

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 341 of 2018**

**[CRIMINAL JURISDICTION]**

**STATE**

**V**

**SAULA TEMO**

**Counsel** : Ms. S. Tivao for the State  
Mr. J. Koroitini for the Accused

**Hearing on** : 17 - 25 February 2020

**Summing up on** : 27 February 2020

**SUMMING UP**

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should 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 you agree with that opinion. You are the judges of facts.
2. As I have told 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.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross 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 arguments and comments when you evaluate the evidence only if you agree with them.
4. A police statement of a witness can only be used during cross-examination to highlight inconsistencies. That is, to show that the relevant witness on a previous occasion had said something different to what he/she said in court. You have to bear in mind that a statement made by a witness out of court is not evidence. However, if a witness admits that a certain portion in the statement made to the police is true, then that portion of the statement becomes part of the evidence.
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 the deceased. No such emotion should 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 behaviour 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, 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. Sometimes we honestly forget things or make mistakes when recalling past events.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her 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 when you compare the evidence given by different witnesses on the same issue. This is how you should deal with any inconsistency you may come across. 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. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is 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 you can only

rely on a certain portion of the witness' evidence; or you may accept the reason the witness provided for the inconsistency and consider him/her 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 proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and the defence. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.
14. As a matter of law you should remember that the burden of proving the guilt of the accused always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused is guilty and the accused is not required to prove that he is innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find him guilty. You must be sure of the accused's guilt.

15. In order to prove that an accused is guilty of the offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of any element of the offence the accused is charged with, as to whether the prosecution has proved that element, then you must find the accused not guilty of the offence. 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 a short while.
16. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
17. Please remember that 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 necessary.
18. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

*Statement of Offence*

**Murder:** contrary to Section 237 of the Crimes Act, 2009.

*Particulars of Offence*

**SAULA TEMO** on the 17<sup>th</sup> day of May, 2018 at Suva in the Central Division murdered **AKUILA SALAVUKI**.

19. To prove the offence of murder, the following elements must be proved beyond reasonable doubt;
  - a) the accused
  - b) engaged in a conduct
  - c) that conduct caused the death of a person
  - d) the accused intended to cause the death of that person,  
or  
the accused was reckless as to causing the death of that person by the conduct.

20. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
21. "Engage in a conduct" means –
  - (a) do an act; or
  - (b) omit to perform an act.
22. However the conduct should be a product of the will of the accused. In order to prove the second element, the prosecution has to prove beyond reasonable doubt that the act of the accused in question or the omission of the accused to perform the act in question was deliberate and not accidental.
23. In relation to the third element above, you should remember that the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct substantially contributed to the death of the deceased, that is sufficient to satisfy the third element above.
24. 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.
25. 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.

26. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether the accused 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) The accused was aware of a substantial risk that the death will occur due to his conduct; and
  - b) Having regard to the circumstances known to the accused, it was unjustifiable for him to take the risk.
  
27. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death of the deceased 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 realising 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.
  
28. 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 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 only weaken one's power to resist the temptation to carry out an intent. A drunken intention is in fact an intention.

29. Let us now briefly look at the evidence led in this case. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.
30. The prosecution led the evidence of twelve witnesses. At the end of the prosecution case you heard me explain several options to the accused. The accused chose to remain silent. That is his right. You should not draw any adverse inference against the accused based on his decision to exercise that right.
31. The first prosecution witness was Simione Tomu ("PW1"). He said that;
  - a) *The deceased was his roommate in 2017 and therefore he knew the deceased. He said that the deceased was a transgender.*
  - b) *On 17/05/18 he was drinking at Down Under Nightclub around 8-9pm. He met the deceased at the nightclub around 9 o'clock. He said that the deceased was with his friends from FNU.*
  - c) *He said that while he was drinking with his friends the accused came and bought drinks for them. He said that the accused knew the four gentlemen he was drinking with. Thereafter, they moved to the dance floor and he danced with the deceased. After the dancing they went back to where they were drinking.*
  - d) *The accused then asked him to dance with the accused. He said that he had not met the accused before that day but he danced with the accused. He said that the accused asked him to bite the accused's neck but he was not that interested. After that the deceased saw him dancing with the accused and he asked the deceased to come and dance with the accused. The accused and the deceased then started dancing and he went back to his friends from FNU.*
  - e) *Thereafter the accused and the deceased were dancing together frequently and he thought that the two were actually into each other. He said that he observed the accused for about 10 to 20 minutes. Inside the nightclub it was dark but there was a big screen where the video clips were played and there were other lights. He said that he clearly saw the accused when the accused was dancing with him as they were close to each other at that time.*



- f) *He said that the deceased would have spent about half an hour dancing with the accused and in between the deceased came down to have a drink and went back several times.*
- g) *After some time he sat facing the entrance to the nightclub. While sitting there he saw the deceased going out with the accused. He said that he was about 5 feet away from the door when he saw them go outside. He said that the area where he was sitting was a bit dark but there was a bright light outside the entrance and when the door was opened he could see them leaving. He said that he did not see the two of them later that night.*
- h) *After the deceased left, he called the deceased and asked him where he is going. Then the deceased told him that he will come back inside. He thought that they went out to smoke. He went outside to look for the deceased 5 minutes later but could not find him. He said that when the deceased and the accused left, they were holding their hands.*
- i) *He said that though he was drinking alcohol he was 'a bit okay' because he was 'drinking less'. He said he could remember the accused because the accused had a tattoo on his arm. He said that he identified the accused during an identification parade held on 24/08/18. He said that he told the accused to show his arm and then he identified the accused. He also identified the accused in court.*
- j) *He said that he came to know that the deceased had passed away when the police took him to Totogo Police Station for questioning on the following Monday.*
- k) *During cross-examination he said that on the relevant night he was drunk but not to the extent of being disorderly. He denied the suggestion that he was not able to identify the people around him and he was not able to confirm what was happening around him because he was drunk.*
- l) *When he was asked whether he spoke to the deceased when the deceased was going out of the nightclub he said 'yes' and said that he spoke to the deceased at the entrance. He then agreed that he had told the police in his police statement that he tried to call the deceased, the deceased could not hear him, so he followed the deceased but could not find the deceased. When it was suggested that his statement to police is not true, he said he was in shock when his statement was made.*
- m) *When it was suggested that he could not recognize who was going out of the nightclub because he was drunk, he said that he could clearly recognize because the club was not that full that night.*
- n) *He said that the complexion of the others who participated in the identification parade was the same as the accused but the built was different.*

32. The second prosecution witness was one Amlesh Narayan ("PW2"). He said that;

- a) *On 17/05/18 he was doing night shift with five of his workers at the Fiji Development Bank. He was running business dealing with general aluminum work and his company was carrying out work at the FDB Bank.*
- b) *While he was working, he heard a sound like a timber falling down. After about 2 seconds he heard another sound like timber hitting the scaffolding and falling down. Then he shouted "oi, who is playing there?" because he thought his other workers were playing there and would damage the vehicle which was parked nearby. He explained that first he heard one "tuk" sound and then the second sound was "tuk*

*tuk". There was no response when he shouted. After that he heard someone falling down on the ground and then breathing heavily.*

- c) He then stood up and looked outside. He saw a man lying down in the back side of the building 7-8 meters from the place he was seated. He ran to the place where the person was lying and with the torch light from his mobile phone he could see blood all over the place and blood coming out from both ears of the person. There was a cut on the forehead and the hands were shaking. He did not see anyone else.*
- d) He then ran back to his booth because he thought someone may attack him and called his employees. He told his employees to call the security and then when the security came he told the security to call the police. He said either he or his employees did not attend to the person who was lying on the ground because the person was in a very bad condition.*
- e) He said he saw two pieces of timber on the ground near the person who lay on the ground and he identified that on the photographs shown to him.*

33. The third witness for the prosecution was PC 5137 Akaripa Rokousu ("PW3").

He said that;

- a) On 17/05/18 he was serving at Totogo Police Station and while he was on mobile patrol around 11.05pm, he was informed that a man was lying on the floor at the back of the FDB Building. He then went to the relevant place and he saw an iTaukei man lying down with the face covered with blood. The head was in a pool of blood. He checked the pulse of the man and noted that it was very low.*
- b) He with the other officers who were with him on mobile patrol, took the person to the CWM Hospital. After handing him over to the emergency ward, he and his team went on patrol along Victoria Parade, searching for the suspect based on the description provided by the security. Later he was informed that the person who was admitted to the CWM hospital by him passed away. He said that he handed the deceased over to the hospital around 11.26pm.*

34. The fourth prosecution witness was Areita Saumi ("PW4"). She said that she had been a registered nurse for 15 years. On 17/05/18, around 11.30pm, while she was working at the Accident and Emergency Department at the CWM Hospital, the police brought a patient who was at a critical state. The patient was an iTaukei male and he had multiple facial injuries. He was not responding and was bleeding from the ears. There was no sign of breathing. The patient was then taken to the emergency resuscitation area. She was not aware of that patient's name or what happened to him.

35. The fifth prosecution witness was WPC 4883 Naomi Tava ("PW5"). She said that;
- a) *As at 17/05/18 she was based at the Crime Scene Investigation Unit of the Forensic Science Service of the Fiji Police. She said that she photographed the crime scene relevant to this case. She tendered the photographs that were marked for identification during the evidence of PW2 as MFI-1A to MFI-1G as PE-1A to PE-1G.*
  - b) *She said that all the exhibits were removed and taken to the Crime Scene Lab after the photographs were taken. After they were brought they were again unpacked and she photographed them again with the measurements. She then tendered another 4 photographs as PE-1H to PE-1K. She also tendered two pieces of timber as PE-2 and PE-3 saying that the same were uplifted from the scene of crime.*
36. The sixth prosecution witness was DC 3090 Akuila Debalevu ("PW6"). He said that he was the relieving exhibit writer at the Totogo Police Station on 27/08/18 and on that day, he received the case file and the exhibits PE-2 and PE-3 from IP Mikaele Koro. He tendered a copy of the relevant page of the relevant exhibit register as PE-4.
37. The seventh witness for the prosecution was IP Mikaele Koro ("PW7"). He said that;
- a) *He is the investigating officer of the case and also the interviewing officer of the accused. On 17/05/18 while he was doing the night shift, he was informed that a person was found lying down in a pool of blood at the back of the FDB and that the person is being taken to the CWM Hospital. He went to the CWM Hospital, and by the time he arrived, the aforementioned person was already dead. He found out that the name of the deceased was Akuila Salavuki.*
  - b) *That day he went to the back of the FDB building where the deceased was found. He saw a pool of blood, a pair of flip-flops and a piece of timber. Later he said that there were two pieces of timber and that they were parts of a single piece. The forensic team arrived around 8.00am the next day. The forensic team photographed the scene and took measurements. They uplifted the pieces of timber.*
  - c) *He said that the accused was arrested on 23/08/18 at the Suva Corrections Centre. He said that there was a lapse of few months to arrest the accused as the suspect in this case because the suspect was not known. A dedicated team was formed and a thorough investigation was conducted.*
  - d) *He said that when he met the officer-in-charge at the Corrections Centre on 23/08/18 he was informed that the accused will be released on that day. Accordingly after the accused was released from the Corrections Centre he informed the accused that the accused is wanted in a case of murder and that he is taking the accused to the police station. When he informed the reason the accused voluntarily came with him.*

- e) *The accused was then brought to Totogo Police Station and he escorted the accused to the charge room. He said that at the time of the arrest either him or any other officer did not assault or threaten the accused. He said that he took steps to inform the Legal Aid and a lawyer from Legal Aid arrived at the police station and met the accused. After the accused consulted the Legal Aid lawyer the accused was taken to Lami Health Centre for him to be medically examined.*
- f) *After the medical examination the accused was taken to the CID office and was allowed to rest as per the request made by the accused. Later on, he escorted the accused to the interview room and the interview commenced. He said that the accused was not threatened or assaulted prior to the commencement of the interview. WPC Salote Talaca was present during the interview. The interview was video recorded and he tendered two disks that contains the caution interview as PE-5 and PE-6. He also tendered a transcript of the interview which is in the iTaukei Language as PE-7 and the English translation of the said transcript as PE-8. Thereafter the PE-5 and PE-6 were played in court and the witness also read the English transcript [PE-8].*
- g) *He said that the cautioned interview was suspended at 1323 hours and the accused was taken to the Forensic Biology Lab at Nasoa to obtain the accused's saliva for a DNA test. After that the accused was brought back to the interview room and the interview recommenced. The interview was again suspended at 1551 hours in order to have a scene reconstruction. After the reconstruction he was brought back to the police station and the interview recommenced. Then again it was suspended at 1755 hours and the accused was handed over to the charge room.*
- h) *When the prosecutor asked him why he was asking a lot of leading questions during the relevant session, he said that it was because the accused was keeping quiet when he asked questions.*
- i) *He said that an identification parade was conducted where they brought 9 youths of the same built and complexion as the accused to be stood with the accused in a line for the witnesses to identify the accused. He said the 9 youths were brought from the market area. After the identification parade the accused was taken back to the interview room and the interview recommenced.*
- j) *He said that the accused was not assaulted or threatened during the recording of the interview or during the breaks. After the interview was concluded the accused was again taken to the Lami Health Centre for a medical examination. This was on 25/08/18.*
- k) *He tendered copies of the relevant pages of the Station diary of the Totogo Police Station as PE9. He said that the said station diary does not have any entries in relation to the cautioned interview because in cases such as murder a separate station diary is maintained. He tendered copies of the relevant pages of this separate station diary as PE10. He tendered copies of the relevant pages of the video recording register as PE11.*
- l) *He said that the accused complained to him that he was assaulted by police officers from Lami Police Station when he was arrested. He said Lami Police Station was dealing with a case of burglary at Lami village and the officers from Lami Police Station had nothing to do with this case.*
- m) *During cross examination he said that it took three months to arrest the accused because the accused was remanded for a case of burglary from Lami and was serving a term of one month imprisonment for a another case from Kadavu. He said that he*

*got the information that the accused is in 'Suva Remand' from an informer and this information was received during the investigation.*

- n) He denied the suggestion that the police officer who was inside the vehicle assaulted the accused when he was travelling from the Suva Remand Centre to the Totogo Police Station. He also denied the suggestion that the accused was kicked and punched by the same officer upon their arrival at Totogo Police Station. He denied the suggestion that the accused was further assaulted by a police officer inside the charge room.*
- o) When he was asked whether he explained to the accused about the identification parade, he said that it was done after the interview was suspended.*
- p) He said that his definition of 'youth' would be those who are between 20 and 26 years. Then after serial number 11 of the station diary (PE10) for 24/08/18 was shown, he agreed that most of the people brought for the identification parade were not youths. He denied the suggestion that the accused admitted to the allegation because he was assaulted by the police officers to admit to the charge.*
- q) During re-examination he said that, before the interview he explained to the accused about all the procedures that will be followed during the interview and also explained what will happen during an identification parade. He said that, that is the reason he did not explain to the accused about the identification parade during the interview. He said he explained to the accused again when he suspended the interview. He also said that all those who were brought for the identification parade looked like the accused though their age ranged from 24 to 50 years.*

38. The eighth prosecution witness WPC 3045 Salote Talaca ("PW8") said that she was present throughout the caution interview of the accused. She said that the accused was not threatened, assaulted or intimidated during the interview or during the breaks. She said that the answers were given by the accused voluntarily. She said that she was present during the identification parade. She said that the first witness pointed at the accused during the parade but the second witness informed that he cannot recall the face of the suspect. She said that the accused did not complain to her about any mistreatment at the police station before, during or after the interview.

39. The ninth prosecution witness was Acting Inspector Tevita Savou ("PW9"). He said that on 24/08/18 he was instructed to charge the accused. At that time he was attached to Nasinu Police Station. He tendered the charge statement which is in iTaukei Language as PE-12. The English translation was tendered as PE-13. He said that the accused engaged a lawyer from the Legal Aid Commission during the charge statement. He also said that no assault, threat or intimidation

took place before the charge. The accused did not complain to him about any mistreatment by the police officers at Totogo Police Station.

40. The tenth prosecution witness was Dr. James Kalaugivaki ("PW10"). He said that;

- a) *He is the head of the Forensic Pathology Unit since 2014. He provided his CV and he also said that he had conducted over 1000 autopsies. He conducted the postmortem examination of the deceased on 22/05/18. The report was tendered as PE-14.*
- b) *He said that the entire face of the deceased had multiple bruising and scratches of different sizes and predominantly on the left side of the face. There were bruising on the mouth as well. He found bruises upon removing the skin of the head. There was a depressed fracture at the back aspect of the head measuring 160mm x 80mm and there were multiple fractures within the middle and the back aspect of the floor of the skull. There was extensive bleeding over the entire brain. There were bruises on the back aspect of the brain. He also noted that the alcohol level in 100 ml of blood of the deceased was 322mg and he said that it is a very high level.*
- c) *His conclusion was that the cause of death of the deceased is the extensive bleeding and the severe head injury inflicted by the use of an object which does not have sharp edges. He said that it is highly likely that the timber like PE2 and PE3 could have caused the injuries on the head. He also said that it is highly likely that the deceased had received more than one blow from a blunt object given the multiple injuries.*

41. The eleventh prosecution witness was Dr. Diana A. L. Lidise ("PW11"). She said that;

- a) *She had been a medical officer for 6 years and she medically examined the accused on 23/08/18 at the Lami Health Centre. She tendered the report she prepared as PE-15. She said that the accused informed her that he was punched over the left ear by police officers in the month of May and complained of having pain for 03 months. She said that there were no other complaints and the accused appeared to be in no obvious distress.*
- b) *She noticed a pus discharge from the accused's left ear. She said that she only examined the head and the neck of the deceased because the only history given was the alleged assault on the left ear. She did not do a full body checkup. There were no bruising around the ear or the head. She prescribed oral antibiotics.*
- c) *Questioned by the court, she said that a police officer was present during the examination.*

42. The twelfth prosecution witness was Dr. Taoruru Tebana ("PW12"). She said that;

- a) *She had been a medical doctor for 39 years. She medically examined the accused on 25/08/18 at the Lami Health Centre. The medical report she prepared was tendered as PE-16.*
- b) *She said that a police officer was present during the examination. She said that she was informed by the accused that he was assaulted by 'Lami Police'. She noted that the accused is well and is physically fit. She said that she conducted a full body examination, but by that she meant checking the blood pressure, pulse, heart, lungs and the physical structure. She noted that the left eardrum of the accused was damaged. She said that this could be an old damage. There were no other injuries. She prescribed an antibiotic ear-drop.*
- c) *During cross-examination when she was asked whether there were any other injuries on the body, she said that she concentrated on the complaint made regarding the left ear.*

### ***Cautioned Interview of the accused***

- 43. A confession made by an accused can be considered against that accused if that confession was made voluntarily. Therefore, a confession made as a result of oppression (e.g. due to being assaulted, threatened or subjected to any other ill-treatment by the police) or as a result of trickery (e.g. a false promise) cannot be used as evidence against the relevant accused. Further, though an accused gives the answers during an interview voluntarily, still that accused can lie or give answers which are not true. Therefore it is necessary to assess the truthfulness of the (voluntary) admissions made by an accused before deciding to consider those admissions in concluding whether the accused is guilty or not guilty of the relevant charge.
- 44. For the above reasons, when you are dealing with the cautioned interview statement tendered as PE-5 (disk 1), PE-6 (disk 2), PE-7 (iTaukei transcript) and PE-8 (English translation) you must decide the following;
  - a) Did the accused make the statement in question? If you are not sure that he made it, and there is a doubt whether the answers were fabricated by the police and got the accused to simply admit that version made up by the police, the matter ends there. You should disregard the cautioned interview statement.
  - b) If you are sure that he made the statement that is, he had given the answers and they were not fabrications, then you have to decide whether the accused gave those answers voluntarily. If you have a doubt, that is, you are not satisfied beyond reasonable doubt that the accused gave those

answers voluntarily, then again, you should disregard the cautioned interview statement.

- c) If you are sure that the accused gave the answers during the cautioned interview voluntarily, then you should decide whether the answers are true. You should consider the cautioned interview statement as you would consider the evidence given by a witness. You may find the entire statement to be true or that a part of it is true or you may find that the entire statement is not true. You should rely only on what you would consider to be true.

45. In dealing with the cautioned interview of the accused in line with what I have stated above, you may consider the following among others;

- a) The defence counsel suggested to PW7 that the accused was assaulted before the commencement of the cautioned interview and during the breaks so that the accused would admit the allegation. These suggestions were denied by PW7;
- b) The medical report PE-15 where the accused was examined before the interview and PE-16 where he was examined after the interview do not indicate that there were fresh wounds. However, in both instances, the two doctors had concentrated on the alleged assault on the accused's left ear stating that that was the only complaint raised by the accused and had not examined the other parts of the body. In both instances a police officer was present during the examination. Therefore, you may think that there was a possibility for the accused to have had injuries on the other parts of his body at the time he was examined due to an assault by the police, but he was unable to tell this to the doctor(s) because there was a police officer when he was examined;
- c) The accused was asked according to PE-8 whether he is suffering from any condition that may hinder his ability to answer the questions during the interview [Page 7; Time - 0:18:02.6] and the answer was 'yes'. The accused had said that the hindrance was due to his ear. Given the questions and answers following this where the interviewing officer appear to have simply directed the accused towards agreeing to continue with the interview, and the fact that there was no indication that the accused was given the medicine prescribed by the doctor; you may have to carefully consider whether the accused had been interviewed under oppressive circumstances;
- d) When the prosecutor asked PW7, why he had put a lot of leading questions to the accused in the session recorded on the 3<sup>rd</sup> video of PE-5, he said that it was because the accused was keeping quiet when he asked questions;



- e) According to one of the rules that is applicable to recording of cautioned interviews, at the end of the interview the accused should be allowed to go through the record of the interview and should be asked whether he want to make any corrections, alterations or additions. Then the accused should be asked to sign the record of the interview. In this case, these steps were not followed. PE-8 is a translation of the transcript and it is not signed by the accused;
- f) At page 25 of PE-08 the accused was shown a t-shirt and then asked whether he was wearing that on the night in question and the accused says 'yes'. The next question is "When you killed Akuila" and the answer is 'yes'. By this time, according to the records (PE-8) the accused had already said that he did not intend to kill the deceased and there is no material to indicate that the accused believed that the deceased died at the scene. Therefore the above answer on the face of it cannot be considered as true;
- g) The accused initially says that that the timber he hit the deceased was okay when he was asked whether it broke [Page 20; Time - 0:21:13.4]. However, later, the accused was shown the two pieces of timber [PE-2 and PE-3] separately and is asked whether it is the exact piece he used to hit the deceased in relation to each piece and the answer the accused had given is 'yes'. You would also note in the relevant video the manner in which the accused observes the broken edge when PE-2 was shown to him;
- h) Several questions were asked based on purported statements made by individuals who are not called to give evidence as witnesses. There is no way of ascertaining whether those statements were in fact given by those individuals to the police and whether those statements are true;
- i) According to PW1's evidence, he did not know the accused by his name, even when he gave evidence before this court. However, before PW1 identified the accused during the identification parade, PW7 had asked a question [PE-8; Page 17; Time - 0:14:44.8] which suggests that PW1 had identified the accused. This is in relation to PW1's version that the accused wanted him to bite the accused's neck. In PE-8, page 19, time - 0:18:40.0 the accused was told that 4 individuals saw the accused walking with the deceased. These individuals were not called as witnesses. According to PW8, only one witness identified the accused during the identification parade. Therefore, these assertions put to the accused by PW7 during the cautioned interview appear to be untrue at the time. Then the issue is whether the accused was misled by PW7 either intentionally or unintentionally;
- j) In PE-8 [Page 28; Time - 0:04:38:4], the accused had been asked whether he can confirm that the injuries found on the deceased after the post-mortem

was conducted were injuries sustained by the deceased due to him hitting the deceased and the accused had answered 'yes'. However, there is no way for the accused to confirm such a fact. Again the issue is whether the accused admitted the above fact which was not within his knowledge because he was giving the answers under circumstances that were oppressive to him, whether he was just saying 'yes' because he was scared, or because he was simply lying.

46. Therefore, I would direct you to carefully consider the questions and the answers in the cautioned interview, the circumstances under which the said interview was conducted and the manner it was recorded in deciding the issues, whether the accused gave the answers, whether the answers given voluntarily and whether the answers are true.

#### *The Identification Parade*

47. An identification parade is conducted to ascertain or identify a suspect. However, in this case, the parade was conducted just before the cautioned interview was concluded. This suggests that the police had come to the conclusion that the accused is the perpetrator before PW1 (who was the only witness who claimed seeing the accused with the deceased on the night in question) identified the accused as the person who left the nightclub with the deceased.
48. The defence also raised certain issues regarding the manner in which the identification parade was held. In particular, regarding the age of the individuals selected for the parade.
49. You should bear in mind that PW1 cannot confirm that the accused 'killed' the deceased. His evidence was that he saw the accused and the deceased leaving the nightclub together. Therefore, the fact that PW1 identified the accused at the identification parade would only mean that he identified the accused as the person who left the nightclub together with the deceased and nothing more. This is also subject to whether or not you accept that evidence of PW1.

### *Evidence of other unrelated offences*

50. It came out in evidence that the accused served a prison term for an offence committed in Kadavu and that the accused was in remand for an offence committed in Lami. Please remember that the fact that the accused had committed other offences does not itself make him guilty for the offence he is charged with in this case. You should remember not to allow your mind to be prejudiced given the other offences committed or alleged to have been committed by the accused which does not have any bearing on the charge in this case.

### *Medical Reports*

51. Please note that, PW10, PW11 and PW12 gave their medical opinions based on what they observed and their experiences. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinions given by the said witnesses. Evaluating their evidence will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinion. However, it should be noted that the defence does not challenge the cause of death of the deceased.

### *Analysis*

52. PW1 says that he saw the accused leaving the night club with the deceased. You heard evidence about the lighting condition at the place PW1 was sitting when he saw the deceased leaving. Further, the defence suggested that PW1 was drunk at that time and that he was not in a position to observe what was happening around him clearly. Even if you accept this evidence of PW1, it is to be noted that PW1 does not mention the time he saw them leaving.
53. The defence highlighted an inconsistency in PW1's evidence where he said in court that he spoke to the deceased after the deceased left the nightclub, but he

had told the police that he was unable to speak to the deceased. Further, in his evidence PW1 said that he even went outside after 5 minutes looking for the deceased. However, he came to know that the deceased had passed away on the following Monday when the police took him for questioning. He did not explain why he did not look for the deceased thereafter, until Monday. If PW1 had concerns about the deceased where he called the deceased to ask where he is going on the night in question, and then again went out of the nightclub looking for the deceased after 5 minutes, could it reasonably be expected for him not to make any attempt to find out about the deceased for several days?

54. PW2 said that he was working at the FDB building with 5 others and that he heard the sound of timber two times. First it was a 'tuk' sound like timber falling down, and next it was a 'tuk tuk' sound like timber hitting scaffolding. Then he shouted. After he shouted he heard a person falling and heavy breathing. He said that he saw a person lying on the ground when he stood up soon after he heard the person falling down and the heavy breathing. Then he ran to the place which was 7m to 8m from where he was. Accordingly, he appear to have approached the deceased soon after the deceased fell onto the ground and he does not see anyone else around. PW2 also does not mention the time he heard the sounds and then saw the deceased. However, PW3 said that he was informed about a man lying down near the FDB building around 11.05pm.
55. Needless to say, the time the accused was seen leaving the nightclub with the deceased is crucial and relevant to consider whether it was the accused who assaulted the deceased or whether there were other possibilities, in the absence of any eye witnesses.
56. Apart from the cautioned interview, that is the only evidence with regard to what took place near the FDB building.
57. The investigating officer PW7 repeatedly said that a thorough investigation was done before arresting the accused but did not explain in his evidence on how that

investigation was conducted leading up to identifying the accused as the suspect. According to PW7's evidence an offence was committed on 17/05/18 and the accused was arrested on 23/08/18 where he (the accused) confessed to committing the offence. The identification of the accused by PW1 takes place during the cautioned interview after the accused had allegedly confessed.

58. It was revealed by PW7 and also in the cautioned interview that a saliva sample of the accused was obtained for a DNA test. However, what transpired during that test was not disclosed. The individuals PW7 claimed that saw the accused near the FDB building with the deceased were not called as witnesses and the individual who failed to identify the accused during the identification parade according to PW8 was also not called to give evidence. You may find the evidence of the said individuals relevant in ascertaining whether the perpetrator was the accused or anyone else.
59. With regard to the cautioned interview, you may note the following among others when you consider the answers given by the accused during the cautioned interview and the evidence given by other witnesses;
- a) According to the cautioned interview, the accused had said that he went with the deceased to the guard room and he had apparently hit the accused at that place. However, the evidence of PW2 or the photographs of the scene that were tendered do not reveal about a guard room;
  - b) The accused had also said that the timber he hit the deceased did not break. However, PW2 saw PE-2 and PE-3 which were broken pieces near the deceased;
  - c) The accused had stated that he took the deceased's phone after the deceased fell down and also he picked up the coins that fell from the bag the deceased was carrying. However, according to PW2, he saw the deceased soon after he heard the deceased fell down and he did not see anyone else;
  - d) According to PE-8 [Page 19; Time - 0:18:40.0] the accused was told by PW7 that 4 individuals saw the accused walking with the deceased. These individuals were not called as witnesses. The next question asked is whether the accused was wearing something on his head, and was he wearing a hat and there is no answer. This subsequent question also

suggests that the accused went past the aforementioned 4 individuals. The accused was then asked can he recall, and then he says 'no'. This question whether the accused was wearing something on his head appear to have surfaced from whatever those four individuals have informed the police. PW7, does not allow the accused to give a clear answer to the question and encourages the accused to say that he cannot recall; and

- e) The accused had stated that he hit the deceased three times at the back of the deceased's head. He does not mention about hitting the deceased on the face. But there were injuries noted on the deceased's face and according to PW10 the injuries on the face may have been caused by the same blunt object.

60. Accordingly, may I again remind you that;

- a) if you find that the cautioned interview of the accused is one that is fabricated by the police you should disregard the cautioned interview; and
- b) if you find that the accused had not given the answers during the cautioned interview voluntarily as a result of possible oppression or trickery, you should disregard the cautioned interview.

61. If you disregard the cautioned interview as stated above, then you should find the accused not guilty of the offence as there is no other incriminating evidence the accused.

62. If you are satisfied beyond reasonable doubt that the accused had given the answers in his cautioned interview voluntarily, then you should consider whether the answers are true and should only rely on the answers that you consider to be true.

63. In the event you find that the accused had given the answers in the cautioned interview voluntarily, you may find following questions and answers relevant to the conduct of the accused;

Q: As you went and disappeared behind the FDB building, what happened then?

A: We went to the guard room that was . . . beside that same building, beside that building, he told me for us to . . . for us to have sex. I told him

to turn around. When he turned his back towards me, I took a timber and hit him. [PE8; Page 19; Time - 0:19:50.3]

...

Q: You then hit Akuila's head. What can you say to that? Is it true or is it a lie?

A: It is true. I did do it but I never intended to kill him. [PE8; Page 20; Time - 0:21:29.3]

[It is pertinent to note that the interviewing officer had suggested in the above question that the accused hit the deceased's head without the accused had not said that he hit the deceased's head in his prior answers.]

Q: How many times did you hit Akuila?

A: Three times. [PE8; Page 20; Time - 0:21:40.3]

Q: What part of his body did you hit?

A: The back of his head. [PE8; Page 21; Time - 0:21:50.3]

...

Q: What did you do when he fell?

A: After that then . . . fell and then tried to get up again. I hit him again. He fell flat on the ground. After that he tried to move. I hit him again, then he stopped moving. [PE8; Page 21; Time - 0:22:16.6]

Q: The last time you hit him, did you think he would survive -

A: Yes. [PE8; Page 21; Time - 0:22:40.6]

Q: The beating you gave him -

A: Yes, I - [PE8; Page 21; Time - 0:22:42.1]

Q: Or that he would die?

A: I didn't think he would die. I thought he would survive. The . . . [PE8; Page 21; Time - 0:22:43.4]


64. If you find that the above answers were given voluntarily and they are true you should assess those answers and any other relevant answers you find to be true to decide whether the accused engaged in a conduct that caused the death of the deceased and firstly whether the accused intended to cause the death of the deceased.

65. Intoxication is a relevant matter to be taken into account in determining whether the accused formed the intention to cause the death of the deceased.
66. 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.
67. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether 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.
68. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death of the deceased 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 realising 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.



69. In the event you are not satisfied beyond reasonable doubt that the accused did not have the intention to cause the death of the deceased and that he was reckless as to causing the death of the deceased you should consider whether the accused is guilty of the lesser offence of manslaughter. Please bear in mind that evidence of voluntary intoxication should not be considered in determining the state of mind of the accused with regard to the offence of manslaughter.
70. When it comes to the offence of manslaughter, what is required to be proved is that the accused intended or was reckless as to the risk, that his conduct will cause serious harm to the deceased but not cause the death.
71. Any re-directions?
72. 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 the exhibits and the court clerks will assist you if you wish to do so. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
73. Your opinion should be as follows;
- Murder – guilty or not guilty
- If not guilty
- Manslaughter – guilty or not guilty



  
Vincent S. Perera  
JUDGE

**Solicitors;**

**Office of the Director of Public Prosecutions for the State  
Legal Aid Commission for the Accused**