD version was seen in Court was a zoomed in version? He answered, "No".*
- (xi) *He was asked once the CCTV footage is downloaded and saved into a USB, whether this footage can be edited by software? He answered by saying "I cannot guarantee. Answer is No. Software which can go into editing so much footage not possible".*
- (xii) *He was also asked, whether there is a software to zoom the footage? He said, after it is saved into the USB it is not possible.*

- (xiii) When asked whether he agrees that when the CCTV footage is downloaded into the USB, this version in the USB, can be cut out at the beginning or at the end of the footage? He said, "There is clip cutter that you can use to cut the video. If it is done in the middle the portion will be missing."
- (xiv) The witness was also asked, whether the footage in respect of camera 5 actually had footage to the point where the Police Officers had arrived at the scene? The witness said "No".
- (xv) It was suggested to the witness, that the DVD that was shown in Court was not same as the footage that was downloaded into the USB, and that there was an extension to the footage in the USB that was cut out from the DVD that is now shown in Court. The witness denied these suggestions.
- (xvi) This CCTV footage of the Nakasi Mobil Service Station copied on a DVD-USB Copy, was subsequently tendered in evidence as Prosecution Exhibit **PE 10**.

**[91] Evidence of Detective Sergeant (Sgt) Jemesa Lave**

- (i) The witness is a Digital Forensic Specialist, at the Cyber Crime Unit, based at CID Headquarters. He works with Crime Scene Investigations in the identification, extraction, preservation and analysis of electronic evidence.
- (ii) On 19 February 2016, he was requested by personnel of the Nakasi Crime Department to extract the CCTV footage from the Mobil Service Station in Nakasi. He had proceeded to the Mobil Service Station along with members of the Nakasi Crime Department and Abjit Singh, IT Officer of Tappoos.
- (iii) At the service station, he had gone to where the DVR was recorded. Mr Singh had to log on to the DVR system using a password. After he logged on, there was a menu that showed all the options on the DVR system. He had gone to the option which was for copying footage out of the DVR. The DVR system gives option of the camera, starting date and time, and ending date and time. After you put in those parameters, then you had to initiate by pressing a button to start the copying.
- (iv) The relevant dates and times were given by the officers of the Nakasi Police Station and Mr Singh. He recalls the time period as 8.01.01 p.m. to 8.15.00 p.m. and there were 2 different camera angles (camera 4 and camera 5).



- (v) *The footage was then extracted onto a USB and from the USB it was copied onto a DVD. He had signed the DVD himself and handed over to personnel from the Nakasi Crimes Unit who were conducting investigations into the case. The said DVD was tendered to Court as Prosecution Exhibit PE 1.*
- (vi) *The first footage in this DVD is of camera 4. The duration of the footage is 14 minutes, 1 second (from 8.00.01 – 8.15.01 on 17 February 2016). The second footage in this DVD is of camera 5. The duration of the footage is 14 minutes (from 8.00.01 – 8.14.59 on 17 February 2016).*
- (vii) *The witness testified that no tampering of the footage can take place during the extraction. This is due to the fact that when extraction occurs it is not done by the person extracting, but by the machine, based on the parameters given.*
- (viii) *In essence any extraction of CCTV footage, only the input is done by the person extracting (giving the parameters). The footage can be shortened or lengthened based on the parameters given. So once extraction is done it cannot be edited. Different manufactures have different formats for files. Therefore, it is very difficult to edit the footage once extracted.*
- (ix) *In cross-examination, it was suggested to the witness that when burning from the USB to the DVD the footage can be cut (or edited)? The witness testified that you cannot do that as it will corrupt the whole video.*
- (x) *It was further suggested to the witness that the footage downloaded from the DVR extended beyond 8.15 p.m. and that portion of the footage was cut-out as it had shown when the police had arrived at the scene and loaded the deceased into the back seat of the twin cab? The witness denied these suggestions.*

**[92] Evidence of Waisea Nasili Waqatabu**

- (i) *The witness testified that he is working as a farmer in Kadavu since last year. Prior to that he was working at the Mobil Service Station in Nakasi as a bowser attendant. He was working there for 3 weeks and had started working in the month of February 2016.*
- (ii) *On 17 February 2016, he was doing the afternoon shift from 2.00 p.m. to 10.00 p.m. He, the 1<sup>st</sup> Accused and another bowser attendant were working on the same shift.*
- (iii) *He testified that between 8.00 p.m. and 9.00 p.m., the deceased, Sitiveni, had come to speak with the 1<sup>st</sup> Accused. The 1<sup>st</sup> Accused had told him to go back to his home. Thereafter, the witness and the 1<sup>st</sup> Accused had gone inside the shop of the service station. After that, the*

deceased had opened the door and spoken to the 1<sup>st</sup> Accused. The deceased had told the 1<sup>st</sup> Accused to come outside that he has something for him. Thereafter, the 1<sup>st</sup> Accused had come outside of the shop.

- (iv) The witness had seen the 1<sup>st</sup> Accused and the deceased challenging each other. After that they began to punch each other with their hands. The witness had tried to hold on to the 1<sup>st</sup> Accused and stop the fight. However, the deceased had kept on punching the 1<sup>st</sup> Accused. This incident had been going on for about 2 minutes.
- (v) Thereafter, the witness testified that he had just left them and was going inside the Mobil Service Station shop. Thereafter, he saw some other people come and punched and kicked the deceased. These people were punching using their hands and kicking the deceased. They held him up and put him down again. He could not identify as to who were punching and kicking the deceased as he said it was only his third week working at the service station.
- (vi) When questioned as to where the 1<sup>st</sup> Accused was at this time, the witness said he did not know.
- (vii) Thereafter, the witness was shown the CCTV footage of the Nakasi Mobil Service Station copied on a DVD - the USB Copy (Prosecution Exhibit PE 10). After seeing the footage, the witness confirmed that the deceased and the 1<sup>st</sup> Accused fought each other twice - firstly from 8.03.40 to 8.04.05 at which point the two of them went out of frame and secondly from 8.05.26 to 8.05.50. At 8.06.47 the deceased comes again and challenges the 1<sup>st</sup> Accused. All these footages were seen on camera 4.
- (viii) Thereafter, the witness was shown the CCTV footage on camera 5 from 8.07.00 onwards. The witness confirmed that at 8.07.05, the 1<sup>st</sup> Accused is in the frame and was punching the deceased.

**[93] Evidence of Taniela Tadulala**

- (i) He testified that he is currently 20 years of age.
- (ii) On 17 February 2016, around 6.00 in the evening he had returned from playing touch rugby. He had gone and bought juice and was sitting at Carpenters drinking the juice. He was sitting facing the main road. The Mobil Service Station was about 15 meters away on the right.
- (iii) After a while some of his friends had joined him. He had been having a conversation with his friends for about half an hour. His friend Inoke (also known as Ritova was also with him at the time).

- (iv) *After a while, the deceased, Sitiveni had come walking. Inoke had followed him. They were going towards the Mobil Service Station. Then he had seen, the deceased talking with the 1<sup>st</sup> Accused. He had thought that they were swearing at each other. The deceased had come and touched the 1<sup>st</sup> Accused. The witness demonstrated how this happened. Then the deceased threw a punch at the 1<sup>st</sup> Accused. The 1<sup>st</sup> Accused defended himself because the punches were coming right onto his face. The 1<sup>st</sup> Accused also punched the deceased back in self-defence. The deceased had fallen down. After that he got up and was walking around the Mobil Service Station. "He was not satisfied".*
- (v) *At this point in time, the witness had stood up and gone closer to see clearly what was happening. The deceased kept on calling the 1<sup>st</sup> Accused. The 1<sup>st</sup> Accused did not respond. The deceased went and started punching the 1<sup>st</sup> Accused. After that he had seen them fight again. The deceased fell down and the 1<sup>st</sup> Accused was punching him again. The 1<sup>st</sup> Accused saw the deceased lying on the ground, he just left him there and went. The deceased stood up and left. The witness testified that the deceased really did not leave the place, because he was still not satisfied.*
- (vi) *The deceased stood up and had gone around the gas station (towards the Suva side). The witness had then moved closer to the service station. The witness testified that after a while he saw the father and sons, the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Accused, come running towards the service station. They had come running towards the deceased. The deceased was trying to flee, but it was too late.*
- (vii) *He had then seen them punching the deceased. He had seen the 2<sup>nd</sup> Accused who had thrown the first punch at the deceased. The deceased had blocked his face and his whole body (like he was cuddling/in a curled position). The witness himself had gone and kicked the deceased once on his thigh.*
- (viii) *The witness testified that the 3<sup>rd</sup> and 4<sup>th</sup> Accused kept punching the deceased. When asked as to whether he recalls how many punches they threw on the deceased, the witness said four each. These punches had landed on the deceased's stomach, face and head.*
- (ix) *The deceased was trying to breath but he could not. He was breathing slowly. The deceased kept swerving. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Accused kept on punching him. After that they stopped for a while as they were concerned for the deceased.*
- (x) *At this point the following questions were put to the witness:*

Q. *What position (posture) was the Siti (the deceased) when the punches were landing on him?*

A. *He was looking for life. He was lying down.*

Q. *When the two brothers were landing the 4 punches, what position was Siti?*

A. *He was leaning on the car.*

Q. *When then, did he fall to the ground?*

A. *With the first punch that landed on him, he fell to the ground.*

Q. *Do you know who threw the first punch?*

A. *Their father.*

.....

Q. *Who threw the first punch on Siti?*

A. *Their father.*

Q. *What happened to Siti?*

A. *He sat down. The two brothers came and they were punching him also.*

Q. *What else did they do?*

A. *He was punched and kicked on his head.*

Q. *Who was kicking Siti on the head?*

A. *Saimoni Tucila Junior (4<sup>th</sup> Accused).*

Q. *Who did you see punched Siti on the head?*

A. *Saimoni Tucila Junior (4<sup>th</sup> Accused).*

Q. *How many kicks did you see land on Siti's head?*

A. *3 or 4.*

Q. *How many punches did you see landed on Siti's head?*

A. *4.*

Q. *What was Epeli Tucila (3<sup>rd</sup> Accused) doing when Siti sat down and was being punched by the 4<sup>th</sup> Accused on the head?*

A. *He was also punching.*

Q. *What was Epeli Tucila (3<sup>rd</sup> Accused) doing when Siti was being kicked on the head by the 4<sup>th</sup> Accused?*

A. *He was also punching Siti.*

- Q. *Can you demonstrate how the 4<sup>th</sup> Accused was kicking Siti's head?*
- A. *It was not kicks but stomps.*
- Q. *What was their father doing?*
- A. *He was trying to stop them.*
- Q. *Did he succeed in stopping?*
- A. *Yes.*
- Q. *What did you do?*
- A. *I moved away and was watching. When I realised the camera was there, it was too late.*
- Q. *You said, you kicked Siti's thigh?*
- A. *Yes.*
- Q. *At what stage was this?*
- A. *The time they were assaulting Siti.*
- Q. *Why was it that you kicked Siti's thigh?*
- A. *I saw them crowding there. I just wanted to kick his thigh.*
- Q. *What position was Siti when you kicked his thigh?*
- A. *He was lying down.*
- Q. *How strong was this kick on the deceased?*
- A. *Not really strong, I only kicked once.*
- Q. *After this, what did you observe with the deceased?*
- A. *He was sitting down, his nose was bleeding, and his mouth was bleeding. He was breathing slowly.*
- Q. *Where was this?*
- A. *The same place they were assaulting him.*
- Q. *After this what did they do to Siti?*
- A. *They lifted him up and took him away from where he was assaulted. They lifted him up from both his arms. They made him stand and they dragged him away.*
- Q. *Was he able to stand?*
- A. *Yes.*
- Q. *What was the condition of Siti?*



- A. *He looked weak and was trying to breath. When we looked we can tell that he was trying to breath.*
- Q. *Where did they take Siti after they lifted him?*
- A. *They took him to the junction. The road leading to the Mobil Service Station.*
- Q. *What happened from the time they lifted Siti (and took him) up to the junction?*
- A. *Siti got up and he was punched only once.*
- Q. *Who laid this punch?*
- A. *Epeli Tucila (3<sup>rd</sup> Accused).*
- Q. *Who had lifted Siti?*
- A. *The father, Saimoni Tucila Senior helped him to stand up.*
- Q. *In what position did 2<sup>nd</sup> Accused lift Siti up?*
- A. *They were both facing the Mobil Service Station?*
- Q. *What position did he lift Siti from the ground?*
- A. *Holding him from the back with both his arms. Siti was facing away from the 2<sup>nd</sup> Accused (who was lifting him).*
- Q. *You said Siti got up while he was being taken – can you explain?*
- A. *Sitiveni got up, he slowly started to regain his breath, he wasn't steady.*
- Q. *Then what happened?*
- A. *Then I saw Epeli Tucila punched him on his left chest. Epeli used his left hand to punch.*
- Q. *What happened thereafter?*
- A. *He became weak. He sat down and then he lied down.*
- Q. *Who all where there at the time?*
- A. *Myself and them – the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused.*
- Q. *What did 2<sup>nd</sup> Accused do after this?*
- A. *They were worried about him. From there they lifted him up again and put him on the ground below the Mobil Service Station billboard/sign.*
- Q. *Who all had lifted him?*
- A. *2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> Accused, myself and some other children.*

- Q. *As you assisted in lifting Siti, what did you observe at that time?*
- A. *His breathing was different. His breathing was not normal (witness demonstrated how the deceased was breathing at the time). Then I was told to go and get water.*
- Q. *What else did you observe at the time?*
- A. *He was unconscious.*
- Q. *Who send you to fetch water?*
- A. *No one told me. Someone said to look for water, so I ran, I got the water from the Mobil Service Station.*
- Q. *What was the reason for going to fetch water?*
- A. *I was scared as I saw him lying there. I did not know what to do. When I heard someone say get water I went. The water was poured over his head and whole body and they began to touch him and calling out his name.*
- Q. *Who was doing all this?*
- A. *I was the one who was pouring water. The 2<sup>nd</sup> Accused was calling out Siti's name. Some other people were also touching him and calling out his name. They were moving closer and calling him.*
- Q. *Was Siti responding to all of this?*
- A. *He only responded twice. After a while the Police vehicle came.*
- Q. *What type of response did he give?*
- A. *When they were calling him "Siti" he responded.*
- Q. *Can you demonstrate his response at the time?*
- A. *I cannot recall.*
- Q. *How long after did the Police vehicle come?*
- A. *20 minutes later.*
- Q. *What happened when Police vehicle arrived?*
- A. *They were all gone. It was empty. Police vehicle came and stopped and I helped the Police Officers to lift the body and put it at the back seat (of the vehicle).*
- Q. *Why did you say lifted his body instead of saying Siti?*
- A. *Because he was injured.*

- Q. *When Police vehicle came, were only you there?*
- A. *No, what I meant, was the father and sons were not there. After that I went home. After a while the Police vehicle came and took me to the Police Station,*

.....

Q. *During the 20 minutes (until the Police vehicle arrived), where was Siti?*

A. *He was lying down at the bottom of the service station billboard.*

Q. *During the 20 minutes, did he respond in any way?*

A. *No.*

Q. *Do you know why there was this altercation between the 1<sup>st</sup> Accused and Siti?*

A. *I do not know.*

Q. *Do you know why the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Accused came and assaulted Siti?*

A. *No.*

Q. *Then why did you go and kick Siti on the thigh?*

A. *When I saw them running I wanted to follow them and do what they were doing.*

(xi) *This witness too was shown the CCTV footage of the Nakasi Mabil Service Station copied on a DVD - the USB Copy (Prosecution Exhibit PE 10).*

(xii) *This witness was cross examined at length by counsel for the 1<sup>st</sup> Accused, 2<sup>nd</sup> Accused, 3<sup>rd</sup> Accused and 4<sup>th</sup> Accused.*

**[94] Evidence of Detective Constable 4232 Raj Avinesh Prasad**

- (i) *He is a Police Officer currently attached to the Nausori Police Station. He had been serving at the Nakasi Police Station for 12 years (from 2004 to 2015). In February 2016, he was serving at the Nakasi Police Station (he left Nakasi Police Station in 2015 and returned in January 2016).*
- (ii) *On 17 February 2016, he was on duty. He was doing the day shift from 7.00 in the morning. Around 8.00 p.m. he got a message that there is a fight at the Mabil Service Station bowser. At the time this message was received, they were at the Davullevu Housing Waila patrolling the area.*

- (iii) He together with Special Constables Ron and Tevita proceeded to the scene, by a vehicle driven by PC Elvin. It took them 5 to 6 minutes to get to the service station.
- (iv) When they got to the service station, they saw a big crowd gathered at the bowser. They had gone between the crowds and saw a male iTaukei boy lying upright on the ground. He was without a T-shirt and only wearing a ¾ pants. He was wet, somebody had poured water on him.
- (v) When asked what his reaction was, the witness replied "I felt there was life in him, so I checked his pulse by putting my two fingers under his neck. I felt there was a pulse but very slow. I felt there was life in him."
- (vi) The witness had observed, that the deceased was bleeding. He had lifted the deceased with the help of the other Police officers and members of the public and put him in the back seat of the Police twin cab vehicle. After having put him in the car, the witness had got in and pulled the deceased shoulder towards him. The head of the deceased was kept upright so that he can have better breathing. Thereafter, the deceased was rushed to the Nausori Hospital.
- (vii) Special Constables Ron and Tevita had stayed back to control the crowd.
- (viii) They had reached the Nausori Hospital at around 8.30 p.m. He was then seen by a female doctor. She checked and tried to revive the deceased by giving him mouth to mouth resuscitation and by pressing his chest. However, there was no response from the deceased. The doctor informed that the deceased had passed away.
- (ix) It was suggested to the witness in cross examination that out of the three Police officers who were present, one held the deceased by his shoulders, and the other two held him by the waist, and threw him to the back seat of the vehicle. The witness denied that the deceased was thrown to the back seat of the vehicle.
- (x) It was also suggested to the witness, that whilst this was being done, the deceased head hit the door of the vehicle. The witness testified that at no time, did his head hit the door of the vehicle. He said, that the Police officers took good care of the victim at the time they put him into the vehicle.

**[95] Evidence of Dr. Losena Natuva**

- (i) The witness is a practising Medical Officer for the past 10 years. She has been serving at the Nausori Health Centre since July 2015.

- (ii) *She recalls the 17 February 2016. She was manning the afternoon shift – from 2.00 p.m. to 10.00 p.m.*
- (iii) *In the evening of 17 February 2016, she was informed by a Police officer (an Indo Fijian officer) that they had brought in a male person who needed her attention. She recalled that it was an officer by the name of Raj or something like that. She can clearly remember his face.*
- (iv) *She testified that she went out and found the person in the back seat of the police twin cab. She checked to see if the person was still alive. She could not find any pulse. The person's pupils were fixed and dilated which means that he was dead. The witness testified that the deceased was already cold and clammy and there were no signs of life.*
- (v) *The doctor had then asked the Police if the person was still alive when loaded in the police vehicle and how long it took to get to the hospital. The Police said it had taken about 20 minutes. So she decided to take the person in and attach him into defibrillator and at least try CPR to see if she could resuscitate him. However, these measures were not successful.*
- (vi) *She had then informed the Police that the person was dead and certified him as dead and told the Police that he needed a post mortem to confirm the cause of death. She had confirmed that the person was dead verbally and in writing.*
- (vii) *When asked, whether she recalls what time she received this body at the hospital, she answered that she could not recall the exact time. However, she recalls that it was late in the evening.*
- (viii) *The witness testified that the male person referred to above, was brought in as an unidentified male person. Police were not sure of his identification. The Police had just found him and brought him straight away to the hospital.*

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

- (i) *The Doctor is a Forensic Pathologist and Head of the Forensic Pathology Unit within the Fiji Police Force (The Doctor's curriculum vitae was handed over to Court).*
- (ii) *He has been a Medical Officer for more than 10 years and a Specialist in Forensic Pathology for more than 6 years. He has conducted more than 800 medico legal autopsies during his career.*
- (iii) *The witness recalls conducting the post mortem examination on the deceased Sitiveni Jamie Qali, on 18 February 2016. His findings have been recorded in the form of a Post Mortem Examination Report.*



- (iv) *The Post Mortem Examination Report of the deceased, was tendered to Court as Prosecution Exhibit PE 8.*
- (v) *The post mortem examination was conducted at the CWM Hospital on 18 February 2016, at 10.35 in the morning. The body was identified by Doroŋia Tavele, the mother of the deceased. The observers present at the examination was Detective Sergeant 3149 Viliame. The age of the deceased has been given as 21 years.*
- (vi) *The doctor explained that the purpose of a post mortem examination is to find out what is the cause of death, the manner of death (circumstances surrounding the death), and mechanisms of death – abnormal functioning of the body relating to the death, disease, injury etc.*
- (vii) *The doctor testified that as soon as the post mortem examination is completed, the cause of death is made known and a death certificate is issued to the relatives and a copy is issued to the Investigating Officer, who uses it for the investigation. The Post Mortem Examination Report is prepared 1 week to 6 weeks after the examination, depending on the case load.*
- (viii) *The doctor explained in detail the external injuries found on the deceased's body. Injuries were found on the face, chest and right posterior shoulder. The doctor testified that some of the causes for the bruising, swelling, and abrasions found on the face was due to blunt force trauma. Blunt force trauma is basically injuries caused by a blunt object, which can range from a fist to a foot, baseball club etc. As to what degree of force was needed for such bruising, swelling and abrasions to be present, the doctor said, "There are a varying degrees (of force). The deeper the bruise, the higher the level of energy or force of the blunt force object (was required)".*
- (ix) *The doctor said that the injuries on the chest and right posterior shoulder of the deceased could also be caused by blunt force trauma.*
- (x) *The witness explained further the corresponding internal injuries found on the body of the deceased, namely on the head, which comprises of the scalp, face, skull, meninges and brain. As to the degree of force needed to cause such injuries, the doctor said "You require multiple blows – these blows should be high energy blows – a knock-out punch". These high energy blows could include, stomps and kicks as well.*
- (xi) *When asked as to what would be the likely reaction or what would happen to a person who has received such injuries. The doctor explained that the most or highly likely reaction would be a person losing*

*consciousness. It is also highly likely that the person can have a fatal outcome after the injury (someone dying).*

- (xiii) *The doctor went on to explain further that on the Thoracic Cavity - which includes the respiratory system and cardiovascular system - there was nothing positive or no injuries on examination (it was unremarkable). On page 5 of the Post Mortem Report, the only remarkable finding was on the liver – a bruise is noted on the right part of the liver. On page 6 of the Report, the only remarkable finding is in the kidneys – there is a soft tissue bruise noted in the right kidney.*
- (xiv) *In his opinion the doctor has given the cause of death as:*
- (a) *Severe Traumatic Brain Injury and Extensive Sub-arachnoid Haemorrhage;*
  - (b) *Severe Traumatic Head Injury;*
  - (c) *Multiple Traumatic Injuries;*
  - (d) *Blunt Force Trauma;*
  - (e) *History of Assault.*

**[97] Evidence of Dr. Josese Rakuīta**

- (i) *He is a Medical Officer attached to the Nausori Health Centre since 2015. He specialises in General Practice. The witness testified to the 2 medical examinations conducted on the 1<sup>st</sup> Accused – firstly on 18 February 2016 at 13.00 hours and secondly on 19 February 2016 at 11.15 hours. The 2 Medical Reports were tendered to Court as Prosecution Exhibits PE 4A and PE 4B respectively.*
- (ii) *As per PE 4A, the doctor explained the specific medical findings which he has noted at column D12 of the Report.*

**[98]** The Report of the Medical Examination conducted on the 2<sup>nd</sup> Accused on 18 February 2016 and 19 February 2016, have been tendered to Court as Prosecution Exhibits PE 2A and PE 2B respectively, by consent of parties.

**[99]** The Report of the Medical Examination conducted on the 3<sup>rd</sup> Accused on 18 February 2016 and 19 February 2016, have been tendered to Court as Prosecution Exhibits PE 3A and PE 3B respectively, by consent of parties.

**[100]** It is admitted facts for Saimone Tucila Junior, the 4<sup>th</sup> Accused, that he was medically examined at Nausori Health Centre on 18 of February 2016 at 10.42 a.m. and he was medically examined again at Nausori Health Centre on 19 of February 2016 at 11.02 a.m.

**[101] Evidence of DC 4344 Amani Bosenawai**

- (i) He is an officer currently working at the CID Branch of the Nausori Police Station. In 2016, he was serving in the same capacity at the Nausori Police Station.*
- (ii) He conducted the caution interview statement of the 1<sup>st</sup> Accused, on 18 February 2016, at the Nakasi Police Station. He had been instructed by the Divisional Crime Officer, Western Division, to conduct the caution interview.*
- (iii) He testified that DC 3751, Isoa Vakaciwa was present as the witnessing officer.*
- (iv) The caution interview statement had been conducted in the English language and was hand written. The interview was conducted in the Crime Office (crime officer's room). The interview had commenced at 14.06 hours and concluded at 19.40 hours.*
- (v) The hand written caution interview statement made by the 1<sup>st</sup> Accused in the English language, was tendered to Court as Prosecution Exhibit PE 5A; and the typed caution interview statement made by the 1<sup>st</sup> Accused in the English language, was tendered to Court as Prosecution Exhibit PE 5B.*
- (vi) It has been suggested to the witness by the Defence that the caution interview was conducted in the iTaukei language although written in the English language. The Defence also suggested that questions 27, 29, 34, 35, 52, 54 and 56 of the statement and the answers thereto were fabricated by the Police.*

**[102] Evidence of DC 3751 Isoa Vakaciwa**

- (i) He is an officer currently working at the Ba Police Station.*
- (ii) In 2016, he was serving at the CID Branch of the Nausori Police Station.*
- (iii) On 18 February 2016, he had been instructed by the Divisional Crime Officer, Western Division to proceed to the Nakasi Police Station, to witness the caution interview statement of the 1<sup>st</sup> Accused. He had followed the instructions.*
- (iv) The caution interview was conducted by DC 4344 Amani Bosenawai from the Nausori Police Station.*

**[103] Evidence of Detective Corporal 3154 Alike Taria**

- (i) *He is an officer currently serving at the Lautoka Police Station. In 2016, he was serving at the Nausori Police Station.*
- (ii) *He conducted the caution interview statement of the 2<sup>nd</sup> Accused, on 18 February 2016, at the Nakasi Police Station. He had been instructed by the Divisional Crime Officer, to conduct the caution interview.*
- (iii) *He testified that DC 3372 Ame Raogo was present as the witnessing officer.*
- (iv) *The caution interview statement had been conducted in the iTaukei language and was hand written. The interview was conducted in the Station Officer's room. The interview had commenced at 14.00 hours and concluded at 18.45 hours.*
- (v) *The hand written caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language, was tendered to Court as Prosecution Exhibit PE 6A; the hand written English translation of the caution interview statement made by the 2<sup>nd</sup> Accused was tendered to Court as Prosecution Exhibit PE 6B; the typed English translation of the caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language was tendered to Court as Prosecution Exhibit PE 6C; and the typed caution interview statement made by the 2<sup>nd</sup> Accused in the iTaukei language was tendered to Court as Prosecution Exhibit PE 6D.*
- (vi) *It was suggested by the Defence that several portions of the 2<sup>nd</sup> Accused's caution statement was fabricated by the Police.*

**[104] Evidence of DC 3372 Ame Raogo**

- (i) *He is an officer currently based at the CID Branch of the Nakasi Police Station. In 2016 too, he was serving in the same capacity at Nakasi Police Station.*
- (iii) *On 18 February 2016, he had been instructed by Detective Inspector Vijay to witness the caution interview statement of the 2<sup>nd</sup> Accused. He had followed the instructions.*
- (iv) *The caution interview was conducted by Detective Corporal 3154 Alike Taria from the Nausori Police Station.*

**[105] Evidence of DC 4509 Mesulame Narawa**

- (i) *He is an officer currently based at the Commissioner's Task Force in Suva. In 2016, he was serving at the Nausori Police Station.*

- (ii) *He conducted the caution interview statement of the 3<sup>rd</sup> Accused, on 18 February 2016, at the Nakasi Police Station. He had been instructed by the Divisional Crime Officer, to conduct the said caution interview.*
- (iii) *He testified that WDC 4234 Vani was present as the witnessing officer.*
- (iv) *The caution interview statement had been conducted in the English language and was hand written. The interview was conducted in the Crime Writer's room. The interview had commenced at 14.17 hours and concluded at 20.40 hours.*
- (v) *The hand written caution interview statement made by the 3<sup>rd</sup> Accused in the English language, was tendered to Court as Prosecution Exhibit PE 7A; and the typed caution interview statement made by the 3<sup>rd</sup> Accused in the English language, was tendered to Court as Prosecution Exhibit PE 7B.*
- (vi) *It has been suggested to the witness by the Defence that the caution interview was conducted in the iTaukei language although written in the English language. It was further suggested by the Defence that several portions of the 3<sup>rd</sup> Accused's caution statement was fabricated by the Police.*

**[106] Evidence of WDC 4234 Vani**

- (i) *She is an officer currently based at the Nakasi Police Station. In 2016 too, she was serving in the same capacity at Nakasi Police Station.*
- (iii) *On 18 February 2016, she had been instructed to witness the caution interview statement of the 3<sup>rd</sup> Accused. She had followed the instructions.*
- (iv) *The caution interview was conducted by DC 4509 Mesulame Narawa from the Nausori Police Station.*

**[107] Evidence of DC 4791 Jone Tupua**

- (i) *He is an officer currently based at the CID Branch of the Nakasi Police Station. In 2016 too, he was serving in that capacity.*
- (ii) *He conducted the caution interview statement of the 4<sup>th</sup> Accused, on 18 February 2016, at the Nakasi Police Station.*
- (iii) *He testified that Corporal 3464 Vilikesa Gasaudra was present as the witnessing officer.*
- (iv) *The caution interview statement had been conducted in the English language and was typed. The interview was conducted in the Crime*



*Officer's room. The interview had commenced at 14.00 hours and concluded at 17.50 hours.*

- (v) The typed caution interview statement made by the 4<sup>th</sup> Accused in the English language, was tendered to Court as Prosecution Exhibit PE 9.*
- (vi) It has been suggested to the witness by the Defence that the caution interview was conducted in the iTaukei language although typed in the English language.*

**[108] Evidence of Corporal 3464 Vilikesa Gasaudra**

- (i) He is an officer currently based at the Nabua Police Station. In 2016, he was serving at the Nakasi Police Station.*
- (iii) On 18 February 2016, he had been instructed to witness the caution interview statement of the 4<sup>th</sup> Accused. He had followed the instructions.*
- (iv) The caution interview was conducted by DC 4791 Jone Tupua from the Nakasi Police Station.*

**[109] Evidence of Dorotea Davele**

- (i) She is the mother of the deceased, Sitiveni.*
- (ii) In the year 2016, she was residing at Lot 16, Chadwick Road, Nakasi.*
- (iii) She recalled that on 18 February 2016, she was instructed by Police to go and identify the body of her son. She had been taken to the CWM Hospital. She had identified the body of the deceased as her son.*

**[110]** The prosecution recalled DC 4791 Jone Tupua to formally tender the CCTV footage of the Nakasi Mobil Service Station copied on a DVD-USB Copy. It was tendered to Court as Prosecution Exhibit PE 10.

**[111]** 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 four accused. I explained to them that they could give sworn evidence and call witnesses on their behalf. They could also address Court personally or through their Counsel. The accused could have even remained silent. The four accused were given these options as those were their legal rights. The accused need not prove anything. The burden of proving their guilt rests entirely on the prosecution at all times. However, the four accused opted to offer evidence under oath.

**[112] Evidence of the 1<sup>st</sup> Accused – Alipate Naimosa**

- (i) He is currently residing at Naitonitoni, Navua. He has been staying there for the past 2 years and 3 months.*
- (ii) In February 2016, he was residing in Salim Street, Nakasi.*
- (iii) At the time he was working as a bowser attendant at the Mobil Service Station in Nakasi. He had been working as a bowser attendant for 6 to 7 months.*
- (iv) He knew the Tucilas' as they used play rugby together. Prior to moving to Salim Street, he was staying at the 2<sup>nd</sup> Accused's house.*
- (v) On 17 February 2016, he started his shift from 6.00 a.m. to 2.00 p.m. Then he had a one hour rest. Then he started working again at 3.00 p.m. and finished at 10.00 p.m.*
- (vi) He testified that the deceased, Sitiveni came that evening. He knew the deceased as he used to come and buy at the bowser and he used to come around to Saimoni's place, when he was staying there. He had known Sitiveni for about 2 months at the time.*
- (vii) When the witness had gone to drop the money at the cashier, the deceased followed him and said that he had something good. After that, the deceased swore at him. The cashier at the shop told him that the deceased was swearing at him. The witness had told the cashier that the deceased was just playing around and joking around. The witness could not recall the exact time this took place.*
- (viii) The witness had remained in the shop a little longer. The deceased had gone away. He doesn't know where the deceased went to.*
- (ix) Thereafter, the witness had come out of the shop. He had seen the deceased walking from the middle of the road (heading towards Nausori), and heading towards him. He came straight to the witness and said he doesn't like him. The witness then asked the deceased, why does he hate him? If there was something that he hated him for, they could talk about it. The deceased sounded angry at the time.*
- (x) Then thereafter, the deceased tried to punch him. The witness tried to stop these punches while the deceased was punching. However, the deceased kept on punching him. The witness and the deceased had*

*started pushing each other and ended up at the tyre pump (air pump). At this stage, Walsea tried to stop the witness, however, by holding him but the deceased kept on punching him.*

- (xi) Thereafter, the witness had gone back to pump number 6. The deceased had gone towards Carpenters and came back to where the witness was standing. The witness had told him to go to his home and not to come and ruin his work. The deceased had responded by saying that he will wait for the witness at 10.00 p.m. when the witness finishes his work.*
- (xii) Thereafter, the deceased had come back to where he was standing and told the witness that he hates him. At the same time, the deceased was swearing at him. The deceased had then punched the witness. The witness had tried to stop his punches. He held onto the deceased's waist. The deceased kept on punching him. The witness tried to push the deceased. They were pushing each other and the deceased fell on the ground. The deceased fell sideways and his hand was touching the ground. The deceased was in a curled position and was protecting his face up to the chest (witness demonstrated in Court).*
- (xiii) At this stage, the witness said that he did not punch the deceased using his knuckles. He used his closed palm to slap the deceased. The witness said that he is left handed and he has a permanent injury on the left hand, so he cannot close it fully.*
- (xiv) The witness said that when he was punching the deceased, his punches landed on the deceased's forearm. At this point a person named Sikeli had come and held the witness.*
- (xv) The witness said that Inoke (also known as Ritova) was also there at the time. Inoke had kicked the deceased on his head twice.*
- (xvi) Thereafter, the deceased got up and asked for his hat from Inoke. The witness had told Inoke to give the hat to the deceased so that he could go home.*
- (xvii) However, the deceased had not left. He came back to the witness while the witness was standing near pump number 7 and punched the witness on his face. The witness did not respond to these punches and was walking back into the shop. He had again told the deceased to go back to his house.*

(xviii) Before he reached the inside of the shop, the witness had seen some people come running. At the same time, he had seen the deceased getting punched. The witness had also gone closer and punched the deceased on his back. At this point, an Indo Fijian man had called him to pump fuel to his car, and the witness had left. Thereafter, the security at the Mobil Service Station called him and he went inside the shop.

**[113] Evidence of the 2<sup>nd</sup> Accused - Saimone Tucila Senior**

- (i) He is 55 years old. In 2016 he was living in Nakasi with his family. Family meaning, his wife and children. He has 10 children including the 3<sup>rd</sup> and 4<sup>th</sup> Accused. He had been staying in Nakasi since 1992.
- (ii) In 2016, he was doing farming for a living. He was also doing community service. He was running a rugby team in Nakasi – Nakasi Cowboys Rugby League.
- (iii) He confirmed that the 1<sup>st</sup> Accused was staying at his residence for about 2 months prior to the incident.
- (iv) On 17 February 2016, he was working at the plantation. He came back before 12.00 noon to have lunch. He had seen the 3<sup>rd</sup> and 4<sup>th</sup> Accused and another child. The 4<sup>th</sup> Accused was injured. He had asked the 4<sup>th</sup> Accused what had happened. The 4<sup>th</sup> Accused had said that the deceased had punched him. He had then advised the 4<sup>th</sup> Accused to go and report the matter to the Police.
- (v) The 4<sup>th</sup> Accused had said, that the deceased is his friend and he usually comes home and left the matter there.
- (vi) Thereafter, in the afternoon, he had gone to the playground and had returned home. They were about to have dinner. One of his children named Emilio (Milo) came and said that the deceased had sent him to call the 3<sup>rd</sup> Accused. The witness had told the 3<sup>rd</sup> Accused not to go out of the house.
- (vii) Thereafter, Milo came back and said that the 1<sup>st</sup> Accused was being assaulted. That the 1<sup>st</sup> Accused and the deceased were fighting. The witness then ran out of the house. When he got there (the Mobil Service Station) the 1<sup>st</sup> Accused and the deceased were challenging each other. The deceased had seen the witness and tried to flee. The witness had then gone and held the deceased. The witness said he held the deceased to stop the fight.
- (viii) When asked why he didn't just let the deceased flee, the witness answered "Because some others were waiting for him".



- (ix) The witness said that he held onto the deceased because others were throwing punches and he was wanting to stop the fight. The witness then said to call the Police. Then he had told the deceased to stand up. Then he took the deceased to the side of the bowser in the front.*
- (x) When asked as to what actions he took to stop the fight. The witness replied "When he was getting punched, I held him. Then I tried to push the others because there were a lot of them. Then I tried to protect him.*

**[114] Evidence of the 3<sup>rd</sup> Accused - Epeli Tucila**

- (i) He testified that in the afternoon of 17 February 2016, he was at home. He and the 4<sup>th</sup> Accused had returned from Tacirua.*
- (ii) Thereafter, the two of them had waited at Carpenters Hardware. They had been waiting for their aunty who was bringing him clothes. The witness explained that he was planning to go to Hawaii that Friday to work on board a fishing vessel.*
- (iii) At Carpenters, in addition to the 4<sup>th</sup> Accused and himself, one of his cousin brother's named Jone was also there. The time may have been around 2.30 – 3.00 p.m. as the students were returning from school.*
- (iv) After a while, the deceased had come there in a taxi together with another person. He knew the deceased, as they had attended the same primary school together.*
- (v) After getting off the taxi, the deceased came straight towards where they were sitting. He came and called the 4<sup>th</sup> Accused. He then saw the 4<sup>th</sup> Accused and the deceased standing close to each other. Then he saw the deceased pushing the 4<sup>th</sup> Accused 3 times. He thought that they were playing. Thereafter, the deceased punched the 4<sup>th</sup> Accused. The witness says that he did not hear anything because he was on facebook on his phone (he was using his ear piece).*
- (vi) The first punch that the deceased threw, the 4<sup>th</sup> Accused face got lacerated. After that they were punching each other. Then they became tired. Then they both got slammed to the ground.*
- (vii) At this point, the witness had gone and punched the deceased on his shoulder and his chest. He said punched the shoulder twice and his chest twice (the witness said it was below the deceased's shoulder and ribs). Thereafter, the deceased had left.*
- (viii) He had taken the 4<sup>th</sup> Accused back home to apply the Fijian medicine "mile-a-minute" on his face.*



- (ix) Thereafter, the witness together with the 4<sup>th</sup> Accused had walked to Rups in Nakasi and returned home. He said he had walked in this manner to cool the 4<sup>th</sup> Accused down.
- (x) When they got back home, the rest of the family were having dinner. He believes the time was around 7.00 in the evening. His brother Milo had his dinner and had gone to the shop. After a while (3-5 minutes), Milo came running that the deceased is waiting for the witness at Carpenters for them to fight. His father had told him not to go out.
- (xi) Milo then left again. Then Milo came back and said that the 1<sup>st</sup> Accused was getting punched and was injured. After hearing this, the witness had gone to the road, to see if the 1<sup>st</sup> Accused was really injured or not. He was going towards the service station. When he reached the top of the road before the bowser, he had seen a crowd at the service station. Then he ran towards the service station.
- (xii) When he arrived, he saw the deceased was getting punched. He doesn't know who was punching, there were lot of people. He too had gone and punched and kicked the deceased. He said he did so, because he was hurt of what the deceased did to his younger brother and the 1<sup>st</sup> Accused. He testified that he could not recall the number of times he punched and kicked the deceased. He had punched the deceased's shoulder and kicked his ribs.

**[115] Evidence of the 4<sup>th</sup> Accused - Saimone Tuclla Junior**

- (i) He testified that he is 23 years of age and currently resides at the Verata. He is currently unemployed.
- (ii) In the year 2016, he was residing at Tacirua as he was looking after a farm there. He was working in the farm for about 3 months.
- (iii) Prior to that he was residing with his parents and his siblings at Nakasi.
- (iv) On 17 February 2016, around 12.00 noon, he was at the farm in Tacirua. Around 1.30 p.m. he had left Tacirua to go to Nakasi. He had come to Nakasi with the 3<sup>rd</sup> Accused. On reaching Nausori, they were waiting for their aunty to bring some clothes for the 3<sup>rd</sup> Accused.
- (v) Thereafter, the 3<sup>rd</sup> Accused wanted to go and buy cigarettes at the canteen – opposite Carpenters Hardware. On their way they had seen some people sitting at Carpenters. He had seen Ritova and his cousin Jane. So he and the 3<sup>rd</sup> Accused went to talk to Jane. They were sitting and having a conversation.

- (vi) *While they were sitting there, a taxi arrived and parked nearby. He saw the deceased and another person. He knew the deceased as they attended the same primary school and also grew up together in Nakasi.*
- (vii) *On seeing the deceased he had called him. The deceased came towards him and stood in front of him. The witness had then asked the deceased about what Inoke had told him (about the \$10 that the deceased had taken from Inoke the day before). The deceased had then told him that it was none of his business.*
- (viii) *Thereafter, the witness testified that the deceased had pushed him and punched his chin. Thereafter, he had punched his face on his left eyebrow. The witness had felt dazed. The witness tried to stand, he could not see anything around him. The deceased then had thrown another punch on his face. Thereafter, the deceased pulled the collar of his T-shirt and punched his chin. The witness had then punched the deceased back. Then the witness and the deceased were punching each other. Then he saw the 3<sup>rd</sup> Accused had stood up and gone and punched the deceased. At that point the Security Officer at Carpenters came and stopped the fight.*
- (ix) *He had seen that his face was bleeding. He together with the 3<sup>rd</sup> Accused had then left. The 3<sup>rd</sup> Accused had applied mile-a-minute on his face. His father had asked him what had happened. He informed that the deceased had punched him. His father then told him to report the matter to the Police.*
- (x) *The witness later testified to the incident that took place while the family was having dinner together. The first time Milo had come and said that the deceased is waiting for the 3<sup>rd</sup> Accused at Carpenters and later had come and said the 1<sup>st</sup> Accused was getting punched by the deceased. He had then walked towards the road and went to the service station. While going, he saw the deceased throw a punch at the 1<sup>st</sup> Accused. Then the witness had run towards the service station. He tried to hold onto the deceased to ask him the reason for punching the 1<sup>st</sup> Accused. At the same time the deceased threw his hand towards the witness. It landed on the side of his face that was earlier injured.*
- (xi) *The witness had then punched the deceased back. He testified that he had punched the left side of the deceased's rib. At this point the deceased slid on top of the bonnet of the car (the white car seen in the CCTV footage). Then the witness had punched on the back of his left shoulder. Then the deceased had fallen in front of the car. Then the witness had punched and kicked the deceased on his leg/knee. He could not recall how many times he had punched the deceased, but he had kicked him once.*

## Analysis

- [116] The above is a brief summary of the evidence led at this trial. In this case the prosecution is relying on eye witness evidence, police evidence and medical evidence. The prosecution is also relying on the CCTV footage. The Defence is relying on the evidence of the 4 Accused persons.
- [117] Medical evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefits, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [118] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [119] In this case the prosecution is also relying on the admissions made by the four accused in their caution interview statements. Any admission made by these accused in their caution statements are admissible and sufficient evidence to prove their guilt to a charge. However, please bear in mind that the caution interview statement of one accused cannot be used against the other accused.
- [120] Also please bear in mind, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the caution interview statements were made by the accused voluntarily and fairly. The prosecution must establish these facts beyond a reasonable doubt.
- [121] Whether the accused gave their statements voluntarily and fairly and whether the statements set out a set of events in relation to the offence, on which you can rely and accept, is a matter for you. Of course if you believe that the interview is false, that it was made up or fabricated by the police, you may think that you cannot put any weight on it. However, if you believe that the accused gave his caution interview statement without force or fabrication, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of the accused. However, the question of whether the said admissions are true and what weight you can put on the admissions made in the said statements is a matter of fact for you to decide.
- [122] The Defence states that the caution interview statements were fabricated. The prosecution says that the caution interview statements were not obtained under pressure or inducement and that the statements were not fabricated. You have heard from the police officers that there were no threats or force or any form of intimidation of any kind by anyone on the accused and their statements were freely and voluntarily given and that they correctly recorded what the accused said. I reiterate that the

truthfulness of the statements and what weight you put on the said statements made to the police is entirely a matter for you.

- [123] As to the CCTV footage, the Defence states that there was an extended version of the footage, up to the point where the Police arrived at the scene and loaded the deceased into the Police vehicle. The Defence position is that the Police officers threw the deceased into the vehicle and whilst doing so, the deceased's head struck the door of the Police vehicle. The Defence is trying to establish that the injuries on the deceased's head were caused as a result of the Police action.
- [124] Evidence has also been led in this case of other persons – namely Inoke, Waga and Tadulala - assaulting the deceased. However, the Investigating Officers have only named the four Accused as the Accused in this case. What you have to decide in this case is whether the four accused substantially contributed to the injuries that were caused on the deceased's head.
- [125] 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.
- [126] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [127] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the prosecution witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the four accused not guilty of the charge, 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 has proved the elements of the offence of Murder, beyond any reasonable doubt.
- [128] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence of the accused. You must consider their evidence also for its consistency and also the probability of their version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.
- [129] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and they should be found not guilty of the charge.
- [130] However, I must caution you that even if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically

proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

**[131]** Based on the directions I have already given you, as an alternative to Murder, you may consider whether any of the accused is guilty or not guilty of the lesser offence of Manslaughter.

**[132]** Similarly, based on the directions I have already given you, as an alternative to Manslaughter, you may consider whether any of the accused is guilty or not guilty of the lesser offence of Assault Causing Actual Bodily Harm.

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

- i. *If you accept the version of the accused, then you must find the accused not guilty of the charge murder;*
- ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge of murder;*
- iii. *If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge murder;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of murder has been established beyond reasonable doubt. If so you must find the accused guilty of the charge of murder.*
- vi. *As an alternative, you may consider whether any of the accused is guilty or not guilty of the lesser offence of Manslaughter.*
- vii. *As an alternative to Manslaughter, you may consider whether any of the accused is guilty or not guilty of the lesser offence of Assault Causing Actual Bodily Harm.*

**[134]** Any re directions the parties may request?



The Counsel for the 1<sup>st</sup> Accused, Ms. Hazelman, submitted that the Assessors should be re-directed with regard to the last sentence in paragraph 123 of the summing up, which states: The Defence is trying to establish that the injuries on the deceased's head were caused as a result of the Police action. Accordingly, I direct the Assessors as follows:

The defence position is that the police action could have substantially contributed to the injuries caused on the deceased's head.

The Counsel for the 3<sup>rd</sup> Accused, Ms. Kean, submitted that the Assessors should be re-directed at paragraph 124 of the summing up, to the effect that the 2 kicks given by Inoke on the head of the deceased could have substantially contributed to the injuries caused on the deceased's head. Accordingly, I direct the Assessors as follows:

However, the defence position is that the 2 kicks given by Inoke could have substantially contributed to the injuries caused on the deceased's head.

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

**[136]** Your possible opinions should be as follows:

Count One

Murder- Guilty or Not Guilty

If not guilty,

In the alternative

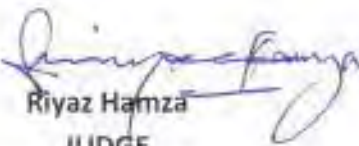
Manslaughter- Guilty or Not Guilty

If not guilty,

In the alternative

Assault Causing Actual Bodily Harm-Guilty or Not Guilty

[137] I thank you for your patient hearing.

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

AT SUVA

Dated this 17<sup>th</sup> Day of April 2018.



Solicitors for the State : Office of the Director of Public Prosecutions, Suva.  
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.