

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 119 of 2015

STATE

V

PAULIASI NAUSARA

Counsel : Mr. S. Babitu for the State.
: Ms. V. Narara with Ms. P Reddy [LAC] for the
Accused.

Dates of Hearing : 27, 28 September, 01, 02 October, 2018
Closing Speeches : 03 October, 2018
Date of Summing Up : 04 October, 2018

SUMMING UP

Ladies and Gentleman Assessors

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

ROLE OF JUDGE AND ASSESSORS

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

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

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

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system

of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
10. You must decide the facts without prejudice or sympathy to either the accused or the deceased. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. At this point in time I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinion. This case involves a loss of life this certainly shocks the conscience and feelings of our hearts.
12. It is quite natural given the inherent compassion and sympathy with which human beings are blessed. You may perhaps have your own personal, cultural, spiritual and moral thoughts about such an incident. You must not, however, be swayed by such emotions and/or emotive thinking. You act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to in the present day society that we live in.

13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

14. The accused is charged with the following offence: (a copy of the information is with you).

Statement of Offence

MURDER: contrary to section 237 (1) of the Crimes Act No. 44 of 2009.

Particulars of Offence

PAULIASI NAUASARA, on the 25th of June, 2015 at Lautoka in the Western Division murdered **MICHAEL SEMITI OSBORNE**.

15. In order to prove the offence of murder the prosecution must prove beyond reasonable doubt the following:
- (a) the accused
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of the deceased; and
 - (d) the accused intended to cause the death ; or
 - (e) was reckless as to causing the death of the deceased by his conduct. The accused is reckless with respect to causing the death of the deceased if;
 - (i) he was aware of a substantial risk that death will occur due to his conduct; and
 - (ii) having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
16. What you will have to consider with regard to this particular state of mind is whether the accused was aware of a substantial risk that

death will occur due to his conduct and having regard to the circumstances known to him, it was unjustifiable for him to take that risk.

17. The first element is concerned with the identity of the person who committed the offence. This element of the offence is not in dispute the defence agrees that it was the accused and no one else. This element is therefore proven beyond reasonable doubt.
18. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is a voluntary act by the accused or is a result of the will of the accused. Like the first element the defence agrees that it was the accused who had engaged in a conduct. This element of the offence is also proven beyond reasonable doubt.
19. The third element is the conduct of the accused that caused the death of the deceased. Conduct means an act done by the accused it can be anything such as punching, kicking, stomping, stabbing, strangling etc. The law requires a link between the conduct of the accused and death of the deceased. You must be sure that the conduct of the accused caused the death of the deceased.
20. In other words whether the punching of the deceased on his face when he was sitting in the car then pulling him out and dragging him to the roadside punching, kicking and stomping his head when the deceased was lying down in an unconscious state caused the death of the deceased. You should remember that the act of the accused need not be the sole cause but the act of the accused should substantially contribute to the death of the deceased.

21. Like the other two elements the defence does not dispute this element of the offence as well so you are to accept this element of the offence as proven beyond reasonable doubt as well.
22. With regards to the final two elements of the offence which concerns the state of mind of the accused the prosecution must prove beyond reasonable doubt either that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased by his conduct.
23. The prosecution has to prove only one of the two limbs of this element. In this case the prosecution is alleging that the accused intended to cause the death of the deceased.
24. It is for the prosecution to prove beyond reasonable doubt that the accused was engaged in a conduct and the conduct caused the death of the deceased and the accused intended to cause the death of the deceased by his conduct. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.
25. The prosecution says the accused punched the deceased twice on his face when he was sitting in the car then pulled him out and dragged him to the roadside and repeatedly punched, kicked and stomped him whilst wearing his canvas on the face and head of the deceased when the deceased was lying down in an unconscious state. At the time of assaulting the deceased the accused was yelling "mortuary", "mortuary".
26. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of murder.

27. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of murder.
28. If you accept that the accused did not intend to cause the death of the deceased or you are not sure whether he intended to cause the death of the deceased then consider the offence of manslaughter which is a lesser charge than murder.
29. Manslaughter has the first two elements of murder, that is to say that the accused engages in a conduct which caused the death of the deceased and the accused intends that conduct will cause serious harm to the deceased.
30. Manslaughter is the killing of someone by unlawful conduct if you are satisfied that the accused was engaged in a conduct which caused the death of the deceased and the accused intended that conduct will cause serious harm to the deceased then you must find the accused guilty of manslaughter.
31. In this case there is evidence that the accused had punched the deceased twice in the car on his face, pulled him out and dragged him to the roadside then repeatedly punched, kicked and stomped him whilst wearing his canvas on the face and head of the deceased whilst he was lying on the ground in an unconscious state.
32. Whether the accused intended to cause the death of the deceased by his conduct or intended to cause serious harm to the deceased by his conduct is a matter entirely for you to decide on the basis of the facts and circumstances of the case.

AMENDED ADMITTED FACTS

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

PROSECUTION CASE

37. The Prosecution called seven (7) witnesses to prove its case against the accused.
38. The first prosecution witness was Dr. Praneel Kumar a Forensic Pathologist employed by the Fiji Police Force. Dr. Kumar graduated with an MBBS degree in the year 2010 from the Fiji School of Medicine and in the year 2014 he graduated with a Post Graduate Diploma in Pathology.

39. The witness confirmed conducting the autopsy on the deceased on 2nd July, 2015 he signed the Post Mortem Report on 28th October, 2015. This report was marked and tendered as prosecution exhibit no.1.
40. The estimated date of death was 25th June, 2015. The history given to the witness was that the deceased was punched and kicked in a brawl and was admitted at the intensive care unit at the Lautoka Hospital on 21st March, 2015.
41. Upon examination of the lungs the witness noted it was filled with edema and was congested, usually the lungs are just air sacs that shouldn't have fluid but in this case the lungs were filled with fluid leading to septicemia or infection.
42. Also the deceased had developed large bed sores, bacteria can multiply in that area and eventually go into the blood stream and cause septicemia. Although the brain was normal on gross inspection, however, there was something called diffuse axonal injury which results from high velocity trauma and assault.
43. The deceased was in a persistent vegetative state meaning he was not able to move his limbs that led to bed sores which led to septicemia and then to death. To get diffuse axonal injury the assault has to be severe. Trauma was the main cause of persistent vegetative state. In this case it was highly likely the trauma sustained by the deceased caused this persistent vegetative state of the deceased because the deceased was like that throughout his hospitalization.
44. The witness was unable to see any injuries on the head of the deceased since he died after three (3) months he was admitted in the

hospital. The witness did not do a post mortem x-ray or a CT scan since it was not available in Fiji.

45. The witness stated that the deceased was assaulted resulting in diffuse axonal injury which led to him being in a persistent vegetative state. He then developed multiple bed sores which led to septicemia.
46. The cause of death was:
 - (a) Septicemia;
 - (b) Multiple bed sores;
 - (c) History of head injury and assault.
47. In cross examination the witness agreed he did not see any injuries on the head or the abdomen of the deceased. The history of assault and head injuries was given to the witness by the investigating officer.
48. The second prosecution witness was Dr. Poonam Pala who graduated with a MBBS degree in the year 2012 from the Fiji School of Medicine. On 21st March, 2015 the witness was at the Lautoka Hospital Emergency Department.
49. The victim who was unidentified at the time was brought to the Emergency Department he was unconscious and bleeding from his mouth and nose and clearly had a fractured jaw.
50. After the victim was stabilized he was admitted to the intensive care unit. The witness was the receiving doctor she stabilized the victim's airways, he was bleeding into his mouth and nose. There was lot of blood around his nose, mouth and face which was compromising his

airways and his ability to breathe. His jaw was clearly deformed and fractured.

51. The witness described the injuries as blunt force injuries to the face and jaw. By stabilization the witness secured the airways with a breathing tube, secured his circular like cervical spine and then the victim was taken to the CT scanner.
52. Patients with life threatening conditions or very serious injuries are referred to the intensive care unit.
53. In cross examination the witness stated that after she secured the victims airways his breathing was slightly better but needed to be assisted by an ambo bag and eventually his breathing was controlled.

Ladies and Gentleman Assessors

54. You have heard the evidence of two doctors who were called as expert witnesses on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The Post Mortem Report of the deceased is before you and what the doctors said in their evidence as a whole is to assist you.
55. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctors. When coming to your own conclusions about this aspect of the case you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the experts you do

not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctors.

56. You should remember that the evidence of the doctors relate only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
57. The third prosecution witness was Albert Pickering, on 21st March, 2015 at about 3pm he was drinking liquor with the deceased and the accused at the multi-purpose court. After a while the witness went to sleep at the back of the car which belonged to the accused.
58. This was the first time the witness met the accused but he knew the deceased from childhood. During the day the accused, the deceased and Aporosa had picked the witness from town.
59. Before going to the multi-purpose court the witness was drinking with Aporosa and some of his workmates at the Namoli beach. At the multi-purpose court the deceased, the accused, Aporosa and the witness bought some more beer. After a while the accused was not around.
60. Since the witness was sleeping at the back of the car the deceased drove the car to drop him home Aporosa was in the car as well. All went to Natabua, on the way three (3) others namely Teu, Warren and Pado were picked up. After buying some more drinks from Natabua they went to Field 40.
61. By this time it was almost 7pm. At the Oriana junction the deceased stopped the car to turn it around. The accused came in a twin cab and stopped behind the car driven by the deceased. The accused

came and gave the deceased two (2) punches on the side of his face whilst he was sitting in the car. At this time the deceased knocked out. The witness saw this since he was sitting in the back seat of the car in the middle.

62. The accused pulled the deceased out of the car, the deceased did not do anything, and was thrown on the road. The accused stood on the deceased head and was punching the deceased, by this time the witness was standing at the back of the car. The deceased and the accused were about 5 or 10 meters away from the witness.
63. The witness was clearly able to see what was happening, although it was dark the stomping and punching to the head of the deceased was done by the accused under the street light.
64. The accused was punching and stomping at the same time. The witness recalled 10 or more punches were thrown by the accused. The witness demonstrated what he saw to the court.
65. At the time the accused was stomping and punching the deceased he was shouting "mortuary", "mortuary", the deceased was lying on his stomach facing down.
66. The witness shouted at the accused to stop, the accused left the deceased and ran after him, the witness tried to defend himself but fell in the process. The person who had come with the accused came and stopped the accused. The accused was wearing a vest, shorts and canvas, the person with the accused was James a school mate of the witness. The accused again ran to the deceased and started hitting him by kicking and punching on the back of his head.

67. The deceased was unconscious the witness described the punches and kicks as heavy punches and kicks. The witness then begged James to stop the accused otherwise the victim will die because of the repeated punching to the head. According to this witness the deceased was smaller and slimmer than the accused in physical appearance.
68. James went and pulled the accused away. Both then went away in the twin cab they had come. The witness went to the deceased and turned him over. He could not recognize the deceased since his mouth and face were swollen he was struggling to breathe, blood was coming out of his nose and mouth. The deceased was still unconscious.
69. The witness found a van with the help of Warren and Pado they took the deceased to the hospital in a van. He visited the deceased at the hospital who was getting worse he did not seem to recover and was getting weaker and weaker.
70. The witness identified the accused in court.
71. In cross examination the witness denied it was the deceased who threw the first punch at the accused. The witness stated the deceased wasn't expecting the punches from the accused it was all of a sudden.
72. The witness was referred to his police statement dated 23rd March, 2015 which he had given after the incident when facts were fresh in his mind. The witness agreed he did not tell the police the deceased had knocked out after two (2) punches. The witness explained, he had said about the deceased became unconscious in court because

the deceased could not defend himself and the witness knew the deceased was capable of defending himself or running away.

73. The witness maintained the deceased was unconscious. The witness agreed in his police statement he did not say ten (10) punches but on page 2 line 14 of his police statement he had stated:

“The owner started punching Michael on the head.”

74. In re-examination the witness clarified the accused did not talk to the deceased. After the accused left, he had turned the deceased over since the deceased couldn't do so on his own.
75. The fourth prosecution witness was Luke Vosa Osborne the younger brother of the deceased he had identified the body of the deceased at the Lautoka Hospital.
76. The fifth prosecution witness was Warren Pickering, on 21st March, 2015 at about 7.40pm he was at Field 40 Oriana junction. Before going to Field 40, the witness was picked from Natabua junction by the deceased, Albert, Varo, Poasa and Aporosa in a black car driven by the deceased.
77. At the Oriana junction the deceased stopped the car, the accused came and punched the deceased twice on his face and dragged the deceased out of the car punched, kicked and stomped on his face and head. There was a streetlight which was dim. This witness also informed the court more or less what PW3, Albert Pickering had told the court except this witness did not say anything about the accused running after Albert and then going to punch and kick the deceased again. This witness said he was present at the scene where the accused had assaulted the deceased.

78. In cross examination the witness agreed the car the deceased was driving did not belong to the deceased. The witness disagreed when he was picked up from the Natabua junction that he drank alcohol with the others in the car.

79. The witness was referred to his police statement dated 20th July, 2015 which he had given to the police. When questioned whether the witness had told the police the deceased was dragged out of the car, the witness replied he had told the police at line 30 of his police statement as:

"I saw that Fijian man pulled out Semiti."

80. The witness agreed the statement did not say the accused had dragged the deceased out of the car. He agreed he told the court the accused had punched, kicked and stomped the deceased. When referred to line 27 of his police statement the witness read:

"and punched Semiti on the face twice"

81. When questioned by counsel whether he told the police the accused had punched, kicked and stomped Semiti the witness stated he told police the accused hit the deceased. Although he did not tell the police the accused had kicked and stomped the deceased, however, he saw what the accused had done.

82. Again the witness agreed he did not tell the police the accused punched more than 10 times, however, he saw what had happened. The witness also agreed he did not tell the police the deceased was unconscious.

Ladies and Gentleman Assessors

83. The learned counsel for the accused in this regard was cross examining PW3 Albert Pickering and PW5 Warren Pickering about some inconsistencies in the statement they gave to the police after the incident when facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statements of these two witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
84. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
85. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of the witness.
86. The sixth prosecution witness Eminoni Varo informed the court on 21st March, 2015 he left his home to buy 6 bottles of beer, after drinking with Teu whilst heading home he saw a car parked at Natabua Park.

87. The witness also joined Albert who was sitting at the back seat, the deceased was driving the car. Teu was in the front passenger seat at a little distance they picked Aporosa also known as Bond.
88. From Natabua they went and bought 4 bottles of beer, on the way they picked Warren. At the Oriana junction the deceased stopped the car. The accused came without saying anything threw two (2) or three (3) punches on the side of the deceased face. The witness then saw the deceased was unconscious since the head of the deceased had tilted back on the seat and he was not moving after the punches.
89. When the deceased got punched Teu opened the door and ran away. Albert and Warren opened the door and went to the driver's side. Aporosa was sleeping.
90. The accused opened the door and dragged the deceased out of the car. After getting out of the car he saw the accused punching, kicking and stomping the deceased on his face and body.
91. This witness told the court more or less what Albert Pickering (PW3) and Warren Pickering (PW5) had informed the court.
92. In cross examination the witness stated the windows at the back of the car were up but the windows at the driver's side was down. The witness explained the accused punched the deceased opened the door and dragged him out. Before the door closed he saw the accused punch the deceased and then close the door.
93. When the door was closed he did not see anything but after two (2) or three (3) minutes he got out of the car.

94. The seventh prosecution witness PC 3899 Ashneel Ravinesh informed the court that he was the investigating officer in this case. Upon receiving the report the witness went to the Lautoka Hospital. At the Emergency Ward he saw the deceased, he issued a medical examination form and handed it over to the nurse. The deceased was Michael Semiti Osborne who was admitted at the hospital for 3 months until he passed away. The accused was Pauliasi Nauasara the witness identified the accused in court.
95. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

96. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence under oath and be subjected to cross examination.
97. He has these options because he does not have to prove anything. The burden to prove the accused guilty beyond reasonable doubt remains with the prosecution at all times.
98. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination.

Ladies and Gentleman Assessors

99. I now draw your attention to the evidence adduced by the defence during the course of the hearing. The accused elected to give evidence on oath in his defence.
100. You must take into account what the defence adduced in evidence when considering the issues of fact which you are determining.
101. The accused informed the court that on 21st March, 2015 he was driving his vehicle in town when he saw the deceased and others trying to stop a vehicle, all of them were drunk. He stopped his vehicle since he knew the deceased and the others well.
102. There were four of them namely the deceased, Aporosa, Albert and another whom the accused did not know. The accused took all of them to Natabua. At Natabua the accused was requested to go again to town to buy beer. From town he was requested to go to the multi-purpose court. At the multi-purpose court the accused parked his vehicle and went to relieve himself. When he came back he saw his vehicle was not there. The accused was not drinking.
103. From the multi-purpose court the accused went to his workplace and requested his boss (James Ledger) to assist in looking for his vehicle. Whilst fueling at a service station at Field 40 the accused heard loud music he saw it was his vehicle that had gone past.
104. The accused and his boss followed the vehicle at this time he was thinking of getting his vehicle back. The deceased was driving his vehicle. After a while the vehicle of the accused was spotted. The vehicle in which the accused was, stopped behind the vehicle the deceased was reversing. While reversing, the deceased bumped the

vehicle at the back. The accused got out of the vehicle and opened the driver's door and pulled the deceased out. At this time the deceased punched the accused. When the deceased was out of the vehicle he punched the accused again.

105. The accused also punched the deceased with his right hand to try and stop the deceased there was an exchange of punches. The accused punched the deceased three (3) times who fell down. The accused did not see anyone else there. When the deceased was on the ground he was verbally abusing the accused.
106. The deceased landed on the ground face up since the deceased continued swearing the accused punched the deceased. The reasons given by the accused for his actions were firstly when he pulled the deceased out of the car the deceased had punched him, secondly his vehicle had been damaged by the deceased, thirdly the accused tried to protect himself since the deceased was drunk and swearing.
107. After his last punch the accused kicked the deceased who was lying down he does not know where the kick landed. When he was punching the deceased he did not have any intention to kill the deceased since they knew each other very well. After kicking the deceased the accused's boss Ledger came and took him back to his vehicle and they went away.
108. In cross examination the accused stated when he got hold of the deceased after opening the door of the vehicle the deceased punched him once on his head. The accused said he spoke to the deceased but could not remember what he said.
109. The accused denied he had punched the deceased twice before opening the vehicle door and that the deceased had become

unconscious inside the vehicle. The accused stated he had exchanged punches outside the vehicle with the deceased. The deceased had punched his head. The accused stated the deceased had punched him four (4) times when they were exchanging punches outside the vehicle but agreed this proposition was not put to the prosecution witnesses Albert, Varo and Warren. The accused disagreed he had made it up he said it was in his interview to the police.

110. When the deceased was lying on the ground he was only swearing at the accused. It was the accused who went and punched and kicked the deceased.
111. The reason why the accused did not leave the deceased when he had fallen to the ground was because he thought the deceased might attack him since the deceased was drunk. The accused said he did not yell out “mortuary”, “mortuary” when he was assaulting the deceased and it was a lie since he knew the deceased well and it was not his intention to see the deceased in that condition.
112. The accused agreed during the cross examination of Albert, Warren and Varo it was not put to them that they were lying in court since according to the police statement of Warren he had not stated that the accused had used the word “mortuary” but Varo and Albert had stated it in their police statement. The accused denied saying the word “mortuary” when assaulting the deceased.
113. The accused denied kicking and stomping the face of the deceased. He agreed it was not put to Albert, Warren and Varo that the deceased was swearing at the accused. The accused denied further assaulting the deceased after Albert had shouted at him and he went

after Albert. The accused had a good relationship with Albert, Warren and Varo.

114. The accused agreed that due to their good relationship there was no reason for Albert, Varo and Warren to lie but they gave their evidence to hide the fact that they had taken his vehicle. This was only his view.
115. The accused did not report his missing vehicle to the police because he knew the deceased and the others, their families would suffer if they went to Prison that is the reason why he only wanted to get his vehicle back.
116. The accused stated that he was only protecting himself since the deceased was stronger than him and he only tried to weaken the deceased. The accused explained he defended himself when the deceased was on the ground firstly the deceased was swearing, secondly he was drunk and thirdly the accused thought the deceased might stand up and throw a wood or stone at him.

SELF DEFENCE

Ladies and Gentleman Assessors

117. In his evidence the accused said he was acting in self defence. Self defence if validly made out is a complete defence to the charge of murder, so if you think the accused was acting in self defence then you will find him not guilty of the offence of murder. Since the prosecution must prove the guilt of the accused it is for the prosecution to prove that the accused was not acting in self-defence.

118. It is not for the accused to establish that he was acting under self defence. You must consider the matter of self defence in light of the situation which the accused honestly believed he faced. You must first ask whether the accused honestly believed that it was necessary to use force to defend himself. Secondly you must decide whether the type and amount of force the accused used was reasonable. Obviously a person who is under attack may react on the spur of the moment and he cannot be expected to work out exactly how much force he needs to use to defend himself.
119. On the other hand if he goes and uses excess force or force out of all proportion to the anticipated attack on him or more force than is really necessary to defend himself, the force used would not be reasonable so you must take into account both the nature of the attack on the accused and what the accused did as a result.
120. The accused informed the court that he went to his vehicle which was driven by the deceased he opened the door and pulled the deceased out. At this time the deceased punched him then there was an exchange of punches between the accused and the deceased. Thereafter the deceased fell and started swearing at him. The accused then punched and kicked the deceased. In respect of kicking the accused did not say where it landed.
121. If you are sure that the force the accused used was unreasonable then the accused could not have been acting in self defence, but if you are satisfied that the force used by the accused was or may have been reasonable then you should find the accused not guilty of anything.
122. The prosecution is saying the deceased never punched the accused at any time he fell unconscious when punched twice in the car and that

is the reason why the accused had pulled and dragged the deceased to the roadside. Further the prosecution says the two doctors testified about the serious injuries suffered by the deceased when he was brought to the hospital immediately after the alleged assault and the post mortem report also confirms this.

123. The eye witnesses after the assault were unable to recognise the deceased whose face was swollen and there was a lot of blood on the face of the deceased. The prosecution submits the force used by the accused was disproportionate and unreasonable therefore self defence does not arise in the circumstances of the case.
124. Another defence that you need to consider is the defence of provocation. Provocation is not a complete defence it is a partial defence reducing what would otherwise be murder to the lesser offence of manslaughter. Since the prosecution must prove the accused's guilt, it is for the prosecution to make sure that this was not a case of provocation and not for the accused to establish that it was.
125. Provocation has a special legal meaning and you must consider it in the following way:

First you must ask yourselves whether the accused was provoked. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that had been done and said by the deceased, rather than just by his own bad temper. There is a suggestion that the accused was angry because the deceased had damaged his vehicle which was gifted to him by his father. Furthermore, the accused told the court that when the deceased had

fallen down he was swearing at the accused. The accused did not elaborate on the nature of the swearing.

126. If you are sure that the accused was not provoked the defence of provocation does not arise and he is guilty of murder.
127. But if you do conclude that the accused was or might have been provoked in the sense which I have explained, you must go on to weigh up how serious the provocation was for him. Was there anything about this accused which may have made what was said and done affect him more than it might have affected other people?
128. You must also ask yourselves whether a person having the powers of self-control to be expected of an ordinary sober person of the accused age and sex would have been provoked to lose his self-control and act in the way that the accused did that evening. If you are sure that such a person would not have done so, the prosecution will have disproved provocation and the accused is guilty of murder. If, however you conclude that such a person would or might have reacted and done as the accused did, you should find the accused not guilty of murder, but guilty of manslaughter.

ANALYSIS

Ladies and Gentleman Assessors

129. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.

130. The prosecution alleges that in the evening of 21st March, 2015 the deceased was seriously assaulted by the accused at the Oriana junction. The deceased was brought to the Lautoka Hospital in an unconscious state.
131. Dr. Pala who was the receiving doctor saw the deceased was unconscious, bleeding from his mouth and nose. There was lot of blood around his nose, mouth and face which was compromising his airways and his ability to breathe. His jaw was clearly deformed and fractured. After the victim was stabilized he was admitted to the intensive care unit. The doctor described the injuries as blunt force injuries to the face and jaw.
132. The Pathologist Dr. Kumar conducted the autopsy on the deceased on 2nd July, 2015. The estimated time of death was 25th June, 2015. The deceased was admitted at the intensive care unit at the Lautoka Hospital on 21st March, 2015. The deceased passed away on 25th June, 2015.
133. Although the brain of the deceased was normal on gross inspection, however, a condition called diffuse axonal injury which results from high velocity trauma and assault was not ruled out.
134. As a result the deceased went in a persistent vegetative state meaning he was not able to move his limbs that led to bed sores which led to septicemia and then to death. The cause of death was septicemia, multiple bed sores, history of head injury and assault.
135. The three eye witnesses Albert Pickering (PW3), Warren Pickering (PW5), and Eminoni Varo (PW6) gave an account of what they had seen that evening which was the violent assault on the deceased. They described the punches, kicking and stomping on the head of

the deceased who was in an unconscious state after being punched by the accused when seated inside the car. According to these eye witnesses the deceased did not punch the accused anytime but it was the accused who was assaulting the deceased.

136. The defence says that the accused had gone to relieve himself when the deceased drove his vehicle without letting him know. The accused and his boss went to look for the vehicle. After a while the vehicle of the accused was spotted. The vehicle in which the accused was, stopped behind the vehicle the deceased was reversing. While reversing, the deceased bumped the vehicle at the back. The accused got out from the vehicle bumped went and opened the driver's door and pulled the deceased out. At this time the deceased punched the accused.
137. The accused also punched the deceased with his right hand to try and stop the deceased there was an exchange of punches. The accused punched the deceased three (3) times who fell down. When the deceased was on the ground he was verbally abusing the accused.
138. The deceased landed on the ground face up since the deceased continued swearing the accused punched him. The reasons given by the accused for his actions were firstly when he pulled the deceased out of the car the deceased had punched him, secondly his vehicle had been damaged by the deceased, thirdly the accused tried to protect himself since the deceased was drunk and swearing.
139. After his last punch the accused kicked the deceased who was lying down he does not know where the kick landed. When he was punching the deceased he did not have any intention to kill the deceased since they knew each other very well. After kicking the

deceased the accused's boss James Ledger came and took him back to his vehicle and they went away.

Ladies and Gentleman Assessors

140. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
141. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
142. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
143. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own

evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.

144. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

145. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

146. The accused is not required to prove his innocence he is presumed innocent until proven guilty.

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

148. Your possible opinions are:-

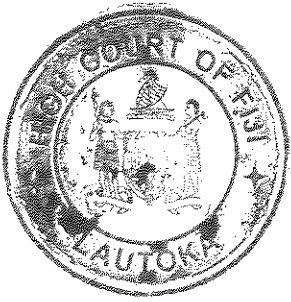
1. **MURDER - ACCUSED - GUILTY OR NOT GUILTY.**
2. If you find the accused not guilty of murder then you are to consider whether the accused is guilty or not guilty of **MANSLAUGHTER.**

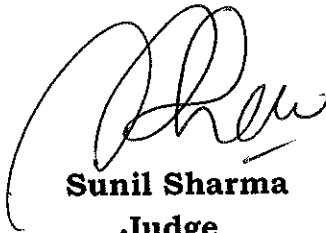
3. If you find the accused guilty of murder then you are not to consider the offence of manslaughter.

Ladies and Gentleman Assessors

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

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




Sunil Sharma
Judge

At Lautoka

04 October, 2018

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.