

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 360 OF 2015S

STATE

vs

WAME KUBUISAVUSAVU WAQAVANUA

Counsels : Mr. M. Vosawale for State
Ms. A. Tuiketei and Mr. E. Navuda for Accused

Hearings : 9, 10, 11, 12, 15 and 16 April, 2019.

Summing Up : 18 April, 2019

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

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

B. THE BURDEN AND STANDARD OF PROOF

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

C. THE INFORMATION

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

(read from the information)...

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
- (i) Did the accused, between 23 and 24 November 2015, at Raiwai, Suva in the Central Division, murder Watsoni Rokosawa?

E. THE OFFENCE AND ITS ELEMENTS

9. The accused was charged with murdering Watson Rokosawa by allegedly hitting his head with a piece of stick, between 23 and 24 November 2015, at Raiwal, Suva in the Central Division, contrary to section 237 of the Crimes Act 2009. For the accused to be found guilty of "murder", the prosecution must prove beyond reasonable doubt, the following elements:

- (i) that the accused did a wilful act; and
- (ii) that wilful act caused the death of the deceased; and
- (iii) at the time of the wilful act, the accused either:
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.

10. On the first element of murder, a "wilful act" is a voluntary act by the accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, if A assaults B in what manner whatsoever, A thereby did a "wilful act" to B.

11. On the second element of murder, the "wilful act must cause the death of the deceased". This simply meant that the accused's wilful act, substantially contributed to the death of the deceased. The accused's wilful act must be a substantial contributor to the death of the deceased. In other words, the accused's wilful act was a substantial cause of the deceased's death. Continuing from the above example, when A assaulted B, it caused serious injuries to the body of B, thereby resulting in B's death. A's assaulting B, set in motion a chain of events that led to B's death, and as such, was a substantial cause of B's death. B would not have died, but for A's assault.

12. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 9 (iii) (a) and 9 (iii) (b). It would appear that the prosecution is running its case on both fault elements. It need only satisfy one fault element, to prove the charge of murder. We will therefore begin by discussing the first element, and then move on to the second fault element.

13. On the first fault element, the prosecution must make you sure that when the accused did "the wilful act", he "intended to cause the death of the deceased". You cannot cut open the accused's

head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But you can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted him. If you find that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.

14. As for the second fault element of murder, the prosecution must make you sure that when the accused did "the wilful act", he "was reckless as to causing the death of the deceased". A person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk was unjustifiable is one of fact for you. Was the accused aware of a substantial risk that the victim would die if he assaulted him? If he was aware of the substantial risk that the deceased would die if he assaulted him, and he nevertheless took the risk, he was reckless. If otherwise, he was not reckless.
15. If you find all the elements of murder, as described above, proved beyond reasonable doubt by the prosecution, then you must find the accused guilty as charged. If you find one of the above elements of murder not proved beyond reasonable doubt, then you must find the accused not guilty as charged.
16. If you find the accused guilty of murdering the deceased, you may need to consider the lesser offence of "manslaughter". This was because on the basis of the total evidence presented at the trial, and in the interest of justice, this defence was available to the defence. It is also permissible in law for you to consider the lesser offence of manslaughter although he was not formally charged with the same, in the alternative. On the facts, it appeared that the accused was provoked into killing the deceased. Section 242 (1) and (2) of the Crimes Act 2009 reads as follows:

"... when a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation... and before there is time for the passion to cool, he is guilty of manslaughter only. Provocation means any wrongful act or insult of such a nature as to be likely when done to any ordinary person, to

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

So, if you find on the evidence that the accused was provoked into killing the deceased, in the sense given above, and you are sure of it, then you will have to find the accused not guilty of murder, but guilty of manslaughter only.

17. If you find the accused not guilty of murder, you may in the alternative, consider the lesser offence of 'manslaughter'. A person, as a matter of law, may be convicted of the lesser offence of 'manslaughter', although he was formally charged with the same. The first and second element of 'manslaughter' are similar to that of 'murder', as described in paragraphs 9 (i) and 9 (ii) hereof. The only difference between the two offences are their fault elements. In 'manslaughter', the prosecution must prove beyond reasonable doubt, the following elements:

- (iv) that the accused did a wilful act; and
- (v) that wilful act caused the death of the deceased; and
- (vi) at the time of the wilful act, the accused either:
 - (a) Intends the wilful act to cause the deceased serious harm; or
 - (b) Is reckless as to causing serious harm to the deceased.

18. If you find the accused guilty of "manslaughter", you may convict him accordingly.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. On 23 November 2015 (Monday), the deceased, Mr Watisoni Rokosawa was 22 years old. The accused was 55 years old, married with 3 children aged 20, 19 and 17 years old. The accused was a retired military officer of the Republic of Fiji Military Forces. He was residing with his family at Leys Road, Raiwal, Suva. After 9 pm on Sunday, the 22nd of November 2015, the accused and his family went to sleep in their home at Leys Road, Raiwal.

20. The accused, prior to sleeping, had parked his motor vehicle, a Mitsubishi Pajero, registration number DQ 452 along Leys Road, next to a two storey white concrete dwelling. Other residents

often parked their cars along Leys Road, because most do not have garages. According to the prosecution, it was quite common for cars parked along Leys and Kia Street to be broken into, that is, their glass doors broken into and items stolen. They said, in a month, approximately 20 cars would be broken into.

21. According to the prosecution, Mr. Tikiko Delai (PW1) was returning home to Raiwal after 3 am after consuming liquor at a Suva nightclub. He met the deceased at Kia Street. Both were drunk. They started to walk to PW1's residence at Goodsir Road, Raiwal. Along the way, the deceased smashed the left front glass window of the door of the accused's Mitsubishi Pajero. The accused was awoken from his sleep by a nephew, and told that two unknown I-taukei youths had broken the window of his car. The accused later came to his car and saw the same broken into. He reported the matter to police. The police came, saw the car, and later returned to Raiwaqa Police Station.
22. The accused later walked along Leys Road and met Tikiko (PW1) and another youth, presumably the deceased. He asked them whether or not they knew the person who broke the glass of the window of his car. According to the police, they denied the same. The accused later went to Raiwaqa Police Station and reported the matter. He later returned home. After a while, the accused saw Tikiko and the other youth walking along MacFarlane Road towards Kia Road. Upon seeing the accused, the two started laughing. Later the accused went to sleep. A while later, he was awoken by his wife, who saw someone looking into the accused's broken vehicle. It was about 5 am. Accused woke up and saw the youth that was with Tikiko looking into his vehicle through the broken glass.
23. The accused went to his vehicle. On the way, he picked up a tree branch. Half of the youth's body was in the car through the broken window, and the other half outside the car. The accused asked the youth why he broke into his car. According to the prosecution, the accused then struck his head with the tree branch. The boy fell on the road injured. He was later taken to Raiwaqa Police Station and locked in the cell. Later at 1.49 pm on 23 November 2015, police took the deceased to CWM Hospital. He was attended to, but died on 24 November 2015 at 10.45 pm because of his injuries. A police investigation was carried out. On 27 November 2015, the accused was taken to Suva Magistrate Court, charged with murdering the deceased.

24. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

25. On 9 April 2019, the first day of the trial, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he chose to remain silent, and called only one witness, Doctor Allan Aimer Birzo (DW1), from the CWM Hospital. That was totally within his rights.
26. Nothing negative whatsoever should be imputed to the accused when he chose to exercise his right to remain silent. This is because the burden to prove his guilt beyond reasonable doubt, remains with the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. Remember what I told you in paragraph 4 hereof, and I repeat the same here. There is no burden on the accused to prove his innocence, or prove anything at all. He is presumed innocent until he is proven guilty beyond a reasonable doubt. He is entitled, as he had done here, to fold his arms, sit there in the dock, and demand the prosecution prove his guilt beyond a reasonable doubt.
27. Although the accused had chosen to remain silent, all is not lost because he had given his version of events to the police when he was caution interviewed at Raiwaqa Police Station on 25 and 26 November 2015. His caution interview statements were tendered in evidence as Prosecution Exhibit No. 5. Please, read the same carefully, because it enables you to understand the defence's case, from their point of view.
28. In their closing submissions, the defence outlined to you their defence. First, they said the prosecution was unable to prove beyond reasonable doubt the willful act [paragraph 9 (i)] that the accused allegedly did. They said, the prosecution produced Tikiko (PW1) to prove that the accused was allegedly seen swinging a piece of timber at the deceased's head, at the material time. The defence asked you to disregard Tikiko's evidence as he was heavily intoxicated at the

material time, and therefore unreliable. Also, the alleged timber was not produced in court by the police.

29. Second, even assuming the above willful act was accepted, they said there was a break in the chain of causation of the deceased's death. They said police neglected in taking him to CWM Hospital for medical attention and what appeared to be inadequate medical treatment caused the deceased's death, rather than any willful act by the accused. They said, the police rushed matters in attending to the case and did not do a proper job. Given that he pleaded not guilty to the charge, and because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

30. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the evidence presented at the trial and your role as assessors and judges of fact, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analysing the evidence, we will first discuss the "Agreed Facts", and its significance. Then we will discuss the State's case against the accused with reference to the three elements of murder as described in paragraphs 9 (i), 9 (ii) and 9 (iii) (a) and 9 (iii) (b) hereof. Then we will discuss the defence's case, and the need to look at all the evidence.

(b) The Agreed Facts:

31. The parties submitted an "Agreed Facts", dated 15 August 2016. There are 4 paragraphs of "Agreed Facts". Because the parties are not disputing those four paragraphs of "Agreed Facts", you may take it that the prosecution had proven those 4 paragraphs of "Agreed Facts" beyond a reasonable doubt. As such, you may treat them as established facts.
32. In addition to the above, the following exhibits were tendered by consent of the parties:
- (i) Booklet of Photos – Prosecution Exhibit No. 1.
 - (ii) Defence Sketch Plan of Area – Prosecution Exhibit No. 2.
 - (iii) Doctor James Kalouglvaki's CV – Prosecution Exhibit No. 3.

33. Please, read the above exhibits carefully. The significance of the Agreed Facts and the above exhibits, was that it provided background information on the case. The Agreed Facts tells you who the accused was and other surrounding circumstances. The Booklet of Photos gives you an idea of what the alleged crime scene looked like. The two doctors CV's gives us an idea that we are dealing with two very experienced doctors, making their views on the case very important.

(c) **The State's Case Against the Accused**

34. Under this heading, we will discuss the three elements of the offence of murder, as described in paragraphs 9(i), 9(ii) and 9(iii)(a) and 9 (iii) (b) hereof, and the type of evidence the prosecution had called upon to prove those elements beyond a reasonable doubt.

First Element: The Accused did a Wilful Act (Paragraphs 9 (i) and 10 hereof)

35. It was the prosecution's case that, at the material time, the accused swung what looked like a piece of timber to the deceased's head. This assertion came from Mr Tikiko Delai (PW1). You have heard Mr. Delai's evidence on 9 April 2019. I am sure his evidence is still fresh in your minds, and I will not bore you with the details. I will only cover the salient points in regard to the above issue. PW1 returned home from a nightclub early morning, probably after 3 am on 23 November 2015, which was a Monday. He had been drinking liquor from the evening of 22 November 2015, which was a Sunday. PW1 said, he met the deceased at Kia Street, and the two walked along Leys Road towards Goodsir Road, where he lived. PW1 said, on the way he saw the deceased break the front left door glass window of a Mitsubishi Pajero, later identified to belong to the accused. PW1 said, the deceased was also very drunk.

36. The accused, in his police caution interview statement said, he was alerted after 3 am on 23 November 2015, that two unknown itaukei youth had broken the front left door glass window of his Pajero. The accused said, he was asleep in his house prior to that. The accused said, he went to investigate the matter, and walked along Leys Road. The accused said, he met Mr Tikiko and an unknown youth, presumably the deceased. He said, he asked them if they knew who broke his Pajero's left front door glass window, and they denied knowing anything about the same. In his police statement, the accused said he went back to his home at the Barracks at Leys Road. He

said, he went back to sleep but was later awoken by his wife who saw a youth "peeping" into the broken door glass window of his Pajero. Accused said, he went to the car to investigate. On his way, he said he picked up a tree branch. When he came to his Pajero, accused said, he saw the youth's top body through the window into the car, and the lower half outside the car. He said, he asked him why he broke his vehicle. Accused said, the youth tried to flee. However, he said, he swung the tree branch at him, and he later fell and hit his head on the road. He said, he hit the deceased's leg.

37. So, from Mr. Tikiko Delal's sworn evidence, and the accused's statements in his police caution interview statements, it was common ground that Mr. Tikiko and the deceased were at the crime scene at the material time. The accused in his caution statements, also agreed he was at the crime scene at the material time. The accused, in his caution interview statement, did not deny hitting the deceased with the tree branch, at the material time. Mr. Tikiko said, he saw the accused hitting the deceased with what appeared to be a piece of timber, at the material time. The act of hitting the deceased with a stick or wood, at the material time, was common ground between the accused and Mr. Tikiko. The only difference between the two was the part of the deceased's body that was hit. The accused said, he hit the deceased on the leg, he jumped and fell and hit his head on the tarsealed road. Tikiko said, he saw the accused hit the deceased on the head. Which version of events to accept is entirely a matter for you. Note that both the accused and Tikiko agreed that the accused hit the deceased with a piece of tree branch or what looked like timber, at the material time. The "act of hitting the deceased" at the material time is enough to constitute a "wilful act" in terms of the first element of murder, as discussed in paragraph 9 (i) and 10 hereof. Tikiko said, the hit landed on the deceased's head and he fell on the tarsealed road. The accused said, he hit the deceased's leg, he jumped and fell and hit his head on the tarsealed road. Whichever version you accept, started with a hit to the deceased by the accused, which is a "wilful act", in terms of the first element of murder, as discussed in paragraph 9 (i) and 10 hereof. In any event, it is a matter entirely for you.

Second Element: The Wilful Act Caused the Death of the Deceased (Paragraphs 9 (ii) and 11 hereof)

38. On this issue, the evidence given by Doctor James Kaiougiaki (PW3) and Doctor Alan Binbo (DW1) are very important. PW3 conducted the post-mortem examination on the deceased, and

tendered the post-mortem report as Prosecution Exhibit No. 4. DW1 said, when the deceased was first admitted to the CWM Hospital, he came under the care of his team. Doctor Biribo is a consultant neurosurgeon and attends to patients who are living, while Doctor Kalougivaki attends to patients who are dead by conducting post-mortem examinations.

39. In his post-mortem report, Doctor Kalougivaki said, the cause of the deceased's death was "severe traumatic brain injury, severe intra-cranial haemorrhage, base of skull fracture, severe traumatic head injury and blunt force head trauma". When cross examined, this was what Doctor Kalougivaki said:

"There was severe blunt force head trauma. There was bleeding in and out of the brain coverings and within the brain and between the brain and the skull. The CT scan showed bleeding in the brain cavity, space between skull and covering. The bleeding noted in the examination was fresh. The breaking of the skull's bones externally destabilized the brain and its covering internally. I have done more than 900 post mortem examinations. If the bone hole was not put in, the patient's chances of survival would drop to 10 %. He needs a miracle to survive.

After the head trauma, the first 24 hours is very important. Any bleeding in the brain is crucial in the first 24 hours. The mechanism of injury is important. Because of the mechanism of injury, they cause the bleeding. Even if deceased was taken to CWM Hospital soon after the blunt force trauma to his head, his chances of survival is still 20 to 25 %, given what I have seen in the post mortem examination. My comments are grounded on what I discovered at the post-mortem. An artery in the brain had ruptured and other blood vessels feeding the brain had also ruptured and they bleed at their own rate."

40. When Doctor Biribo was cross-examined, this was what he said:

"The CT scan can only reveal the extra dural haemorrhage. It can also pick up bleeding in the brain coverings and brain itself, but we didn't pick it up, at the time. Drilling the hole into the skull was standard procedure. If there is sub dural haemorrhage, the chances of survival in Fiji is 30%. At time of admission, his chance of survival was 34%. A hard blow to the head could cause such injuries. Even if police handle the patient well at the station, his chances of survival would still be slim. Lucid

interval is only relevant to extra-dural haemorrhage. If patient was presented earlier at CWM Hospital, given his conditions, his survival rate was 34%. Some of the injuries occurred at the time of the alleged assault and some occurred as part of the secondary injury. The total injuries showed that the chances of survival was nil. The fracture to the skull is the result of the first injury from the alleged assault. Severe trauma caused the skull injuries."

41. What does the two doctor's evidence tell you? Did the accused hitting the deceased's head with what appeared to be timber (Tikiko's version), or hitting the deceased's leg wherein he jumped and fell and hit his head on the larscaled road (accused's version), at the material time, cause the deceased's death? How you answer the above questions is entirely a matter for you.

Third Element: At the Time of the Wilful Act, the Accused Intended to Cause the deceased's death, or was Reckless in causing the same (Paragraphs 9 (iii)(a), 9 (iii) (b), 12, 13 and 14 hereof).

42. Under this heading, we will first discuss the first fault element, as discussed in paragraphs 9 (iii) (a), 12 and 13; and then move on to discussing the second fault element, as discussed in paragraphs 9 (iii) (b), 12 and 14 hereof. On the first fault element of murder, the prosecution must make you sure that when the accused hit the deceased at the material time, he intended to kill the deceased. As I had said in paragraph 13 hereof, you cannot cut open the accused's head, to find out what his intentions were; at the time he swung the piece of tree branch/timber at the deceased's head/leg and thereby caused his death. However, you can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly hit him with a tree branch or timber, at the material time. On this issue, the prosecution tendered the evidence given by Mr. Tikiko (PW1), and the statements the accused gave in his police caution interview statement.
43. Tikiko (Pw1) said, he saw the accused swing what appeared to be a piece of timber at the deceased's head, at the material time. He said, he heard a thud on the deceased's head. The accused, in his police statement said, he was trying to do a citizen arrest on the deceased, who had broken the window of his car, and was trying to steal something therefrom. The accused said, he was trying to apply minimum force to the deceased, to weaken him, to enable him to do a citizen arrest. The accused said in his caution interview statements, that he had no intention

whatsoever to kill the deceased. He apologized to the deceased's family. The above evidence were tendered by the prosecution. You have heard the other witnesses' evidence, as to the circumstances surrounding this incident. What do the above assertions tell you? Did the accused have the intent to kill the deceased at the material time, when he allegedly hit him with a tree branch/timber? How you answer the above question is entirely a matter for you.

44. On the second fault element of murder, the prosecution must make you sure that, when the accused hit the deceased with a tree branch or timber, at the material time, he was reckless in causing the deceased's death. As I had said in paragraph 14 hereof, a person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. On this issue, the only evidence tendered by the prosecution was the evidence of Tikiko (PW1) and the accused's caution interview statements. On the accused's version of event, he was trying to do a citizen arrest on the deceased, who was at the material time, breaking into his car. The accused said, he was trying to apply minimum force to enable him to arrest the deceased. This was acceptable as a matter of law. Ordinary citizens are entitled to use minimum force to arrest people who are breaking the law. The accused was a retired military officer, and they are trained to uphold the law. So, in a sense, given this background, it was arguable that it was totally justifiable to take the risk of hitting the deceased, to weaken him, to enable the accused to do a citizen arrest. From Tikiko's version, the accused hit the deceased on the head. When looking at the above competing version of events, do you think the accused was reckless in hitting the deceased with a piece of tree branch or timber, at the material time? How you answer the above question is entirely a matter for you.

45. If you find that the prosecution had proven all the elements of murder beyond a reasonable doubt, then you must find the accused guilty as charged. If otherwise, you must find the accused not guilty as charged. It is a matter entirely for you.

(d) The Accused's Case:

46. I had summarized to you the accused's case from paragraphs 25 to 29 hereof. I repeat the same here. You have read the accused's police caution interview statements, which was tendered in evidence, as Prosecution Exhibit No. 5. The accused's police caution interview statements tells you the accused's version of events. It basically tells you the following story. A 55 years old man,

who had spent his life in the Republic of Fiji's Military Force. He was married with 3 children aged 20, 19 and 17 years old. They were living in a barrack near Leys Road. He had bought his family a Mitsubishi Pajero, and he had parked the same along Leys Road. On Sunday 22 November 2015, he and his family went to sleep at 9 pm. At 3 am he was awoken by his nephew, who said two itaukei youths were breaking into his Mitsubishi Pajero. He went to investigate. He saw his car damaged. He reported the matter to police. The deceased, accompanied by Tikiko (PW1), had broken into his car. He tried to do a citizen arrest. He tried to use minimum force to arrest the deceased. He now ends up in court charged with murder. He said he did not intend to kill the deceased at all and apologized to his family.

47. As a matter of fairness, and given the overall evidence called in the case, the defence of provocation ought to be put to you. I direct you as follows. If you are sure that the accused unlawfully killed the deceased, intending to kill him, the accused is guilty of murder unless you conclude that this was or may have been a case of provocation. Provocation is not a complete defence, leading to a verdict of "not guilty". It is a partial defence, reducing what would otherwise be murder to the lesser offence of manslaughter. Because the prosecution must prove the accused's guilt, it is for the prosecution to make you sure that this was not a case of provocation, and not for the accused to establish that it was. Provocation has a special legal meaning, and you must consider it in the following way. Firstly, you must ask yourself whether the accused was provoked in the legal sense at all. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said or done by the deceased, rather than just by his own bad temper.

48. As shown above, the accused was sleeping in his family house from 9 pm on 22 November 2015 (Sunday) to 3 am on 23 November 2015 (Monday). He was awoken from his sleep by his nephew, who told him that two itaukei youths were breaking into his Pajero. He went to investigate. He saw his Pajero broken into. He reported the matter to police. The police came to investigate and went again. He saw two youths at Leys Road. This was Tikiko and the deceased. He asked them if they knew who broke into his car. They said, they did not know. In fact it was Tikiko's friend, who broke into his car. So, they lied to the accused. The accused went back to his house. It was between 4 am and 5 am on 23 November 2015. Tikiko and the deceased were still wandering around Leys Road at that time. The accused, while sitting beside his house, saw the two again

later. When the two saw the accused, they laughed at him. They knew very well they lied to the accused. The area was known for repeated car break-ins. The police said 20 cars are broken into in the area per month. The accused went back to sleep. He was awoken by his wife, who saw someone looking into his car. Accused woke up again. He went to investigate. He saw the deceased looking into his car. Half the deceased's body was through the broken window into the car, and half outside. Accused tried to do a citizen arrest. He asked the deceased why he was breaking into his car. He then hit him, to weaken him, to enable him to arrest him. Given the above, if you are sure that the accused was not provoked in the sense mentioned above, the defence of provocation does not arise, and the accused was guilty of murder.

49 But if you conclude that the accused was or might have been provoked, in the sense which I had explained, you must then go on to weigh up how serious the provocation was for this accused. Is there anything about this accused which may have made what was said or done affect him more than it might have affected other people? Finally, having regard to the actual provocation and to your view of how serious that provocation was for this accused, you must ask yourselves whether a person having the power of self-control to be expected of an ordinary, sober person of the accused's age and sex, would have been provoked to lose his self-control and do as this accused did. If you are sure that such 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, your verdict would be 'not guilty of murder but guilty of manslaughter'. It is a matter entirely for you.

50 If you accept the defence's version of events, you may find the accused not guilty as charged, or in the alternative, not guilty of murder but guilty of the lesser offence of manslaughter. If otherwise, you will have to assess the strength of the prosecution's case, and decide accordingly. It is a matter entirely for you.

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

51 The prosecution called 8 witnesses:

- (i) Mr. Tikiko Delai (PW1)
- (ii) Mr. Anasa Taucilagi (PW2);
- (iii) Doctor James Kaldugivaki (PW3);

- (iv) DC 4645 Paullasi Tabualevu (PW4);
- (v) PC 3691 Joape Qio (PW5);
- (vi) Sgt 3662 Peter Vai (PW6);
- (vii) WPC 3769 Mereini (PW7); and
- (viii) PC 4977 Vonivate Ravonu (PW8)

The defence called 1 witness:

- (i) Doctor Alan Biriba (DW¹)

52. The prosecution tendered the following exhibits:

- (i) Booklet of Photos - Prosecution Exhibit No. 1.
- (ii) Sketch Plan of Area - Prosecution Exhibit No. 2.
- (iii) Doctor Kalougrivaki's CV - Prosecution Exhibit No. 3.
- (iv) Post-Mortem Report - Prosecution Exhibit No. 4.
- (v) Accused's Caution Interview-Statements - Prosecution Exhibit No. 5.

The defence tendered Doctor Alan Biriba's CV as Defence Exhibit No. 1.

53. You must consider the above evidence together. Compare them and analyze them together. If I haven't mentioned a piece of evidence you consider important, please take it on board in your deliberation. If you find a witness credible, you are entitled to accept the whole or some of his/her evidence in your deliberation. If you find a witness not credible, you are entitled to reject the whole or some of his/her evidence in your deliberation. You are the judges of fact.

I. SUMMARY

54. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. If you do not accept the prosecution's version of events, and

you are not satisfied beyond reasonable doubt so that you are not sure of the accused's guilt, you must find him not guilty as charged

55. Your possible opinions are as follows:

- (i) Murder: Accused - Guilty or Not Guilty
- (ii) If Not Guilty of Murder, lesser offence of Manslaughter - Guilty or Not Guilty

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



Salesi Temo
JUDGE

Solicitor for the State
Solicitor for the Accused

: Office of the Director of Public Prosecution, Suva.
: Ms. A. Tuiketoi, Barrister & Solicitor, Suva.