IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 135 of 2019

STATE

vs.

PIO RATUWAQA

Counsel: Ms. S. Tivao for the State
Mr. V. Vosarogo for Accused

Date of Hearing: 02nd March 2021

Date of Closing Submission: 03rd March 2021

Date of Judgment: 10th March 2021

JUDGMENT

1. The accused is charged with one count of Manslaughter, contrary to Section 239 (a) & (b) & (c) (ii) of the Crimes Act. The particulars of the offence are that:

COUNT 1

Statement of Offence

MANSLAUGHTER: *Contrary to Section 239 (a) & (b) & (c) (ii) of the Crimes Act 2009.*

Particulars of Offence

PIO RATUWAQA *on the 30th day of March, 2019 at Suva, in the Central Division, drove motor vehicle with registration number HZ 404 along Gardener Road Nasese, in a manner that caused the death of* ***ANE TAUATEA TAAKE****, and at the time of driving, the said* ***PIO RATUWQA***

was reckless as to the risk that his conduct would cause serious harm to ***ANE TAUATEA TAAKE.***

2. The hearing of this matter commenced on the 2nd of March 2021 and concluded on the same day. The Prosecution presented the evidence of five witnesses. The accused exercised his right to remain silent; hence, he did not adduce any evidence for the Defence. The learned Counsel for the Prosecution and the Defence then made their respective written and oral submissions. Having carefully considered the evidence presented in the hearing and the respective written and oral submissions of the parties, I now proceed to pronounce the judgment of this matter.

The Burden of Proof and Standard of Proof/Right to Remain Silence

3. The accused is presumed to be innocent until he is proven guilty. The presumption of innocence is in force until the Court finds him guilty of the offence. The burden of proof of the charge against the accused is on the Prosecution. It is because the accused is presumed to be innocent until he is proven guilty. In other words, there is no burden on the accused to prove his innocence, as his innocence is presumed by law.

4. The standard of proof in a criminal trial is "proof beyond a reasonable doubt." It means that the Court must be satisfied that the accused guilty of the offence.

5. The accused opted not to give evidence and exercised his right to remain silent. The accused does not have to provide evidence. It should not be assumed that the accused is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

Evidence

6. The Prosecution case is based upon the allegation that the accused had caused the death of the deceased by driving his car, after consuming alcohol, in the early morning of the 30th of March 2019. The accused was drinking with his friends and the deceased at a club in the night of the 29th and 30th of March 2019. That was the first time the accused met the

deceased. He then decided to leave for home, and then the deceased had requested him to drop her at Nasese. The accused had then gone to Nasese to drop her.

7. On his way to Nasese, his car, bearing the registration Number HZ 404, had fallen to the Nasova creek along the Gardener Road. The accused had managed to come out of the vehicle, which had landed in the creek upside down. He had sought help from the bystanders. Mr. Kolinisau, who is residing nearby, had called the nearby taxi stand to come and help the accused. Mr. Kolinisau had heard the crying sound of a lady who was inside the fallen car. Two taxi drivers initially came and tried to open the passenger side door to get the lady out but failed. They managed to open the door in their second attempt, which was about 30 minutes after the incident. According to Mr. Kolinisau, the lady's crying sound faded away when they managed to open the door. They got the lady out and placed her on the ground as she was unconscious. They had tried to resuscitate the lady but failed.

8. PC. Victor was doing night mobile patrol when he received the report of this accident. He had then gone to the scene of the incident, where he found Cpl. Ajay was already there. Cpl. Ajay advised PC Victor to escort the accused to the Police Station. PC Naicker had conducted the accused's breath analyst test on the 30th of March 2019 at the Totogo Police Station. According to the test result, 72 micrograms of alcohol in 100 millilitres of the accused's breath were found. In respect of the milligrams, 158.4 milligrams of alcohol in 100 millilitres of his blood were found. The test result of the breath analyst test was not disputed and tendered as an agreed document.

9. Doctor Praneel Kumar, who conducted the post-mortem examination of the deceased, gave evidence, explaining his findings. According to Doctor Kumar, there were no external injuries found in the body of the deceased. In respect of the internal injuries, there were no other injuries apart from the cardiovascular system. The heart was weighed 420g, which was heavier than the normal weight of a female. It was found that the right coronary artery was blocked by 70 to 75%. There was a thickness of 20 mm of the left ventricle wall. Due to these two conditions, the heart did not get enough blood and oxygen. This condition is called Ischaemic Heart Disease. This heart condition can cause death, but the manner it happens is different from a heart attack.

10. The Post-Mortem Examination report of the Disease states that the leading cause of death is Ischaemic Heart Disease. It had further noted that the external cause of death is the history of a motor vehicle accident. Doctor Kumar explained in his evidence that a person with such a compromise heart condition gets a sudden increase in heart rate due to a panic mode; it can be a contributing factor to death, though it cannot be proven in the post mortem. According to Doctor Kumar, if the deceased were awake and aware at the time of the said motor accident, it would have increased her heart rate as it is natural to a fright response. Doctor Kumar said that he could not really say for certain that the increase in heart rate was due to the motor vehicle accident and that caused the death. However, he affirmatively said that it can be a contributing factor to death.

11. During the cross-examination, the learned Counsel for the Defence asked Doctor Kumar if the deceased was drinking, smoking or dancing that night, would it caused the increase of the heart rate. Doctor Kumar, answering that question, said that dancing can, but it depends on how hard the deceased danced.

Elements of the Offence

12. Having briefly summarized the evidence presented during hearing, I now turn to discuss the main elements of the Manslaughter. Section 239 of the Crimes Act states that:

> *"A person commits an indictable offence if*
>
> *a) the person engages in conduct; and*
>
> *b) the conduct causes the death of another person; and*
>
> *c) the first mentioned person*
>
> *i) intends that the conduct will cause serious harm; or*
>
> *ii) is reckless as to a risk that the conduct will cause serious harm to the other person.*

13. Accordingly, the main elements of the Manslaughter are that:

i) The accused,

ii) Engaged in a conduct,

iii) The said conduct caused the death of the deceased,

iv) The accused, either intended that the conduct will cause serious harm, or was reckless as to a risk that the conduct will cause serious harm to the deceased.

Analysis

14. In view of the evidence presented and the admitted facts, the Defence has not disputed the events leading up to the deceased's death. Hence, I find the first two elements of the offence were not disputed. The closing submissions of the learned Counsel for the Defence mainly focus on the issues of causation, where he argues that the alleged conduct of the accused did not cause the death of the deceased. Moreover, the learned Counsel for the Defence submitted that the mere fact of the existence of a certain amount of alcohol in his blood is not sufficient to establish that the accused was reckless in driving the vehicle, causing the said accident.

15. The issue of the causation links to the *actus reus* of the offence, while the issue of recklessness relates to the *mens rea* of the offence. I first take my attention to the issue of causation.

Causation/*Actus Reus*

16. During this judgment, I will consider the principles enunciated in several leading decisions from other leading common-law jurisdictions, such as England and Australia, regarding the *actus reus* and *mens rea* of the offence of Manslaughter. However, I am mindful of the difference between common-law Manslaughter and Manslaughter as stipulated under the Crimes Act of Fiji. Common-law Manslaughter encompasses two categories, the first is killing by an unlawful and dangerous act, and the second is manslaughter by negligence. (*vide Blackstone's 2015 Ed p202*). The Manslaughter under Section 239 of the Crimes Act arises from a conduct of the accused that he performs with the intention that the conduct will cause serious harm or reckless as to the risk that conduct causes serious harm. Section 240 of the Crimes Act defines the offence of Manslaughter arising from a breach of duty.

17. Lord Justice Robert Goff in **David Keith Pagett (1983) 76 Cri. App. R. 279)**, in explaining the issues of causation. had referred to a passage in Professor Smith and Professor Hogan's Criminal Law (4th ed.1978) where it states that:

> *"Causation is a question of both fact and law. D's act cannot be held to be the cause of an event if the event would have occurred without it. The act. that is, must be a* ***sine qua non*** *of the event and whether it is so is a question of fact. But there are many acts with are sine qua non of a homicide and yet are not either in law, or in ordinary parlance, the cause of it. If I invite P to dinner and he is run over and killed on the way, my invitation may be* ***sine qua non*** *of his death, but no one would say, I killed him and I have not caused his death in law. Whether a particular act which is a* ***sine quo non*** *of an alleged actus reus is also a cause of it is a question of law."*

18. The above passage referred to by Goff LJ in **Pagett (supra)** defines the causation of Manslaughter, that the alleged act of the accused must be a *sine qua non* of the death of the deceased. The causation is the relationship between the unlawful act committed by the accused and the resulting effect of that act: the victim's death. (*vide* **Hettige JA in Nacagilevu v State [2016] FJSC 19; CAV 023.2015 (22 June 2016)**.

19. Goff LJ in **Pagett (supra)** had then gone on and explained the scope of the causation, where he held that:

> *"It is usually enough to direct them simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death. It being enough that his act contributed significantly to that result."*

20. Hence, the Prosecution is only required to establish that the accused's act had contributed significantly to the death of the deceased and no need to establish that his action was the sole or the main cause of death.

21. In this matter, the cause of death of the deceased is Ischaemic heart disease due to coronary artery disease and left ventricular hypertrophy. Doctor Kumar, in his evidence, explained

that the panic situation caused by the accident would have increased the heart rate of the deceased, and it can be a contributing factor for the heart to function in a non- synchronize harmony, causing Arrhythmias. Therefore, as Doctor Kumar testified, the most possible cause was the cardiac arrhythmias that have caused death. However, Doctor Kumar further said that it cannot be established in an autopsy, unlike living patience attached to the cardiac monitor. Doctor Kumar further said that after concluding that there were no other injuries, externally or internally, caused by the motor vehicle accident, the deceased's heart condition could be the most likely cause of death.

22. Based on Doctor Kumar's evidence, the learned Counsel for the Defence submitted that it cannot be certain that the panic or heightened state of the deceased's heartbeat was caused by the motor accident. Therefore, the evidence presented by the Prosecution lacks the required standard of proof to convict the accused of Manslaughter.

23. The Court of Appeal of England in **R v Dawson (81 Cr App R 150 CA at 153, 154)** had discussed the proper approach of evaluating the expert opinion given by the doctor's evidence. In **Dawson (supra)**, two masked men, one was carrying a pickaxe handle and another armed with a replica gun, while the third accused kept watch, demanded money from a 60 years old petrol filling station attendant, who, unknown to the accused, was suffering from heart disease. The attendant pressed the alarm button, and the suspects fled the scene. Shortly after the police arrived, the attendant collapsed and died from a heart attack. The three accused were charged, *inter alia*, for Manslaughter. During the hearing, the medical experts were of the opinion that the attempted robbery was responsible for the attendant's death. However, they could not rule out the possibility of a heart attack has occurred before the attempted robbery. The three accused were convicted and then appeal to the court of appeal on the following grounds:

> *"The learned judge*
>
> *i) failed to withdraw the offence of manslaughter from the jury seeing that the medical evidence amounted to it being no more than a high probability or that it was most probable that the attempted robbery started the heart attack which caused death.*

ii) *directed the jury that putting a person in such terror that he may suffer such emotional or physical disturbance as would be detrimental could for the relevant purpose constitute harm. It is argued that it is not open to a jury to convict if they find merely that an emotional disturbance that was detrimental was suffered by a deceased.*

iii) *directed the jury upon the burden of proof with regard to the expert medical evidence as to the cause of death. Both medical witnesses said they could to be sure that the robbery started the heart attack. They said it was no more than highly probable that it did.*

iv) *failed to direct the jury that the opinion it was highly probable that death was so caused was based on the assumption that the deceased's condition was stable minutes before the attempted robbery.*

v) *failed to direct the jury that if the heart attack had or may have started before the attempted robbery there was no or no sufficient evidence that the attempted robbery substantially caused death.*

vi) *directed the jury that the sane and reasonable people referred to in the test for the creation of the risk of some harm to the person must connote people who know all the facts, including, it is to be inferred, that the deceased suffered from chronic heart disease. There was no evidence that the appellants were aware of that condition.*

24. The Court of Appeal in **Dawson (supra)**, dealing with ground 1 and 3 of the appeal, which the Court later found had no merits, concluded that the direction given by the learned trial Judge based on the **Bracewell directions (1979) 68 Cr. App. R 44 at 49)** on how to evaluate the Doctor's evidence and the distinction between the scientific proof and legal proof was correct. I find the direction given by the trial Judge in Dawson has a significant persuasive value in this matter, which I reproduce below:

"You must remember this, that a doctor, and you may have thought that Dr. Green was a splendid example of fairness, is speaking from a scientific point of view. He was saying, 'I cannot as a scientific certainty rule out that which you postulate, namely partial asphyxia, recovery and then a heart attack,' but, he said, 'I incline strongly against that view.' You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr. Green as a scientific certainty, might, with propriety, satisfy you so that you felt sure. Do not be misled. There is no such thing as certainty in this life, absolute certainty. You ask yourselves the simple question upon the whole of the evidence do I feel sure? Take account of course of the doctor's evidence. It is the most important evidence on this aspect. He is really the only one qualified to speak here. Take account of his reservation fully. That direction, in our judgment, correctly draws the distinction between what might be described as scientific proof on the one hand and legal proof on the other. It is, with respect, an admirably lucid and succinct way of dealing with a problem which often arises in connection with scientific evidence. It is, of course, part of cross-examining counsel's duty to invite expert witnesses to consider alternative hypotheses and, after examining them in detail, to conclude by asking, 'Can you exclude the possibility?' The available data may be inadequate to prove scientifically that the alternative hypotheses is false, so the scientific witness will answer, 'No, I cannot exclude it,' though the effect of his evidence as a whole can be expressed in terms such as, 'But for all practical purposes (including the jury's) it is so unlikely that it can safely be ignored.' This is in substance what Dr. Green said."

25. As mentioned above, Doctor Kumar testified, explaining that the panic situation caused by accident would have increased the deceased's heart rate, and it can be a contributing factor for the heart to function in a non- synchronize harmony, causing Arrhythmias. Therefore, the most possible cause of death was cardiac arrhythmias. However, Doctor Kumar further said that it cannot be established in an autopsy, unlike living patience attached to the cardiac monitor. Doctor Kumar also said that after having concluded that there were no other

injuries caused by the motor vehicle accident, the deceased's heart condition could be the most likely cause of death.

26. During the cross-examination, the learned Counsel for the Defence asked Doctor Kumar whether drinking, smoking dancing could also be a cause to increase the heart rate. Answering that question, Doctor Kumar said, "*Well, dancing it can, but it depends on how hard their dancing, yes, but it can*". Accordingly, Doctor Kumar only affirmed that dancing could be an alternative possibility. However, there is no evidence presented or pointed out by the Defence that the deceased was dancing before this alleged accident. Additionally, the learned Counsel for the Defence did not venture further in exploring other alternate possibilities during his cross-examination.

27. Doctor Kumar's evidence of opinion of the cause of death is founded on probabilities and not on certainty. As expounded in **Dawson (supra),** the Court is not obliged to conclude that the cause of death of the deceased is not sure based on the opinion of "probability' or "cannot be excluded the possibility" given by the Doctor (*vide p 154 of Dowson (supra)*). If then, there is no purpose in giving this Court the jurisdiction to adjudicate the facts of the dispute. Of course, the opinion of the Doctor has the greatest importance. However, the Court needs to make its judgment on the whole of the evidence presented during the hearing, including the Doctor's opinion.

28. Mr. Kolinisau had heard the deceased's crying when she was stranded inside the car after it fell upside down in the creek. It had taken nearly 30 minutes to get her out of the vehicle. During that period, Mr. Kolinisau had observed her crying faded away. She was unconscious when she was taken out. This evidence was not disputed or suggested otherwise by the Defence. Thus, it establishes that the deceased was awake and aware of the accident when the car fell into the creek. According to Doctor Kumar, if the deceased was awake or aware of the accident, it is natural that her heart rate would increase in response to the feeling of fright. Besides that, the Doctor had not found any external or internal injuries caused by the accident to rule out other possibilities. For these reasons, I find the evidence of Prosecution has established that the accident had caused or substantially contributed to increasing the deceased's heart rate, which then ultimately caused her death. Accordingly, I find that the Prosecution has established beyond reasonable doubt the *actus reus* of this offence, that the

accused was engaged in conduct, which was the driving of the car after consuming alcohol, and involved in an accident, and that accident had substantially contributed the death of the deceased.

Mens Rea

29. I now turn to *mens rea* of this offence. Unlike in England, the Prosecution is not required to prove that the conduct engaged in by the accused was unlawful and dangerous. According to section 239 of the Crimes Act, the Prosecution has to establish that the accused's alleged conduct had a risk of causing serious harm to the deceased. Irrespective of the said risk, he continued his conduct, thus causing the death of the deceased.

30. I do not find much distinctions between a conduct that poses a risk of causing a serious harm and a dangerous conduct that causes serious harm. On that account, the test adopted by the Courts of England in determining the dangerous act and corresponding fault element of the said dangerous act could be adopted with necessary variances.

31. The House of Lords in **DPP v Newbury (1977) A.C. 500, H.L)** had discussed the *mens rea* pertaining to the dangerous act, where Lord Salmon held that:

> *"I agree entirely with Lawton LJ that that is an admirably clear statement of the law which had been applied many times. It makes it plain (a) that an accused is guilty of manslaughter if it is proved that he intentionally did an act with was unlawful and dangerous and that the act inadvertently caused death and (b) that it is unnecessary to prove that the accused knew that the act was unlawful or dangerous. This is one of the reasons why cases of manslaughter very so infinitely in their gravity. They, may amount to little more than pure inadvertence and sometimes too little less than murder.*

32. The House of Lords in **Newbury (supra)** enunciated an objective test to determine the accused's *mens rea*. The objective test is whether all sober and reasonable people would recognize that the act was dangerous and unnecessary to establish whether the accused recognized its danger.

33. The Court of Appeal of England in **Dawson (supra)** had elaborated the meaning of sober and reasonable man. In dealing with the appeal ground 2 and 6, where the Appellants contended that direction of the trial Judge to the jury in respect of the reasonable person was erroneous, the Court found that:

> *"This test can only be undertaken upon the basis of the knowledge gained by a sober and reasonable man as though he were present at the scene of and watched the unlawful act being performed and who knows that, as in the present case, an unloaded replica gun was in use, but that the victim may have thought it was a loaded gun in working order. In other words, he has the same knowledge as the man attempting to rob and no more. It was never suggested that any of these appellants knew that their victim had a bad heart. They knew nothing about him."*

34. In **Pagett (supra)**, Goff LJ found that the trial Judge's direction, which was founded on the above discussed objective test, was fair and lucid directions. In **R v F (J) and E (N) (2015) 2 Cr. App. R.S. CA)** the Court of Appeal (Criminal Division) had considered whether the subjective test adopted in **R v G (20030 UKHL 50, (2004) 1 AC 1034)** could be applied to the offence of Manslaughter. In this case, a teenage boy and a girl were prosecuted on the counts of Manslaughter through unlawful and dangerous act and arson, being reckless as to whether life was endangered. Having considered the previous decisions of **R v Church (1965) 49 Cr. App. R. 206) R v Lamb (1967) 51 Cr. App. R. 417) and R v Newbury (supra)**, Lord Thomas of Cwmgiedd CJ concluded that the Court must adopt the objective test enunciated by those cases in order to determine whether the act was dangerous.

35. In view of the above discussed judicial precedents of England, I find it would be more practical to adopt an objective test based on a sober and reasonable man, but obviously with the necessary variation that suits the requirement of Section 239 of the Crimes Act, to determine whether the alleged conduct of the accused had the risk of causing serious harm to the deceased.

36. The learned Counsel for the Defence urged in his submission that the Court has to determine whether the drinking and driving, itself reckless conduct? The learned Counsel submitted further, apart from the mere drinking and driving, the Prosecution must prove certain other conduct of the accused such as over speeding, indifference to weather condition, dangerous overtaking, or reckless disregard of pedestrians' life *etc*.

37. There are certain conducts in our ordinary life, which are inherently capable of causing a risk of harm to others. Driving a motor vehicle carries such an inherent risk or danger of damaging other vehicles or causing serious harm/harm to other people. (*vide Blackstone's 2020 Ed p 25; **Hill v State [2018] FJCA 123; AAU109.2015 (10 August 2018)***) Such risks or dangers have been mitigated with a set of laws, rules and regulations, governing the manner of driving motor vehicles. Section 103 (1) of the Land Transport Act is one such law stipulated to maintain the driving of the drivers with due care and attention. Section 103 (1) of the Land Transport Act has prescribed that it is an offence if a person drives or attempts to drive a motor vehicle or is in charge of a motor vehicle while more than the prescribed concentration of alcohol is present in his or her blood. According to Regulation 3 of the Land Transport (Breath Test and Analysis) Regulations 2000, the prescribed concentration of alcohol is 80 milligrams of alcohol in 100 millilitres of blood.

38. It appears that the legal regime in Fiji has found a driving a vehicle while having over 80 milligrams of alcohol in 100 millilitres of blood is a prohibited act. Such an action has the potential of undermining the capacity of the driver to drive the vehicle with care and proper attention, thus exposing the public and other vehicles to the inherent risk associated with the driving of a motor vehicle. According to PC Naicker, the breath analysis test confirmed that the accused had 158.4 milligrams of alcohol in 100 millilitres of his blood. As a consequence of this evidence, I find that any sober and reasonable bystander, who knew the circumstances that were known to the accused at that material time, will find the driving of the accused after consuming alcohol had a risk of causing serious harm to the deceased, who travelled with the accused in his car.

39. The next issue is whether the sober and reasonable bystander knew that the deceased was having an Ischaemic Heart Disease. There is no evidence to establish that the accused knew the heart condition of the deceased. It was the first time the accused had met the deceased

that night at the club. There is no evidence of what happened or what kind of conversation took place between the accused and the deceased during their journey in the car before the accident. Under such circumstances, could the Court safely conclude that the sober and reasonable man, who had the same knowledge as the accused, would find the driving of the accused after consuming alcohol will cause serious harm as he did not know about the heart condition of the deceased? Together with this issue, the Court has to determine further whether the fright or sudden panic caused by the accident, triggering the increase of heartbeat, is considered serious harm.

40. In **Dawson (supra)**, the Court of Appeal of England discussed whether the frightening is itself "harm". As I explained before, the accused attempted to rob the deceased, a 60 years old petrol station attendant. He had succumbed to death due to the heart attack, which was triggered by the alleged attempted robbery. Watkins LJ, in his judgment, found that:

> *"There seems to us to be no sensible reason why shock produced by fright should not come within the definition of harm in this context. From time to time one hears the expression "frighten to death" without thinking that the possibility of such event occurring would be affront to reason or medical knowledge. Shock can produce devastating and lasting effects, for instance upon the nervous system. That is sure harm, i.e. injury to the person."*

41. However, the Court found in **Dawson (supra)** that the trial Judge's direction to the jury regarding the objective test was erroneous. Hence, the Court had not considered whether the Appellant's lack of knowledge about the poor heart condition of the deceased could exonerate the Appellants from their criminal culpability of Manslaughter.

42. In **Regina v M (J) and another (2013) 1 WLR 1083)**, the accused were involved in an altercation at a nightclub with some of the doormen. One of the doormen, who appeared to be in good health and had not been aware that he had a renal artery aneurysm, died. The accused were charged with Manslaughter on the basis that they had contributed to the victim's death. The Prosecution's case was founded on the allegation that the cause of death was the rupture of the aneurysm consequent on shock and a sudden surge in blood pressure due to the release of adrenalin during the altercation. The trial Judge ruled that to enter a

conviction for Manslaughter, the Prosecution has to prove that the victim died due to the harm the affray risked causing.

43. The Court of Appeal of England in **Regina v M (J) and another (supra)**, allowing the appeal, found that it is not required that the accused should have foreseen any specific harm or the reasonable bystander would have recognized the precise form or nature of the harm, which had in fact ensued and caused the death of the victim. What required is whether the reasonable and sober bystander would have recognized that the accused's unlawful activities had inevitably put the victim at risk of some harm resulting from such activities.

44. Accordingly, it is not required to satisfy in this matter that the accused or the reasonable and sober bystander would have realized the risk of the actual nature of the harm ensued to the deceased. It is sufficient to establish that the reasonable and sober bystander would have realized that the alleged conduct of the accused, that was driving a car while having 158.4 milligrams of alcohol in 100 millilitres of his blood, would have put the deceased at risk of some serious harm resulting from that conduct. Accordingly, there is no requirement to establish that the accused had the knowledge or would have known the actual condition of the deceased's heart to determine the accused's conduct had caused a risk of serious harm to the deceased.

45. The High Court of Australia in **Mamote Kulang v The Queen (1964) HCA 21, (1964) 111 CLR 62)** held that the frailty of the victim's health is not an excuse for the offence of Manslaughter. In **Mamote Kulang (supra),** the accused had punched his wife on her upper part of the abdomen. The blow caused her great pain, and she died soon after she received the blow. It was found at the post-mortem that the blow had ruptured her spleen, which was the cause of death. It was further found that the spleen was a typical malarial spleen, large, soft and mushy and more susceptible to rupture than a normal spleen. The accused contended that he was not aware of the condition of her spleen; hence, the death was an accident.

46. Windeyer J in **Mammoth Kulang (supra p79)** held that:

> *"There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt,*

although not intended to be fatal or to cause grievous bodily harm. It does not avail an accused charged with manslaughter in such a case to say that death was unexpected and that it was only because the person struck was in ill-health or had some unsuspected weakness that the blow proved fatal. That does not make homicide excusable. A killing is not the less a crime because the victim was frail and easily killed."

47. The Supreme Court of Fiji in **Nacagilevu v State [2016] FJSC 19; CAV 023.2015 (22 June 2016)** found that the contention that the medical condition of the deceased of which the Petitioner was unaware would have rendered the victim susceptible to death than a person of normal health is not a valid ground to excuse the Petitioner from criminal liability of Manslaughter.

48. Section 246 (2) (d) of the Crimes Act states that:

> *i) Without limiting the right of a court to make a finding in accordance with subsection (1), a person is deemed to have caused the death of another person although the act is not the immediate or the sole cause of death in any of the following cases—*
>
> *a) if by any act or omission he or she hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused death;*

49. Accordingly, there is no requirement to establish that the accused knew about the actual condition of the deceased's heart to find him culpable for causing the death of the deceased. Moreover, the accused is not allowed to use the lack of knowledge of the deceased's weak heart condition as a shield to exonerate him from the culpability of causing the death of the deceased. Given the evidence presented during the hearing, I am satisfied that a sober and reasonable bystander will find the conduct of the accused, that was driving a car while having 158.4 milligrams of alcohol in 100 millilitres of his blood, had put the deceased at risk of some serious harm resulting from that conduct. Accordingly, I find the Prosecution has proven the *mens rea* of the accused beyond a reasonable doubt.

50. In conclusion, I hold that the Prosecution has proven beyond a reasonable doubt that the accused has committed the offence of Manslaughter as charged in the information. I, therefore, find the accused guilty of the offence of Manslaughter, contrary to Section239 (a) & (b) & (c) (ii) of the Crimes Act and convict him for the same accordingly.

.....

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

10th March 2021

Solicitors

Office of the Director of Public Prosecutions for the State.

Vosarogo Lawyers for the Accused.