

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 08 of 2019
[CRIMINAL JURISDICTION]

STATE

V

TIMOCI CAKAU

Counsel : Ms. S. Tivao and Mr. S. Shah for the State
Ms. T. Kean for the Accused

Hearing on : 18 January – 22 January 2021

Summing up on : 25 January 2021

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 exhibit 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. You have to bear in mind that a statement made by a witness out of court is not evidence. Therefore, a statement made to police by 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. However, if a witness admits that a certain statement in such police statement was made by that witness and that it is true, then that portion of the police statement becomes part of that witness' 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. 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.
9. 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. Inconsistencies may lead you to question the reliability of the evidence given by a witness.
10. 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 see whether there is any acceptable explanation for it. In this regard, you may bear in mind that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail given by a witness to be the same from one account to the next.

11. Accordingly, if there is a significant inconsistency in the evidence given by a witness, it might lead you to conclude that the witness is generally not to be relied upon and reject the entire evidence of that witness; or, you may reject the part of that witness' evidence that you may find unreliable given the inconsistency and accept the part of the evidence you consider reliable; or if you find that the inconsistency has been duly explained you may disregard the inconsistency and accept the entire evidence of the witness as reliable.
12. 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.
13. Based on the evidence you decide to accept after your assessment, 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.
14. As a matter of law you should remember that the burden of proof 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 person's guilt.

15. In order to prove that the accused is guilty of a particular offence, the prosecution should prove all the elements of that offence beyond reasonable doubt. If you have a reasonable doubt in respect of even one of those elements, as to whether the prosecution has proved that element beyond reasonable doubt, then you must find the accused not guilty of that 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 offences the accused is charged with and matters that will enable you to decide whether or not those charges have 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

Manslaughter: contrary to Section 239 of the Crimes Act 2009.

Particulars of Offence

TIMOCI CAKAU between the 23rd day of December, 2018 and the 24th day of December, 2018 at Suva, in the Central Division, unlawfully assaulted **RATU EMOSI SERU TAGIVAKATINI**, which caused the death of the said **RATU EMOSI SERU TAGIVAKATINI** and at the time of such assault was reckless as to causing serious harm to **RATU EMORI SERU TAGIVAKATINI**.

19. Now, let me take you through 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 evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

20. The prosecution led the evidence of five witnesses. After the prosecution case the accused was explained his options according to law. The accused chose to give evidence on oath.

21. The following facts which are before you as admitted facts have been admitted between the prosecution and the defence. The prosecution need not prove those facts. You should regard them as facts that are proven beyond reasonable doubt. Those facts are;

1. *The Deceased is Ratu Emosi Seru Tagioakatini, 52 year old Security Officer of Yue Lai Hotel, Suva.*
2. *The Accused is Timoci Cakau, 28 year old Security Officer of Yue Lai Hotel, Suva.*
3. *The deceased and the accused worked together.*
4. *On 23 December 2018 a breakup party was held at Yue Lai Hotel, for staff working at the hotel. The deceased and accused attended the party.*
5. *At the party, grog and alcohol was available. The deceased and the accused both consumed grog and alcohol at the party.*
6. *After drinking at the party the deceased with a few colleagues proceeded to Sand Dunes night club where they proceeded to drink alcohol, he was later joined by the accused.*
7. *After a while the group left Sand Dunes night club and proceeded to Temptations 2 nightclub, where they continued to consume alcohol.*
8. *Sometime after midnight at Temptations 2 nightclub witnesses noticed the accused and the deceased throwing punches at each other. The bouncers for Temptations 2 Nightclub then took both the deceased and the accused out of the nightclub.*
9. *Outside of Temptations 2 nightclub the deceased and the accused continued to fight. This was witnessed by Kavei Waqatabu, Kaliopati Galuake, Viliame Cama Kaitani and [Atueta] Vueti.*
10. *At about 3am Veniasi Turaga noticed the deceased lying near the main door inside of Temptations 2 Nightclub, he approached the deceased and tried to get him to sit but he was too heavy, with the help of the other staff he carried the deceased outside of Temptations 2 Night Club. When they left the deceased outside he was still breathing.*
11. *When the deceased was outside, the bouncers of Temptation 2 Nightclub tried to look for his group of friends but they could not find anyone. The accused noticed the deceased outside Temptation 2 Nightclub and arranged with a private rental to take the deceased back to Yue Lai Hotel.*
12. *The deceased was then taken to Yue Lai Hotel where Mr. Masivoi was present on duty. When he pulled the door of the vehicle he noticed that the deceased was unresponsive. He lifted the deceased with the help of the driver and placed him on the driveway of Yue Lai Hotel.*
13. *After the driver left Mr. Masivoi was calling the deceased to wake up, he threw cold water on the deceased but still did not get a response. Mr. Masivoi then touched the deceased pulse on his wrist but did not feel any movement. He then rushed to*

Flagstaff Police Post to report the matter.

22. The first witness for the Prosecution was one Kaveni Waqatabu Rakautoga (“PW1”). He said that:

- a) *On 23/12/18 he was working as a bouncer at Temptations 2 Nightclub. Around midnight he saw an old man and a young man entering the club. He was concerned about them because they were smelling of alcohol when they entered. He said the old man’s legs were weak when he entered because he had been drinking. After drinking at the nightclub for some time the old man started to punch the young man. The old man threw five punches at the young man, where the young man dodged the punches. He took the two of them outside the club so that they can solve the matter outside.*
- b) *After they were brought outside they challenged each other for a fist fight. At one point he saw the old man holding onto the young man’s shirt. The young man then tackled the old man where the old man fell onto the ground with his head hitting the edge of the footpath. He saw this from a distance of about 4 footsteps. He said he was standing at the door of the nightclub.*
- c) *After the old man fell, the young man pulled the old man up and then they went inside to have more drinks. He also went inside the club. After about 2 hours he saw the old man sitting on the floor leaning onto the first post near the entrance of the nightclub. It was around 3.30am.*
- d) *When he saw this, he carried the old man outside with one of his co-workers. While the old man was sitting on the floor outside the nightclub, the co-worker went and brought the young man. The young man then took the old man and they got into the vehicle. He said he does not know the name of the young man and does not recall how he looked.*
- e) *During cross examination he agreed that the old man was bigger in built compared to the younger man. He agreed that the younger man was taken outside the nightclub by 2 male bouncers, and the old man was already outside the club when the younger man was brought outside. He said that the old man was taken outside first because he is the one who started the fight.*
- f) *He agreed with the suggestion that while the old man and the young man were outside the nightclub, it was the old man who threw the punches first. When it was suggested that the young man was punched by other bouncers before the fight with the old man, he said he does not know about that.*
- g) *He agreed that the old man was pulling the young man from the young man’s shirt collar. He said the old man fell because the young man tackled the old man’s leg. He agreed that after the old man fell down, the old man stood up with the help of the young man. According to him the old man did not complain of any dizziness or headache. He also agreed that it was the young man who put the old man into the private car.*

23. The second prosecution witness was one Kaliopati Galuake ("PW2"). He said that:

- a) *On 23/12/18, he was working as a doorman at the Temptation 2 nightclub. Around midnight he saw a young man and an old man being taken outside the nightclub. From there appearance he noticed that they were heavily drunk.*
- b) *He said he can't recall when that young man and the old man entered the nightclub because they entered as a group and all were wearing the same printed material. He said it was Viliame and Samu who brought them outside. The old man was brought first.*
- c) *When the young man was brought out that young man and the old man started swearing at each other. As they were swearing the old man punched the young man. Then the young man got angry and punched the old man back. He said that he was about 12 feet away from the two.*
- d) *When the young man threw a punch the old man blocked both elbows of the young man and hugged the young man. He said at this point they were punching each other on the footpath. He said that when the old man hugged the young man the force of that made them fall on the pitch. He said that their legs made them fall.*
- e) *He said that when the old man hugged and because of the force of the young man's struggling their legs fell onto the road. They were initially on the footpath. Then he explained that the old man and the young man stepped down onto the road which was at a lower level compared to the footpath when the old man hugged the young man. At this point the old man was facing the road turning his back to club. Then the old man tried to walk back to the footpath then the old man tripped over the footpath as his leg hit the footpath. Because the two were still hugging each other the old man fell on his back and hit his head on the footpath and the young man fell on top of the old man.*
- f) *During this fight he was on duty sitting at the door. He did not see what happened after the two fell down because he had to check the bags of two boys who entered the club at that moment. He said that there was not much light at the place where the two were fighting and only the light from the Christmas lighting at the nightclub was available.*
- g) *Thereafter he noticed the old man and the young man going inside the nightclub. Around 3.30am he saw the old man being carried outside by two bouncers. The two bouncers made the old man sit on his left side and made the old man lean against the wall of the club. Then the young man came outside and asked for help to carry the old man into a car. He recognized the accused as the person he was referring to as the young man.*

24. The third witness for the Prosecution was Atueta Vueti ("PW3"). He said that:

- a) *On 23/12/18, he was working as a bouncer at Temptation 2 Nightclub. He said he witnessed two fights at the nightclub that night. The first fight took place around*

10.00pm in the middle of the dance floor, when he was coming back from his break. He said that a small old man, a tall man and another young man who came together got into an argument with another group of five and then the two groups exchanged punches. That fight did not last for even five minutes.

- b) Later, while he was having a smoke outside the nightclub, a customer informed him that the two bouncers are unable to stop a fight taking place inside the nightclub. When he went inside, he saw that the same group of three men wanted to fight with the second group. He with the others told those who were involved in the fight to stop the fight and move away. He said the tall man in the first group immediately listened but the other two kept on arguing. He had to remove them from the nightclub with Kaveni, Viniasi and Samu.
- c) He pulled the old man outside and the other three tried to pull the young man. While he was outside with the old man, the said old man was still swearing and arguing saying that he wants see the young man. Then the young man came out and the old man tried to punch the young man. There was an exchange of words and a colleague of his pulled the old man. Then the young man got into a heated argument with him (the witness) and his colleagues pulled him aside. In that process the old man escaped and punched the young man again.
- d) After throwing punches, the old man tried to grab the young man and while doing that threw more punches. He said the young man ended up lifting the old man by the chest which he referred to as a 'bear hug'. Then both of them fell down together on the hard pavement where the old man's head hit the edge of the pavement. After they fell, there was a further exchange of words and he pulled them apart with his colleagues. Thereafter, the old man and the young man said that their argument is settled and they had sought forgiveness from each other.
- e) They then went back inside the club. After half an hour a customer informed that the old man had fallen near the door. He lifted the old man with Viniasi and took the old man outside the nightclub. The old man was still conscious after he was taken outside and he asked for ice water saying that he was hot. When Viniasi came back with ice water, the young man and a colleague of his had already loaded the old man into a vehicle.
- f) During cross-examination he confirmed that the old man he took outside the nightclub after the second fight was the same old man who was involved in the first fight he witnessed. He agreed that the bouncers who brought the young man outside after the second fight he described had to use some force on the young man to bring him outside.
- g) He agreed that, during the fight between the old man and the young man outside the nightclub, the old man was pulling the young man's shirt collar at one point. He said, in that process, the young man wrapped his arms around the old man which resulted in the young man lifting the old man. Being shown his police statement dated 24/12/18, he agreed that he had informed the police that he escorted the young man out of the club and not the old man as he said in his evidence.

h) *During re-examination he said that he brought the old man out of the nightclub and he clearly said that to the police. He said that him and Kaveni were interviewed together and his interviewing officer was talking with another officer while he was being interviewed.*

25. The fourth witness for the Prosecution was Viliame Cama Kaitani ("PW4"). He said that:

- a) *On 23/12/18 he was working as a bouncer at Temptation 2 Nightclub. On that night he witnessed two fights. The first fight involved two groups where one group consisted of three men and the other group consisted of three to four men and two women. He said that the two groups exchanged punches. Then the bouncers dragged two men outside. After they were taken outside they continued to challenge each other.*
- b) *He said the younger man asked the old man why the old man punched him inside the nightclub. The old man then challenged the young man for a fight and at the same time the old man ran towards the young man and punched the young man. The young man also punched the old man back. He said that the young man hit the old man on the face and the old man fell down landing on his lower back.*
- c) *He said that he came to know this old man's name as Ratu Emosi Seru Cagiwakatini ("deceased"). Then another man from the deceased's group challenged the young man for a fight. Then the deceased stood up, ran towards the younger man and punched the younger man. When the younger man punched back, that punch landed on the deceased's face and the deceased fell down on his back. He said that the deceased fell down again for the third time during this fight being punched by the younger man. This fight continued till some members of the deceased's group came to take the deceased away. He took the younger man away. He said that this younger man was called by the name "Leps". This fight took place between 9pm and 10pm. 'Leps' then walked towards another nightclub where the deceased and his group went back to their drinking spot inside Temptation 2 nightclub.*
- d) *He said that the second fight took place around midnight. He said that the second fight had started inside the nightclub and he was not present when it started. He saw the deceased being taken outside the nightclub by another man. He was standing beside the door outside the nightclub. He said that the man who brought the deceased requested that Timoci Cakau be brought outside the nightclub. Then he went inside the nightclub and brought the accused outside. As soon as they reached the exit the deceased was swearing at the accused and challenged the accused for a fight. Thereafter the deceased and the accused exchanged few punches and the deceased threw the first punch. After the fight stopped the deceased went back inside the nightclub with another man. That man told them not to allow the accused back inside the nightclub. Then the accused swore at them and challenged him and another workmate for a fight.*

- e) *While he was trying to calm down the accused who kept challenging and swearing at them, another staff member who came there by the name of Atueta had a fight with the accused. He took the accused away from Atueta. While he was trying to calm down the accused, the deceased came and punched the accused's face asking him why he punched the staff of the nightclub. The deceased and the accused then began to exchange punches. He said the first punch thrown by the deceased landed on the accused's face and the second and third punches on the accused shoulders and head respectively. The punches thrown by the accused mostly hit the deceased's head.*
- f) *While they were fighting, the deceased tried to hold on to the accused and they fell down. They stood up and continued to exchange punches. The deceased then tried to grab the accused's shirt. The accused in an attempt to avoid the deceased grabbing him, pushed the deceased using his shoulders like in a rugby tackle. This resulted in the deceased falling down landing on his back and his head heavily hitting the cement footpath. He said he could hear the deceased's head banging on the footpath and it was like when a rock being thrown on cement.*
- g) *He said when the deceased fell, the accused also fell. He saw that the deceased was in shock while lying on the ground. Then he saw the accused kneeling on top of the deceased and saying "I will kill you" while holding onto the deceased's shirt collar. The deceased was in shock and did not move. He said, while the accused was holding on to the deceased's shirt collar the accused was shaking the deceased where the deceased's head was hitting the concrete footpath.*
- h) *After that the accused head-butted the deceased 3 to 4 times. Then another man pulled the accused away from the deceased and then the accused walked away.*
- i) *Then that man helped the deceased to get up on his feet. At this time the deceased looked a bit dizzy. He said, the accused and the deceased were talking at this point in time where he heard the deceased telling the accused that he will meet the accused at their workplace when they are sober. After this conversation that other man took the accused inside the nightclub. The accused was not allowed to go back inside the nightclub.*
- j) *He said he was 4 to 5 meters away from the place the accused and the deceased were fighting and no one was blocking his view. He said the lights surrounding that place were of different colours but it was bright. He said that he did not see the deceased again after the deceased went inside the nightclub.*
- k) *During cross examination he agreed that the deceased and the accused came into the nightclub separately with their respective groups. He agreed that the accused was brought outside the nightclub by two bouncers and the accused confronted those bouncers with regard to the manner he was brought out. He said that he was one of the bouncers who brought the accused out.*
- l) *He said after the accused and the deceased fought outside the nightclub he had to go to their second nightclub to attend to another fight. He agreed that when he came back to Temptation 2 after attending to that fight he saw the deceased sitting beside*

the entrance to Temptation 2 nightclub. He agreed that he also saw the accused putting the deceased into a vehicle and he said that when he came back the accused also came from another nightclub. Then when it was suggested that the accused never left Temptation 2 to go to another nightclub he agreed.

m) During re-examination he said that the deceased fell down two times during the fight with the accused. The first time was when the deceased was pulling the accused's collar and the second time was when the accused pushed the deceased with his shoulder. He said that when he saw the deceased sitting beside the entrance after he returned he asked one of the staff what happened and he was told that the deceased fell down on his face hitting his head on the floor. He was also told that the staff brought the deceased out of the nightclub and made him sit beside the entrance.

26. The fifth witness for the Prosecution was Dr. Praneel Kumar ("PW5"). He said that:

- a) He has been practicing as a pathologist since 2013. He completed his MBBS in 2010 from the Fiji School of Medicine and a Diploma in Pathology in 2014. Since February 2013 he is working in the Forensic Pathology Unit in the Fiji Police Force.*
- b) On 26/12/18 he conducted the post mortem examination of the deceased. The report he prepared was tendered as PE1. He said that the clinical history found on page 1 of the report was given by the investigating officer. He said, first he looked at the external injuries and there were two. First injury he noticed was a 20mmx20mm bruise on the skin on the cheek bone. Secondly he noticed some bleeding at the bottom of the right eye.*
- c) During the internal examination he noted bleeding below the scalp in the right frontal area. He said any trauma to the head can cause such bleeding. This injury could be caused by any heavy blow to the head with an object or with the fist. He said a fall from a height could also cause such injury. He further explained that a simple fall cannot cause this injury and there has to be some velocity applied like a punch or a push.*
- d) He said that the estimated time of death cannot be established from the post mortem because the relevant examination that is necessary to determine that is not carried out in Fiji.*
- e) The next injury he noted was in the brain. He said that there was haemorrhage or bleeding in the right cerebral hemisphere. He said that the brain has three protective coverings and arachnoid mater is one of the three protective coverings of the brain which is stuck to the brain. The bleeding was noted below the arachnoid mater. He said that the most common cause of this bleeding is trauma to the head. Even though in some cases this occurs naturally in this case it wasn't natural. This injury could be caused by any substantial trauma like a blow to the head, a punch, hitting with an object, falling from a height or a change in velocity. He explained that a high*

velocity movement of the head which is usually seen in motor vehicle accidents could also cause such injury.

- f) The last page of his report indicates the cause of death. He said the hemorrhage in the brain could cause death. He said that if a person falls on his back and hit his head it is possible for the injury noted in this case in the brain to occur.*
- g) He said that after an injury noted in the brain as noted in this case occurs, it takes a while for the bleeding to form. He said it takes about two hours and depending on the force and the velocity of the injury, it can range to hours or days before death can occur.*
- h) He said that the estimated time of death was 0600 hours. He said this, based on the clinical history. He said, given the history and the physical findings, the cause of death was due to a traumatic cause. He said it was due to trauma to the head, by a blow to the head or punch and also a fall whereby force was applied to the head and later hitting the curb. He said that all these resulted in the deceased developing a bleed in the brain.*
- i) During cross examination he said he cannot establish the exact time the bleeding noted in the brain occurred and he can just give a time frame. He agreed with a suggestion that if there were any injuries to the back of the head he would have noted that in his report. He agreed that such injuries are not noted in the report because there was none.*

27. The fifth prosecution witness gave his medical opinion based on what he observed and his experience. 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 opinion given by the fifth prosecution witness. Evaluating his evidence will therefore include a consideration of his expertise, his findings and the quality of the analysis which supports his opinion.

28. That was the evidence for the prosecution. The accused opted to give evidence on oath.

29. The accused said in his evidence that:

- a) On 23/12/18 he consumed alcohol with the deceased at the break up party held at Yue Lai Hotel. Thereafter they proceeded to Sand Dunes Nightclub and continued to drink. While he was drinking at Sand Dunes, he felt punches on his face. When*

he turned he saw that it was the deceased who was punching him. He said that more than 3 punches landed on his face. He asked the accused whether he has any problem and they can take it outside. He couldn't recall whether the deceased responded but he remembers that the two then proceeded outside the nightclub. While they were outside he again asked the deceased the reason for punching on his face. He said the deceased smiled but he cannot recall the answer given by the deceased. He said that he and the deceased are "Tau". He explained that where he is from and the where the deceased is from, they are related through the ancestors. Therefore they used to joke with each other.

- b) They then went back to Sand Dunes and continued drinking. Thereafter, around midnight he went to Temptation 2 Nightclub and continued to consume alcohol. He said that he did not go with the deceased. He went and joined his co-workers who were standing beside the bar. After a few minutes he felt two punches one after other at the back of his head. When he turned he saw that again it was the deceased who was throwing the punches. When he asked the reason the deceased started swearing at him. Then there was an exchange of words between the two followed by punches. One of the co-workers stopped the fight at one point. His name was Tomasi Naitini. Thereafter, sometime later the deceased was taken out and he went back and joined his co-workers. While he was standing with his group two bouncers came to him and carried him outside. He felt embaraced due to the way they were taking him. Because of that he struggled. Then the bouncer who was holding him under his arms choked him. Once the bouncers released him he turned to the one who choked him and asked him the reason they brought him in that manner. Then that bouncer punched his face which made him dizzy. Thereafter both bouncers started attacking him and he saw that the deceased also joined the attack.
- c) After a while the bouncers left him and the fight continued between him the deceased. Tomasi Naitini tried to stop the fight again. During the fight, at one point the deceased pulled him by his shirt and that caused both of them to fall down. He fell on his knees with his hands bracing the footpath. Then he brushed aside the deceased's hands and stood up. The deceased got up with the help of Tomasi Naitini. Tomasi Naitini then took the deceased back inside the nightclub. He stayed back to seek forgiveness from the bouncers and explain to them as to how the fight started. After seeking forgiveness he went back inside the Temptation 2 Nightclub and joined the group he was drinking with.
- d) He said that he still does not know the reason the deceased assaulted him. He said that he was both confused and angry when the deceased was punching him. He said that in each fight, it was the deceased who punched him first.
- e) On his way out of Temptation 2 Nightclub after they finished their drinks, he saw the deceased sitting outside the nightclub, leaning against the wall. While his co-workers proceeded to the next nightclub, he remained and tried to wake the deceased by calling him and tapping him. The deceased did not respond. He knew that the deceased had too much alcohol. He stopped a taxi and with the help of the bouncers,

carried the deceased to the taxi. He asked the taxi driver to take the deceased to the Yue Lai Hotel and paid the taxi fare. After that he joined his group at the Sand Dunes Nightclub.

Analysis

30. To prove the offence of manslaughter, the following elements must be proved beyond reasonable doubt by the prosecution;
 - a) the accused;
 - b) engaged in a conduct;
 - c) that conduct caused the death of the deceased;
 - d) the accused intended that the said conduct will cause serious harm to the deceased;or
the accused was reckless as to a risk that the said conduct will cause serious harm to the deceased.

31. The prosecution says that the death of the deceased was caused by the conduct of the accused and the accused intended that his conduct will cause serious harm to the deceased or the accused was reckless as to the risk that his conduct will cause serious harm to the deceased.

32. The first element involves the identity of the offender. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence.

33. To engage in a conduct is to do an act which is the product of the will of the accused. The conduct should be voluntary and not accidental. The prosecution has to prove beyond reasonable doubt that the relevant conduct of the accused was deliberate. Evidence of self-induced intoxication cannot be considered in determining whether a particular conduct was voluntary.

34. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, at law, 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 element that the 'conduct caused the death of the deceased'.
35. With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, the accused intended to cause serious harm to the deceased or that the accused was reckless as to a risk of causing serious harm to the deceased through his conduct. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused'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 the accused from the facts and circumstances you would consider as proved. You should also bear in mind that self-induced intoxication is not a relevant consideration when you deliberate on this final element of this particular offence.
36. In order for you to conclude that the accused intended to cause serious harm to the deceased, you should be sure that he meant to bring about serious harm or that he was aware that serious harm will occur to the deceased 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 serious harm to the deceased.
37. In the event you find that the accused did not have the intention to cause serious harm to the deceased or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to a risk of causing serious harm to the deceased through his conduct. An accused will be reckless with respect of a risk of causing serious harm to the deceased, if;

- a) He was aware of a substantial risk that serious harm 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.
38. You should note that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence. At law, a person carries out conduct in self defence only if he or she believes that the conduct is necessary to defend himself or herself and the conduct is a reasonable response in the circumstances as he or she perceives them.
39. In this case the prosecution acknowledges that the accused acted in self defence, but says that his response was not a reasonable response given the circumstances. Therefore, the burden is on the prosecution to prove beyond reasonable doubt that the conduct of the accused as alleged was not a reasonable response in the circumstances.
40. Given the facts and the circumstances of this case, I consider it appropriate to approach the case by dealing with the following questions in the following order;
- a) What was the conduct that caused the death of the deceased?
 - b) What was the accused's conduct that is relevant to this case?
 - c) Whether that conduct caused the death of the deceased or whether that conduct substantially contributed to the death of the deceased?
 - d) Whether that conduct a reasonable response to defend himself given the circumstances.
41. You need to consider the medical evidence to make a finding on the first question, that is, to decide what was the possible conduct that caused the death of the deceased.

42. According to PW5, the main cause of death was bleeding noted in the deceased's brain which was caused as a result of trauma to the head. He also said that a change in the velocity could also cause such bleeding. The doctor however did not explain how and why such bleeding in the brain could cause the death of a person. The unit he is attached to, comes under the Fiji Police Force. It was noted that he had heavily relied on the information provided to him by the Investigating Officer who was not a witness in this case, in forming his final conclusion.

43. At this point, I have to explain to you about how you should deal with the clinical history that is found in PE1. The facts that are mentioned in the clinical history are not witnessed by PW5. So he cannot confirm the veracity of those facts. Therefore, you cannot consider what is mentioned as clinical history in PE1 if and when you are to decide whether those facts stated therein are true. In other words, you cannot regard the facts that are mentioned in PE1 under the heading 'clinical history' as true just because they are stated there in PE1. You would also note that, certain information found in the clinical history is not consistent with evidence that came out through witnesses who testified before this court. For example, though the clinical history indicates that the deceased was punched around 4.30am and he was seen lying on the floor of the nightclub 15 minutes later, both PW1 and PW2 clearly said that the deceased was seen sitting on the floor around 3.30am and this was two hours after the fight (with the accused). Even PW4 said that the fight between the deceased and the accused took place around midnight.

44. Coming back to the cause of death, according to the evidence of PW5, the bleeding noted in the brain could have been caused by a blow to the head such as a punch or hitting with an object, falling from a height or even a high velocity movement of the head. He couldn't confirm the estimated time of death though he said that it was 0600 hours based on the clinical history. There was no medical evidence led in this case to establish the time and the place of death.

45. Moving on to the next issue, the conduct of the accused relevant to this case, you need to assess the evidence of the first four prosecution witnesses and the evidence of the accused and then decide what was the conduct that the accused engaged in, as proven by the prosecution beyond reasonable doubt.
46. You may have noted that the version of each of the first four prosecution witnesses are not consistent on the conduct of the accused. In brief the four versions were as follows;
- a) According to PW1, though he did not identify the accused, while the deceased was holding onto the accused's shirt, the accused tackled the deceased and the deceased fell onto the ground hitting his head on the edge of the footpath. After that the accused pulled the deceased up, and they went inside the nightclub to have more drinks.
 - b) According to PW2, the deceased hit his head on the footpath when the deceased tried to walk back while hugging the accused and after the deceased tripped over (the edge of) the footpath that resulted in the deceased falling on his back with the accused on top of him.
 - c) According to PW3, when the deceased tried to grab the accused, the accused ended up lifting the deceased and this caused both of them to fall down together where the deceased hit his head against the edge of the pavement. After this there was a further exchange of words between the two. Nevertheless, the duo managed to settle their argument and they sought forgiveness from each other and then went back inside the nightclub.
 - d) According to PW4, when the deceased tried to grab the accused's shirt, the accused pushed the deceased from his shoulder like in a rugby tackle which resulted in both the accused and the deceased falling together and the deceased heavily hitting his head against the cement footpath. PW4 further said that the accused thereafter holding the deceased's shirt collar, shook the deceased saying "I will kill you", that caused the deceased's head to hit the concrete footpath several times and then head-butted the deceased 3 - 4 times. He said that a third person helped the deceased to stand up. PW4 also

said that the deceased and the accused spoke to each other after this episode and after that the deceased went inside the nightclub but the accused was not allowed back into the club. But during cross-examination he agreed with the suggestion that the accused never left the Temptation 2 Nightclub.

47. One other matter that may assist you in your deliberation regarding ascertaining which version to accept is the fact that PW5 did not find any injuries to the back of the head of the deceased. Even though the prosecution appear to rely heavily on the evidence of PW4, you have to ask yourself whether there is an explanation for no external injuries to be found at the back of the deceased's head though PW4 said that he heard the deceased's head banging on the cement foot path making a sound similar to that of a rock being thrown on cement. PW4 also said that the accused made the deceased's head hit on the cement several times again by shaking the deceased from the collar. Moreover, as I have explained to you on how to deal with inconsistencies, you have to consider whether any explanation has been offered for the four prosecution witnesses to come out with different versions if you think that those inconsistencies cannot be attributed solely to the human weakness in remembering facts.
48. You should also consider the accused's version in this regard and according to him, he admits punching the deceased but he says that both him and the deceased fell down on the footpath because the deceased pulled him by his shirt. He says that the deceased got up with the assistance of one Tomasi Naitini.
49. After ascertaining the conduct of the accused, the next question you have to deal with is, whether the prosecution has proven beyond reasonable doubt that, that conduct of the accused caused the death of the deceased or that conduct substantially contributed to the death of the deceased? Is there a doubt that the conduct of the accused may not have caused the death of the deceased or may not have substantially contributed to the death?

50. To remind on PW5's evidence, he said that death can occur after hours or even days from the time an injury that caused bleeding as noted in the deceased's brain was caused. PW5 did not explain whether there would be any signs or symptoms to indicate when someone sustains a brain injury such as the one that is noted in this case. You would have to consider whether you are sure that the deceased had not sustained the relevant brain injury before the alleged encounter with the accused in this case and similarly whether you are sure that the accused did not sustain that injury after the alleged encounter with the accused.
51. In dealing with this question it would be relevant for you to consider the evidence you heard about the other instances the accused may have sustained blunt force trauma to his head that could have caused the brain injury which is the cause of death of the deceased as explained by PW5. In this regard you may consider the evidence of PW4 where he said that the accused fell on his back on three occasions being punched on his face by a person called 'Leps'. PW4 also said that he was informed by one of his staff that the accused fell down face first on his way out, hitting his head on the floor.
52. One other matter which may be relevant for you to consider is, after the fight between the accused and the deceased outside Temptation 2 Nightclub, the deceased was again drinking inside the nightclub for about two hours according to PW1 and PW2. As mentioned above, PW4 said during his re-examination that just before the deceased was made to sit outside the nightclub, the deceased had fallen face first, hitting his head on the floor. There was no evidence as to whether or not there were any other such incidents during these two hours.
53. Moreover, according to PW1 and PW2, the deceased was carried outside the nightclub around 3.30am and according to agreed fact No.10 also it was around 3.00am. Then the accused was sent in a taxi to Yue Lai Hotel. Again, there is no evidence on the manner the deceased was transported to the hotel, the time he reached the hotel and what happened from the time the deceased reached the

hotel until relevant employee of the hotel as identified in admitted facts No. 12 and No.13 had noticed that there is no movement of the deceased and informed the police. Even though no evidence was properly placed, according to the clinical history, the security at the hotel checked and suspected that the deceased was dead around 0600 hours. That leaves a gap again of about two hours and there is no evidence adduced to ascertain what took place in relation to the deceased during those two hours. There is also no evidence on what took place in relation to the deceased from the time the relevant security officer informed the police, until the deceased was pronounced dead by a competent medical personal.

54. In view of the above circumstances and any other circumstances you may consider relevant, you should consider whether you are sure that it was nothing but the conduct of the accused that caused the death or substantially contributed to the death of the deceased. If you are not sure, then you should find the accused not guilty of the offence.
55. If you are sure, then you should consider the next issue. That is, whether that conduct was a reasonable response for the accused to defend himself, given the circumstances. This is because, both the prosecution and the defence acknowledges that the accused did act in self defence. The remaining issue therefore is, whether the accused's response as you have found it to be, a reasonable response, given the circumstances faced by the accused. If you think that the accused's conduct was a reasonable response, you should find the accused not guilty. On the other hand, if you are satisfied beyond reasonable doubt, that the conduct of the accused is not a reasonable response, then you should find the accused guilty of the offence as charged.
56. In the event you are not satisfied beyond reasonable doubt that the conduct of the accused caused the death of the deceased or substantially contributed to the death of the deceased, but you find that his conduct towards the deceased was

not a reasonable response in view of the threat he faced, you should then consider whether the accused is guilty of the offence of assault occasioning actual bodily harm to the deceased. Assault is the use of unlawful force. The accused should cause actual bodily harm to the deceased being aware of the substantial risk that his conduct would cause actual bodily harm, and it should be unjustifiable for him to take that risk, having regard to the circumstances known to him.

57. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
58. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise;
- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
 - (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
 - (iii) The third possibility is that you reject his evidence. But if you disbelieve him, that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

59. Any re-directions?

60. 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. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.


61. Your opinion should be as follows;

Manslaughter - guilty or not guilty

If not guilty

Assault occasioning actual bodily harm – guilty or not guilty




Vinsent S. Perera
JUDGE

Solicitors;

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