

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO.HAC 269 of 2017**

**BETWEEN** :

**STATE**

**AND** :

- 1. KIRIATA NANGINTABUARIKI**
- 2. WILLIAM PETER PICKERING**

*Counsel* : *Ms. W. Elo with Mr. S. Komaibaba for the State*  
*Ms. L. Ratidara for the 1<sup>st</sup> Accused*  
*Mr. A. Chand with Ms. L. Chand for the 2<sup>nd</sup> Accused*

*Hearing on* : *26<sup>th</sup> of February 2019 – 5<sup>th</sup> of March 2019*  
*Summing up on* : *7<sup>th</sup> of March 2019*

## **SUMMING UP**

Lady and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Judges of facts.
2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;
  - i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused have committed the alleged offence, then it is your duty to find them guilty. I must remind you that it is the duty of the prosecution to prove all the elements of the alleged offence beyond reasonable doubt. The accused are not required to prove anything as their innocence is presumed by the law.

ii) An innocent person should never be convicted.

There is a saying that it is better to let 100 offenders go free than to convict one innocent person. That is, unless you are very sure that the accused have committed the alleged offence, you should not find them guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the lawyers for the prosecution or for the defense are not evidence. A suggestion made by a lawyer during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, a part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.

8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. 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. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question of 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 the witness is a matter for you to decide.
10. 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favour, based on the same set of proved facts, then you should not draw the adverse inference.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused are presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused are guilty and the accused are not required to prove that they are innocent. The prosecution should prove the guilt

of the accused beyond reasonable doubt in order for you to find them guilty. That is, you must be sure of the accused person's guilt.

14. In order to prove that the accused are guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in detail in a short while.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused are charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not mandatory.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of the following offence;

KiriataNangintabuariki and William Peter Pickering are charge with the following offence:

*Statement of Offence*

Murder: Contrary to section 237of the Crimes Act of 2009.

*Particulars of Offence*

KiriataNangintabuariki and William Peter Pickering on the 1<sup>st</sup> day of September, 2017 at Navua in the Central Division, murderedRebaio Mekieru by hitting him with a 4x2 piece of timber.

18. Therefore, it is clear that it is only the two accused-persons before court who have been charged for murder. This means that according to the prosecution allegation only two of the accused are alleged to have been responsible for the murder. Please remember that this undisputed fact is very important when it comes to analyze the evidence in this case because evidence has to be analyzed only in relation to the offence for which an accused-persons stand charged.
19. I must explain the legal basis of the charge. When a charge is laid jointly against more than one accused-person in this manner, it brings into focus an important legal principle, which is known as the 'doctrine of joint enterprise'.

20. Usually, a person is liable in law for only acts committed by him and for his conduct. Such acts or conduct alone attract criminal liability if they are unlawful. The doctrine of joint enterprise is an exception to that general rule, of course, for valid and sound reasons. The principle is explained under Section 46 of the Crimes Decree of 2009, which reads:

'Offences committed by joint offenders in prosecution of common purpose  
*'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.'*

21. Lady-assessor and gentleman-assessor, this is how the principle works.

*Three people, for an example, plan to rob a shop and one stands guard outside looking out for any police surveillance. One man goes inside and holds the cashier. The third person threatens the cashier with a gun and takes all the cash. All three men then make their get-away. Now, you will see that only the third man did the actual act of offence, while the other two helped to execute the act of robbery. Under the law, each one of them is held liable for the offence of robbery with violence irrespective of the individual roles played by each one of them under the doctrine of 'joint enterprise'. For the principle to work under the section there should be evidence beyond reasonable doubt that:*

- (i) There should be two or more persons forming a common intention to prosecute an unlawful purpose;*
- (ii) In prosecution of that unlawful purpose, an offence should be committed; and,*
- (iii) The commission of such offence should be the probable consequence of the prosecution of that unlawful purpose.*

*If, in the example above, it is established by evidence that the three men were not actuated by a common intention but they were acting independent of each other or that each one of them had only a similar intention of robbing the cashier, then each one of them is liable only for what each one of them committed but not for the offence of robbery with violence, which actually was committed by the third man.*

22. Therefore, in dealing with the principle, you must consider the following factors as matters of law. They are:

- (i) The case of each accused must be considered separately. That is, you must find evidence as to what each accused did to demonstrate that he too had shared the intention in common to prosecute the unlawful purpose;*
- (ii) Each accused must have been actuated by that common intention with the doer of the unlawful purpose at the time the offence was committed and should have*

contributed in some meaningful way towards the prosecution of the unlawful purpose;

- (iii) Each one of them should have known that the commission of the offence is a probable consequence of the prosecution of that unlawful purpose.
  - (iv) Common intention must not be confused with same or similar intention entertained independently of each other. Instead, it should clearly be distinguished from similar intention. That is, if you find evidence to show that a particular accused did not share the intention in common with others and that he was actuated by his own intention which was, however, similar to the intention of others, you can find that accused guilty only for what he has committed and not for anything else;
  - (v) There must be evidence, either direct or circumstantial, of pre-arrangement or some other evidence of common intention. Sometimes, however, such common intention could occur on the spur of the moment;
  - (vi) The mere fact of the presence of the accused at the time of the offense is not necessarily evidence of common intention.
23. I must direct you further on the application of the legal principle of joint enterprise relating to this case. The charge, based on that principle, is made against the two accused-persons who are before you. Therefore, only their acts will make them responsible for the outcome of their acts or conduct, if you consider it to be so. Therefore, you must consider whether the act or the conduct of these two accused-persons were unlawful; and if so, whether such acts or conduct, caused the death of the deceased. In considering that, you must decide whether, they were actuated by common intention to commit the murder of the deceased. If they are not, they will be liable only to the extent of injuries caused by each one of them.
24. The following were recorded as admitted facts.  
On behalf of the 1<sup>st</sup> accused;
- i) That the 1<sup>st</sup> accused in this matter is KIRIATA ANANGINTABU ARIKI ("**A1**").
  - ii) That the deceased in this matter is REBAIO MEKIERU ("**Deceased**").
  - iii) That A1 and the deceased have known each other since childhood.
  - iv) That A1 was 29 years old at the time of the alleged incident.
  - v) That A1 is married to one Jokaveti Saraivai and they have a son together.
  - vi) That the answers given by him during the interview were given voluntarily and out of his own free will.
  - vii) That A1 was employed at Yarawa Timber and Hardware Limited ("**YTHL**") at Vuninokonoko Road, Navua at the time of the alleged offence.
  - viii) That his co-accused and the deceased were also employed at YTHL at the said time.
  - ix) That on 31<sup>st</sup> day of August, 2017, A1 was doing overtime with the deceased at YEHL.
  - x) That they ended their overtime at around 10pm on the night of the 31<sup>st</sup> day of August, 2017.

- xi) That later that night (31/08/17 A1, his co-accused and the deceased were drinking alcohol with their Manager namely Satend Kumar (**"Manager"**).
- xii) That after they began drinking at the yard, they later headed to a nightclub before returning again to YTHL yard to drink more.
- xiii) That A1 saw the deceased fall face downward on the ground.
- xiv) The 4 x 2 piece of timber was shown to A1 whilst he was being interviewed by Police on the 1<sup>st</sup> September, 2017 and he confirmed that it was the same piece of timber used by him at the material time.

On behalf of the 2<sup>nd</sup> accused;

- i) That the accused William Peter Pickering is charged with 1 count of Murder contrary to section 237 of the Crimes Act 2009 (**"A2"**).
- ii) That the deceased in this matter is REBAIO MEKIERU (**"Deceased"**).
- iii) That A2 is married to Morin Nakibae.
- iv) That A2 was caution interviewed on the 1<sup>st</sup> day of September, 2017 by DC 3633 Ravin Naicker.
- v) That the admission he made during his caution interview were made voluntarily without force or prejudice.
- vi) That at the material time, A2 was employed as a labourer at Yarawa Timber and Hardware Limited (**"YTHL"**).
- vii) That the deceased was also an employee at YTHL at the time of the offending.
- viii) That the Manager of YTHL is Satend Kumar (**"Manager"**).
- ix) That late in the evening of the 31<sup>st</sup> day of August, 2017 the Manager invited A2, the deceased and others for drink after work.
- x) That A2 and the others began drinking at about 10.30pm on the 31<sup>st</sup> day of August, 2017.
- xi) That A2 and the others including he deceased drove to Suva and back by their Manager.
- xii) That bout four (4) of them including A2 and the deceased began drinking at the back of the YTHL office when they returned from Suva on the morning of the 1<sup>st</sup> day of September 2017.
- xiii) That later during that drinking a verbal argument between A2 and the deceased arose.
- iv) That the heated argument began to escalate where the deceased wanted to punch A2.
- v) That the deceased began to approach A2 in an attempt to punch him but as he was doing so, punched his co-accused instead.
- vi) That at the time, their Manager was inside the YTHL office.
- vii) That a fist fight began between A2's co-accused and the deceased.
- viii) That A2 later punched the deceased in his attempt to assist his co-accused as the deceased was causing trouble.
- ix) That A2 punched the deceased on the left side of his face where the deceased fell down as an impact of his punch.

- x) That the deceased fell to the ground, facing downwards.
- xi) That as the deceased was lying facing downward, his co-accused requested that A2 hand him a piece of stick.
- xii) That A2 saw his co-accused hit the deceased twice on his head which he then noticed blood streaming from the deceased's head.
- xiii) That during the time, A2's co-accused hit the deceased as he was lying on the ground, A2 was merely standing next to them.
- xv) That the weapon used to hit the deceased twice on the head was a piece of timber.
- xvi) That a scene reconstruction was conducted during A2's caution interview.

25. Now I will deal with the essential elements of the offence.  
Section 237 of the Crimes Act reads as;

237. 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.

Accordingly, in this case, to prove the offence of Murder the prosecution must prove the following elements beyond a reasonable doubt.

- a) The accused
  - b) Engaged in a conduct
  - c) That conduct caused the death of Rebaio Mekieru
  - d) Accused intended to cause the death of Rebaio Mekieru,
- or

Accused was reckless as to causing the death Rebaio Mekieru by the conduct.

26. The first element of the offence is concerned with the identity of the person who is alleged to have committed the offence. In this case, the identities of the accused are not disputed.

27. To engage in a conduct is to do an act which is a product of the will of the accused. It is not disputed that the 1<sup>st</sup> accused did hit the deceased with a 4 x 2 wood. However, you should be satisfied beyond reasonable doubt that this act of hitting with the wood is a product of the will of the accused and it was not accidental. In this case you heard evidence to the effect that the accused had consumed a considerable amount of liquor prior to the act of hitting. It is a matter for you to decide whether the accused was affected by alcohol at that time and the degree of that intoxication. Law says that, in deciding whether a particular conduct is accidental, voluntary intoxication may be taken into account. In order to prove the second element, the prosecution has to prove beyond reasonable doubt that the act of hitting with the wood is deliberate and not accidental.



28. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, in law, the act of the accused need not be the sole or principal cause, but the act should significantly contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct significantly contributed to the death of the deceased, that is sufficient to satisfy the third element above.
29. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this fourth element. It is not possible to have direct evidence regarding a person'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 an accused from the facts and circumstances you would consider as proved.
30. In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that he meant to bring about the death or that he was aware that death will occur in the ordinary course of events as a result of his 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.
31. However, when you consider whether the accused had the intention to cause the death of the deceased you should consider the effect of the alcohol upon the accused which he is said to have consumed by the time he hit the deceased with the wood. Intoxication by alcohol is a relevant matter to be taken into account in determining whether the accused formed the intention to kill the deceased. Whether the accused was affected by alcohol at the relevant time and the degree of that intoxication are matters for you to decide. A drunken person may still be capable of forming the necessary intention to commit an offence. You should ask yourselves the question, whether you are sure that the accused did form the intention to cause the death of the deceased although he was drunk. A consideration as to whether he would have done what he did had he been sober, will not assist him. Drunkenness may weaken one's power to resist the temptation to carry out the intent. A drunken intention is in fact an intention.
32. In the event you find that the accused did not have the intention to kill the deceased or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. The accused was reckless with respect of causing the death of the deceased, if;
- a) He was aware of a substantial risk that the death will occur due to his conduct; and
  - b) Having regard to the circumstances known to him, it was unjustifiable for him to take the risk.

33. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realize that death was a probable consequence or the likely result of his conduct; and yet he decided to go ahead and engage in the conduct regardless of that consequence. Accused must foresee that death was a probable consequence or the likely result of his conduct and after realizing that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was 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.
34. Again, when you consider whether the accused was reckless as to causing the death of the deceased, you should consider the effect of alcohol upon the accused which he is said to have consumed by the relevant time. Intoxication by alcohol is a relevant matter to be taken into account in determining whether the accused had the knowledge that death was a probable consequence of his conduct and he decided to go ahead with the conduct, regardless of that consequence. As I mentioned earlier, a drunken person may still be capable of forming the necessary state of mind to commit an offence. You should ask yourselves the question, whether you are sure that the accused decided to go ahead with his conduct, having realized that death was a probable consequence, although he was drunk.
35. If you are sure that all the necessary elements of the offence of murder have been proved beyond reasonable doubt, then you must consider the defense of provocation. As provocation has been raised as a defense, the prosecution should prove beyond reasonable doubt that the accused was not acting under provocation when the accused hit the deceased with the wood. If you find that the accused hit the deceased with the wood as a result of provocation or if you have a reasonable doubt that when the accused hit the deceased, accused may have been acting under provocation; then, even though you are satisfied that all the other elements of the offence of murder have been proved beyond reasonable doubt, you should find the accused not guilty of murder; but guilty of manslaughter. Provocation reduces the culpability of an accused from murder to the lesser offence of manslaughter.
36. If an accused does the act which caused the death of the deceased in the heat of passion caused by sudden provocation and before there was time for the passion to cool, then the accused is guilty of manslaughter.
37. In this case, 'provocation' means any wrongful act or insult of such a nature as to be likely when done to an ordinary person to deprive such ordinary person of his power of self-control and to induce him to commit an assault of the kind which the accused committed on the deceased. When I say 'ordinary person', you should think of an ordinary sober person of the accused's age who has ordinary powers of self-control

expected from a person of that age. Question of drunkenness is irrelevant to this defense.

38. The source of provocation can be just one incident or can comprise of several incidents. In this case, the defense says;
- i) that the 1<sup>st</sup> accused was severely punched by the deceased when he tried to prevent the deceased from punching the 2<sup>nd</sup> accused,
  - ii) when the accused tried to avoid further fight by trying to leave, the deceased came after them swearing and punched them,
- which contributed to the loss of self-control at the time of the incident. It is a matter for you to decide to what extent you would consider these incidents when you consider the issue of provocation.
39. You should also remember that it is not up to the accused to prove that he was provoked and it is for the prosecution to prove beyond reasonable doubt that the accused was not acting under provocation when he committed the offence.
40. The offence of manslaughter has the same first three elements of murder. But it is an offence having a lesser culpability than murder. The distinction between the two offences is found in the fourth element which concerns the state of mind of the accused. When it comes to the offence of manslaughter, the requirement is to prove that the accused intended or was reckless as to the risk, that the conduct will cause serious harm. Further, evidence of voluntary intoxication cannot be considered in determining the state of mind of an accused concerning a manslaughter charge.
41. When an accused is charged for murder as in this case, and when you consider the state of mind of the accused, you are not sure that the accused intended or was reckless as to causing the death, but you are sure that the accused intended or was reckless as to the risk that the conduct will cause serious harm, then it is open for you to find the accused not guilty of murder; but guilty of manslaughter even though the accused is not charged for the offence of manslaughter.
42. Now let me direct you on how to deal with the cautioned interview of the accused which were tendered as exhibits. The handwritten cautioned interview of the 1<sup>st</sup> accused was tendered by the prosecution as PE 2 (A) and the typewritten copy as PE 2 (B). Similarly the hand written cautioned interview of the 2<sup>nd</sup> accused and the type written copy of it was tendered as PE 4 (A) and PE 4 (B). The 1<sup>st</sup> accused says that he did not make the admissions recorded in that statement PE 2 (A) and PE 2 (B) in answer to questions 145 and 146. Therefore, it is a matter for you to decide whether he made those admissions and whether those admissions are true. If you are not sure that the accused made the admissions recorded in answer to questions 145 and 146 then you should disregard those admissions. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are true and what weight you should give to those admissions. The 1<sup>st</sup> accused did not dispute the rest of

the contents in his cautioned interview. Therefore, with regard to the rest of the contents, and the contents of the caution interview of the 2<sup>nd</sup> accused, what weight you choose to give is a matter for you to decide.

43. The prosecution also tendered the charge statement of the 1<sup>st</sup> accused as PE3. Accused did not dispute the contents of the charge statement. Again, what weight you choose to give the contents of the charge statement is a matter for you.

#### Summary of the evidence

44. The 1st witness for the prosecution or the PW1 is Satend Kumar, the manager of the Yarawa Timber Yard (YTY). His evidence is that;
- i) Presently he has about 8 employees and their usual working hours are from 8.00am to 5.00pm.
  - ii) On the 31<sup>st</sup> of August 2017, at the request of the 4 workers and for their own benefit, he allowed them to work overtime from 5.00pm to 10.00pm.
  - iii) The witness has gone to his brother-in-law's place and having had a beer there came to the YTY at 10.00pm to pick his employees up. The 4 of his employees namely, Kiriata (the 1<sup>st</sup> accused), William (the 2<sup>nd</sup> accused), Rebaio (the deceased) and peter planned to drink beer, and accordingly he (the witness) bought a carton of beer and went with them back to his brother-in-law's place. Having had the beer there, the 4 employees and the witness decided to go to a night club in Suva.
  - iv) They were at the night club till early morning hours and having had about 4 jars of beer the witness and 3 of his employees, namely Kiriata, William and Rebaio, came back to Lami at about 7.00am on the 1<sup>st</sup> of September 2017. He had few Woodstock cans with him in the car, and having exchanged them for cool Woodstock cans they came back to the YTY and drank some.
  - v) While seated on the packet of timber and drinking Woodstock there happened to be an argument between Rebaio and William. The witness having separated them went into the shop. The witness has seen Kiriata and William walk out of the gate and then seen Rebaio yelling, shouting and going after the other two, challenging them to come for a fight.
  - vi) After a while he has seen Rebaio coming backwards, towards the gate while two sides exchanging punches. Rebaio was on one side and the William and Kiriata was on the other side. They came inside the yard fighting, and then Rebaio has fallen on the ground face downwards. Then, the witness has seen Kiriata, the 1<sup>st</sup> accused picking up a 4 x 2 piece of timber and smacking Rebaio twice on his backside.
  - vii) The witness says that Kiriata was so drunk then that when the police vehicle came, he was shouting and went straight inside the police van. Further the witness identified Kiriata as the 1<sup>st</sup> accused and William as the 2<sup>nd</sup> accused.

45. Answering the cross examination, PW1 says that;
- i) Physically, Rebaio, the deceased was much bigger and stronger than Kiriata, the 1<sup>st</sup> accused.
  - ii) The witness noted that Kiriata has suffered injuries from the fight with Rebaio.
  - iii) When they were seated on the packet of wood Kiriata tried to stop Rebaio from beating up William and the behavior of Rebaio was really bad at that time.
  - iv) The night previous to the incident has been a night of continuous drinking and none of them had any rest, and by the time this incident took place, all of them were so drunk.
46. In re-examination the witness;
- While confirming that Rebaio was much bigger and stronger than the accused stated that the accused were trying to avoid the fight and was also trying to go home.
47. The PW2 was Josefa Colanaudolu. His evidence was that;
- i) In 2017, he was working in the Kevin Agro, the ginger factory down the same road which goes passing the YTY.
  - ii) He has left home at about 6.30am and as he was approaching the YTY, about 25 meters away has heard the male voices shouting inside the yard.
  - iii) He has seen two men coming out of the gate of the YTY and walking towards the town. Few moments later another man has come out of the same gate, swearing and yelling at the other two.
  - iv) The two men who came out first have walked back to him and they started throwing punches and hitting each other, until they ended up back in the yard. Once inside the yard, the single guy sat down as he was tired. The other two went on kicking and punching him. They were all drunk. Then the single guy started to stand up again. At that point one of the two, finding a timber of 4x2, struck the single guy on the back of the neck. The one, who was struck, fell face down on the ground. Then, the one who struck called the other one to do the same. The other one then struck the fallen one on the back. Thereafter the one who struck first took the timber again and struck the fallen one again.
  - v) In cross examination, the witness affirms that the deceased was hit with a timber for the first time when he was sitting down and with the hit he has fell face down on the ground. However, the witness contradicts himself when he states later that the guy went in search of a timber when the deceased stood up. Further, this witness concedes that his evidence is different to what he stated to the police. Therefore, you should be extremely cautious in considering the evidence of this witness.
48. The next witness, PW3 was the Sargent 847 Ram Prasad.
- His evidence is that when he was on duty at the Navua police station, on 01<sup>st</sup> of September 2017 at about 7.30am, he received a complain of a fight in progress at the Noor Ahmed Timber Yard. This timber yard is also known as YTY. He has arrived in the

police van together with two officers at the YTY within a couple of minutes as that place is only about 1000 meters away from the Navua police station. He has seen the victim laying on the ground and rushed there and checked his pulse. He has felt the pulse and made arrangements to keep him on the tray of the van to take him to the hospital. He has met the Manager of the YTY Mr. Satend Kumar (PW1) and was shown the 1<sup>st</sup> accused whom he arrested. He was also informed of and shown the timber (PE1) which was said to have used for the assault and having uplifted that, later handed it over to the station. After hospitalizing the victim he was informed that the victim has passed away. Thereafter he has attended to the other necessities and on the information received has gone in search of the 2<sup>nd</sup> accused. The witness states that at the time of the arrest the 1<sup>st</sup> accused had been very co-operative but was very drunk. In cross-examination the witness states that at the time of the arrest of the 1<sup>st</sup> accused, he noted already sustained injuries on his face.

49. PW4 was PC 3492 Ravind Prasad. He states that;  
On the relevant day, he has visited the scene of the crime with Sargent Ram Prakash and assisted the said officer in numerous ways. This witness basically substantiates and corroborates the evidence of the PW3. In addition, having gone in search of the 2<sup>nd</sup> accused the witness has arrested him at the Navua town. At the time of the arrest the 2<sup>nd</sup> accused has been very drunk.
50. PW5 was Detective Sargent 2771, Aminand Prasad. He stated that;  
This witness was attached to the Sigatoka police station at the time of the incident. He has been on leave at his home in Navua, on that particular day. He was asked by the crime officer of Navua police station to witness a caution interview, which was recorded by the officer Hassan. Accordingly, he has witnessed the recording of the caution interview of the 1<sup>st</sup> accused, Kiriata. The handwritten copy of the interview was marked and produced as PE 2 (A) and the typed copy of the said caution interview was marked and produced as PE 2 (B). In addition the witness has taken the 1<sup>st</sup> accused to the hospital to obtain treatment for his injuries.
51. PW6 was PC Tevita Naiteqe.  
He was the charging officer of the 1<sup>st</sup> accused, Kiriata. The said charge statement was marked and produced as PE 3.
52. The next witness for the prosecution or the PW7 was DC. 3633, Naicker.  
He states that he was the interviewing officer of the 2<sup>nd</sup> accused, William Peter. The record of the said interview was marked and produced as PE 4.
53. PW8 was DC 4230, Lasarusa.  
He was the charging officer of the 2<sup>nd</sup> accused, William. A true copy of the said charge statement was marked and produced as PE 5.
54. PW9 was Sargent 4485, ViliameNaupoto.

He was a crime scene investigator and has examined the crime scene for physical evidence and also photographed the crime scene and the post mortem examination. A photographic booklet containing 1 to 40 photos, which was compiled by him was marked and produced as PE 6.

55. The final witness called on behalf of the prosecution, the PW10 was Dr. James Kalougivaki.

His Curriculum Vitae showing his learning and experience was marked and produced as PE7. The post mortem examination report of the deceased Rebaio, was marked and produced as PE8. That report clearly indicates the cause of death of the deceased as *“severe intra-cranial hemorrhage & base of skull fracture”*. The witness confirms that blow by a 4 x 2 timber with a significant force has a high likelihood of causing the apparent injuries at the back of the head of the deceased. The injuries on the face of the deceased are highly unlikely to have caused by the same blows. The witness opines that there were signs of only two blows with a timber on the head of the deceased and on the rest of the body of the deceased there were no clear signs of any blow with a timber.

56. With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining and giving the due rights of the accused.

57. The 1<sup>st</sup> accused elected to give evidence on his behalf. His evidence is that;
- i) He has studied at Rabi Primary school and his level of education is class 5.
  - ii) In 2017 he has been working as a concrete block maker at YTY and he had worked there for 15 years since the age of 15.
  - iii) On the 31<sup>st</sup> of August 2017, he has started work at 8.00am and worked till 10.00pm. Though usually they finish is at 5.00pm, on that day he and 3 other co-workers, namely William, Rebaio and peter had done overtime.
  - iv) At 10.00pm their boss Satend has come to pick them up. While in the vehicle, they decided to go and have a drink and gone to a place of Satend’s friend. Satend bought a carton of beer, Fiji Bitter long necks, and went there and 4 of them, namely Kiriata, William, Rebaio and peter drank that while Satend drank elsewhere with his friends.
  - v) Having finished that, they have decided to go to a night club in Suva and having bought a half a bottle of Rum and a two liter bottle of Coke have consumed it on the way to Suva.
  - vi) While at the night club, Rebaio and Satend have sat at the counter and the witness, William and Peter have sat at the back. The three of them have drunk about 5 jugs of beer there.

- vii) Thereafter Satend, Kiriata, William and Rebaio have come to Lami while Peter stayed at the night club with some of his friends. Satend has taken him home and when he is about to get down from the vehicle, Rebaio has asked him to join in to have two more cans of Woodstock.
- viii) Then Satend went and bought some more Woodstock cans and they all went to the Yard to have it there. At the yard, they sat on a packet of timber and drank Woodstock. While drinking, Rebaio challenged William for a fight, and on the request of William, the witness has held Rebaio by his waist from the front and tried to stop Rebaio. Then Rebaio has punched him and said that "Today I will kill you and William". Then the witness has gone and joined William, who was already walking out of the yard.
- ix) After a while, Rebaio came at them shouting and swearing and punched them. While exchanging punches, Rebaio fell down and as he was about to get up, the witness having found a 4 x 2 timber nearby, has struck Rebaio twice with it. Though he aimed at Rebaio's body, as he was getting up, they struck on his head. It has happened so fast and all of them have been very drunk.
- x) Thereafter he has seen Rebaio bleeding heavily, and sat there and cried, as he has pleaded with Rebaio at the beginning to not to start a fight.
- xi) The witness affirms that at the time he hit Rebaio with the timber, he wanted to injure him to prevent him from coming after them and not to kill him.
- xii) In cross examination, the witness explains that he was not continuously working at the yard for 15 years. When queried whether the bigger physical build of the deceased did scare him, the witness states that it did not, because he intervened to stop the fight and never expected the deceased to hit him. The prosecution elicits a contradiction in the witness's evidence with his statement to the police in respect of the position deceased was in at the time of hitting him with the timber. The witness's explanation was that the caution interview was recorded in English and he spoke in i-Taukei, hence could not understand what was written by the officer.

58. With the said evidence the 1<sup>st</sup> accused has closed his case. The 2<sup>nd</sup> accused elected to remain silent exercising his constitutional right. You should not draw any adverse inference from it as it is his right and he bears no burden to prove that he is innocent. Anyway, he has called two witnesses on his behalf.

59. The 1<sup>st</sup> witness called on behalf of the 2<sup>nd</sup> accused (DW2) was Mr. WameTuivuya.

He states that;

He is a driver residing at the adjoining land to the YTY and that the two lands are separated by a fence. In the morning of the 01<sup>st</sup> of September 2017, he heard his wife talking to those who were drinking Woodstock at the yard. She has asked them to move away as they were making a lot of noise. Thereafter he has come on to the road with his grandchild. Then the two accused have come on to the road and the witness has asked them to go home as they were drunk. Few moments later, the deceased also has come



running towards them and started a fist fight. The witness has tried to stop that but he could not. The three, have gone back inside the yard fighting. The witness and his grandchild were watching at the gate. Then the bigger man has fallen on the ground and Kiriata the 1<sup>st</sup> accused picked up a timber and hit the deceased. At the moment having seen this and being disturbed by it the grandchild of the witness has started crying and he has moved away. The witness states that the deceased fell on to the ground sideways while protecting his face with his hands. The witness has not seen where the timber hit on the deceased; he has heard only one blow.

60. The 2<sup>nd</sup> witness called on behalf of the 2<sup>nd</sup> accused (DW3) was Ms. Makirina Buatawa.

Her evidence is that;

She was employed at the ginger factory in September 2017. On the 1<sup>st</sup> of September, while on her way to the factory at around 7.00am, she has seen people crowding in front of the YTY. When she moved closer, she has seen Kiriata, who was known to her before, picking up a piece of timber & hitting a man once. The witness has not noticed how the man who was hit, was laying on the ground, but after being hit he was laying face down on the ground. In answering to the cross examination on behalf of the 1<sup>st</sup> accused, the witness admits that she told to the police that the big man was trying to get up when he was hit with the timber. She further states that when she saw Kiriata hitting the man, the other man was walking out of the gate.

61. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
62. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proven and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

### **Analysis**

63. The prosecution says that the accused are guilty of murder as the accused had the intention to cause the death of the deceased, Rebaio and the accused were also reckless as to causing the death of the deceased. According to the prosecution this is a preplanned murder and not a case of provocation.
64. Defence says that the accused stabbed the deceased as a result of provocation and therefore the accused should be convicted for manslaughter and not murder.

65. As I mentioned earlier, there is no dispute with regard to the identity of the accused.
66. With regard to the second element, PW1 and PW2 said that they saw the 1<sup>st</sup> accused hit the deceased with the timber. The 1<sup>st</sup> accused throughout the trial admitted that, he did in fact hit the deceased with the timber twice.

The initial question is whether the 2<sup>nd</sup> accused did hit the deceased with the timber or not. When analyzing this, it is only the evidence of the PW2, that state that he saw the 2<sup>nd</sup> accused hit the deceased with the timber. Altogether there were 5 witnesses who spoke of the incident, inclusive of the 1<sup>st</sup> accused. Many testified that 2<sup>nd</sup> accused did not take part in hitting the deceased with the timber and the 1<sup>st</sup> accused hit the deceased twice, including the 1<sup>st</sup> accused himself. Medical evidence shows that there was high unlikelihood of the deceased being hit by the timber for more than twice. In that light, you should consider how reliable the evidence of PW2 is.

The second question would be whether the accused were acting together in a joint enterprise to kill the deceased. If you decide that the accused were acting together in a joint enterprise, as explained before each would be liable for the acts of the other accused. It is up to the prosecution to prove that the accused acted together with the intention or knowledge that Rebaio should/would be killed. You should consider whether the prosecution has adduced any such evidence for you to infer such intention or knowledge, given the circumstances of this case. If you are not sure that this element is proved, then you should find the 2<sup>nd</sup> accused not guilty of murder.

67. If you are satisfied that the second element above has been proved beyond reasonable doubt, then you should consider the third element which is; whether the conduct of the accused caused the death of the deceased. As I mentioned to you, if you are sure that the conduct of the accused significantly contributed to the death of the deceased, this element is established. Initially you should consider the case against each of the accused separately. If you are of the view that the acts of the 2<sup>nd</sup> accused did not result in the death of the deceased, then you should consider the concept of joint enterprise. If you are of the view that the accused were not acting in joint enterprise and the acts of the 2<sup>nd</sup> accused did not result in the death of the deceased, the case against the 2<sup>nd</sup> accused should end there.
68. If you are satisfied that the prosecution has proved the third element beyond reasonable doubt, then you should consider the final element which is whether the prosecution has proved either the accused intended to cause the death of the deceased or whether the accused was reckless as to causing the death of the deceased.
69. Many Witness said that the deceased started swearing at the accused and came after them challenging them for a fight after the initial brawl. As mentioned before, there is evidence that the 1<sup>st</sup> accused hit the deceased twice with the wood. After his encounter

with the deceased at the yard, 1<sup>st</sup> accused waited there in the yard and surrendered to the police as they arrived. The prosecution suggests that was done with the realization of the gravity of his act. As I have guided you above regarding the inferences, you should be careful in inferring such as there may be many innocent explanations to such. You should also take in to consideration the drunkenness and other relevant factors too. However, another point you should consider in consideration of intention or knowledge is not the subsequent realization, but the realization prior to the act.

70. Considering all the evidence you may decide to accept, you should decide whether you are sure that the prosecution has proved that the accused intended to kill the deceased or whether you are sure that the accused was reckless as to causing the death of the deceased.
- a) If you are not sure that the accused intended to cause the death and not sure that the accused was reckless as to causing the death then you should find the accused not guilty of murder and consider whether he is guilty of the lesser offence of manslaughter;
    - (i) Accordingly, you should consider whether the accused either intended or was reckless as to the risk that his conduct will cause serious harm to the deceased. If you are not sure that the accused intended to cause serious harm and not sure that he was reckless as to the risk that his conduct will cause serious harm, then you should find him not guilty of manslaughter as well.
    - (ii) If you are sure that the accused intended to cause serious harm or you are sure that he was reckless as to the risk that his conduct will cause serious harm, then you should find him guilty for manslaughter.
  - b) In the event you are sure that accused intended to cause the death although he was drunk or if you are sure that he was reckless as to causing the death of the deceased although he was drunk, then you should consider whether the prosecution has proved that the accused was not acting under provocation.
    - (i) If you find that the accused was acting under provocation or you have a reasonable doubt that he may have been provoked, even though you are sure that the prosecution has proved all the required elements of murder, you should find the accused not guilty of murder and should find him guilty of manslaughter.
    - (ii) If you are sure that the prosecution has proved that the accused either intended or was reckless as to causing the death of the deceased and you are also sure that the accused was not acting under provocation, then you should find the accused guilty of murder.
71. When you deal with the defence of provocation, you should ask yourselves four questions.

72. First question you should ask yourselves is; was a wrongful act or insult done by the deceased towards the 1<sup>st</sup> accused.
- According to the manner in which the defense of provocation is raised in this case, the provocative act was the swear words used by the deceased and punching him when he tried to settle it.
73. Second question is whether that act or insult caused the accused to lose self-control.
- In course of the evidence it transpired from many eye witnesses that if the accused did not beat him the deceased would have beaten them both. The 1<sup>st</sup> accused stated in his evidence that he was angry with the deceased for being punched at when he tried to settle. You should consider the said situation together with the state of drunkenness the accused were in.
  - According to the evidence, the accused tried to get away from the deceased. However, deceased came on to them and started punching them.
  - You may consider what the 1<sup>st</sup> accused said or did after the alleged swearing and punching of the deceased, when you look for the answer to this question.
74. Third question is; whether the conduct of the deceased had been such as to cause an ordinary and sober person of the accused's age to commit the assault on the deceased in the manner which the accused did?
- An ordinary person as I explained before would be simply a person who has the powers of self-control to be expected of an ordinary, sober person who is of the accused's age. Therefore, you should consider whether, the nature of the assault carried out was proportionate to the act done considering the standard of a similar aged ordinary sober person.
75. Fourth and final question in relation to the issue of provocation is; was the act which caused the death was done in the heat of passion caused by sudden provocation and before there was time for the passion to cool.
76. I must again remind you that even though the 1<sup>st</sup> accused gave evidence, he does not assume any burden of proving his case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
77. You must remember to assess the evidence for the prosecution and defense using the same yardstick but bearing in mind that it is always the prosecution who should prove the case.
78. Any re-directions ?
79. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the

accused. You may peruse any of the exhibits you like to consider. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

80. Your possible opinions are;

Murder –

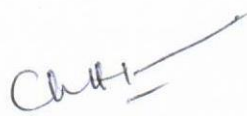
1<sup>st</sup> accused, guilty or not guilty

2<sup>nd</sup> accused, guilty or not guilty

Manslaughter –

1<sup>st</sup> accused, guilty or not guilty

2<sup>nd</sup> accused, guilty or not guilty

  
**Chamath S. Morais**  
**JUDGE**



*Solicitors for the State* : *Office of the Director of Public Prosecutions, Suva*  
*Solicitors for the 1<sup>st</sup> Accused* : *Legal Aid Commission, Suva*  
*Solicitors for the 2<sup>nd</sup> Accused* : *Legal Aid Commission, Suva*