

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 286 of 2019

STATE

vs.

KIALA MARCELLINO PENAKOY HENRI LUSAKA

Counsel: Ms. E. Rice with Ms. J. Fatiaki for the State
Ms. L. Vaurasi for the Accused

Date of Hearing: 13th June to 18th July 2022

Date of Closing Submission: 25th July 2022

Date of Written Submission: 29th June 2022 and 4th August 2022

Date of Judgment : 08th August 2022

JUDGMENT

Introduction

1. The Director of Public Prosecutions has charged the Accused for the following offences as per the Information dated 13th September 2019:

COUNT ONE

Statement of Offence

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

Particulars of Offence

KIALA MARCELLINO PENAKOY HENRI LUSAKA on the 23rd of July 2019, at Suva, in the Central Division murdered **JENNIFER ANNE DOWNES**.

2. On the 13th of June 2022 the Trial commenced with the charge been read and the Accused pleading not guilty. Ms. Rice addressed Court and at that stage the learned counsel for the Accused Ms. Vaurasi informed court that prior to the previous aborted trial a psychiatric evaluation report of the Accused was called for. Apart from bringing this matter to the notice of Court the learned defence counsel did not make any application nor did she submit that the Accused was in any way unfit to stand trial. It was no more than bringing to the notice of court of an antecedent matter. However, to clear any doubt this Court posed certain questions to the Accused to ascertain if he could comprehend the proceedings of Court and to get an insight into his disposition and alertness. He very clearly in English without any hesitation responded to the series of questions. The relevant manner and the contents of his responses without doubt was consistent with that of a normal person's who comprehends these proceedings.
3. Further, this matter was mentioned on several days immediately prior to the commencement of the trial. It was so mentioned on 02nd March, 29th April, 16th May, 3rd of June and 7th of June, 2022. On these mention dates too, the Accused appeared quite normal and I did not observe anything unusual or out of the ordinary in respect of his behavior conduct or the demeanour and certain interactions with court. The Accused had been enlarged on bail on the 2nd of November, 2021 and since been coming to court on his own.
4. As the learned defence counsel brought to my notice of a psychiatric evaluation report I perused the report and found that a report dated 01/09/2022 in respect of the Accused was available in the record. According to which Dr. Kiran Gaikwad has examined and reported that the Accused is fit to take a plea and participate in legal proceedings and stand trial. Considering all these factors this court was satisfied the Accused was fit to stand trial. Accordingly, the trial proceeded. Then as the trial proceeded the Accused on his own has presented himself at St. Giles Hospital on 25/07/2022. As directed by Court Dr. Karthika Goundar who assessed him appeared in Court personally and submitted the report dated 28/07/2022 as to the mental condition and fitness of Mr. Lusaka. The said report confirmed that Mr. Lusaka was aware of the charges and is fit to plead and stand trial. Dr. Karthika Goundar clarified matters raised by both parties and also by Court and confirmed that Mr. Lusaka is fit to stand trial. In these circumstances I am satisfied that the Accused was and is of fit mental state to stand trial.

5. Upon the Accused so pleading not guilty to the said charge of Murder, the hearing commenced on the 13th of June 2022 and concluded on the 25th June 2022. At the close of the prosecution case as it appeared to me that there was a case to answer by the Accused, his options and rights were explained and the Accused was called upon to make his defence. Initially the Accused opted to remain silent and a psychologist was called on his behalf and closed its case. However, when this was set for submissions on 18th July 2022 the Defence made an application to reopen the defence case and for the Accused to take the stand and give evidence. This application was considered and allowed and the evidence of the Accused too was recorded. Final submissions of both parties were heard and the Prosecution tendered their written submission on that day and the defence was permitted to submit to the registry. The Defence written submission was tendered on 29th July 2022. Then on a legal issue both parties were permitted to file written submission on 6th of August 2022 and the Judgment was set for 8th August 2022. Now I will embark upon to consider the evidence and pronounce my Judgement.
6. The Accused Lusaka is charged with the murder of, his wife Jennifer Anne Downes. There are no eyewitnesses and the prosecution is relying on circumstantial evidence to prove its case. The defence taken up by the Accused is not straight forward and clear cut. The Accused takes up position that he did not kill his wife however if he has done so he cannot remember. Simultaneously defence led the evidence of a psychiatrist suggestive of some form of mental sickness or an abnormality of mind of the Accused. In view of this uncertain approach the probable defence, may be either a denial, mental impairment (insanity) or diminished responsibility.
7. Whatever be the defence first the prosecution should establish/prove that the Accused did commit the death of the deceased. Then the issue of mental impairment may be considered and if the prosecution proves that the Accused had committed the murder of his wife as alleged, then the issue of diminished responsibility will be considered.

Elements of the offence of murder

8. To prove the offence of murder, the prosecution must prove beyond reasonable doubt that the Accused Lusaka engaged in a conduct with the intention of causing the death of the deceased Jennifer, or was reckless as to causing her death and that conduct of Lusaka caused the death of the Jennifer.

Burden of proof

9. The Accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the Accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has a right to remain silent and no adverse inference can be drawn if the Accused remains silent.

Circumstantial evidence

10. This case is based on circumstantial evidence and there are no direct eye witnesses as to how the death of Jennifer was caused. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which that are so proved. The drawing of the inference is not a matter of evidence: it is solely a function of this court based on its critical judgment of men and affairs, experience and reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts.
11. Professor Wigmore said the term "*circumstantial*" is *unfortunately but inevitably fixed upon us... this class embraces all offered evidentiary facts not being assertions from which the truth of the matter asserted is desired to be inferred*". (Wigmore on Evidence 3rd Ed Vol.1 par.25 at p.400); and he went on to consider circumstantial evidence as requiring a grouping according to whether the facts constituting evidence of the act to be proved came before the act (prospectant) at the time of the act (concomitant) or after the act (retrospectant), (*Wigmore on Evidence* 5 Vol.1 pars.43, 51-119, 130-149). Cross on Evidence (10th Ed) has considered this classification and explained the said categories of circumstantial evidence as follows. **Prospectant** evidence as being the evidence of the

events, acts, state of mind or affairs in the *past* that could justify an inference that the act was done, or state of mind or affairs previously existed, relating to the fact in issue disputed matter or incident before the court. (*vide: pg.17*). **Concomitant** as being circumstances that existed *contemporaneously* with the transaction which renders the fact in issue more or less probable. (*vide: pg.25*). **Retrospectant** as being evidence of *subsequent occurrences* of the events, acts, state of mind or affairs that could justify an inference that the act was done means the evidence of any act, state of mind or affairs that took place after the alleged transaction that justify an inference that the alleged act was done or state of mind or affairs existed. (*vide: pg. 28*).

Diminished responsibility and Mental impairment (insanity)

12. In view of the facts of this case and the defence position, most certainly the defence of either mental impairment (insanity) or diminished responsibility will become relevant at a later stage. Thus, it is prudent and necessary to consider the elements and the burden of proof of the same before I proceed to consider the evidence. The statutory provisions governing the defence of diminished responsibility is contained in 243 of the Crimes Act 2009 which defines diminished responsibility in the following terms:

(243) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, is at the time of doing the act or making the omission which causes death in such a state of abnormality of mind (whether arising from a condition of arrested or retarded development of mind or inherent causes or induced by disease or injury) as substantially to impair—

- *(a) the person's capacity to understand what the person is doing; or*
- *(b) the person's capacity to control the person's actions; or*
- *(c) the person's capacity to know that the person ought not to do the act or make the omission—*

the person is guilty of manslaughter only.

(2) On a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section liable to be convicted of manslaughter only.

(3) When 2 or more persons unlawfully kill another, the fact that one of such persons is by virtue of this section guilty of manslaughter only shall not affect the question whether the unlawful killing amounted to murder in the case of any other such person or persons.

13. It is a precondition to the application of the defence of diminished responsibility that the prosecution should first prove beyond reasonable doubt, that the Accused is otherwise

liable for murder of Jennifer. This means that the prosecution must prove that the Accused caused the death of Jennifer, and that the Accused had the requisite mental state for murder at the time of the killing. If that is so proven, there are then it shall be for the defence to prove that the Accused is by virtue of this section liable to be convicted of manslaughter. There are three elements which must be satisfied in order to establish the defence of diminished responsibility. They are:

- i. that at the time of the killing, the Accused was suffering from an abnormality of mind;
- ii. that the abnormality of mind arose from one of the causes listed within the parentheses in section 243 of the Crimes Act that is from a condition of arrested or retarded development of mind, or from any inherent cause, or induced by disease or injury; and
- iii. that the abnormality of mind substantially impaired the Accused's capacity to understand what he is doing; or control his actions; or know that he ought not to do the act or make the omission.

14. By virtue of section 243(2) the burden of proving these three elements on a balance of probabilities on the Accused or the defence. In **Khan v State** [2020] FJCA 241; AAU118.2019 (7 December 2020) it was held thus, *"It is clear that the appellant was carrying the burden of proof on diminished responsibility under section 243(2) of the Crimes Act, 2009 and that burden of proof was a legal burden of proof under section 60(b) which has to be discharged on a balance of probabilities as per vide section 61 of the Crimes Act"*.

15. The central feature of diminished responsibility is the existence of an abnormality of mind which can be shown to have substantially impaired the Accused's capacity to understand what the person is doing; or control the person's actions; or know that the person ought not to do the act or make the omission. This should be so at the time of the killing. This is not a situation of a total lack of such understanding, control or knowledge but of a situation of substantial impairment. What section 243 contemplates is the impairment of the capacity to understand, control or know and not the impairment of one's mind itself. This is the difference and the distinguishing feature between Diminished responsibility (section 243) and Mental Impairment (section 28). This is

further confirmed when one considers the historical development of these two defenses. The defence of diminished responsibility originated in Scotland in the 19th century and developed by the courts as a means of avoiding murder convictions for those offenders otherwise liable for murder, who did not satisfy the restrictive test for the “insanity defence” (now referred to as the defence of mental impairment Section 28), but whose mental state or the capacity to understand, control or know was nevertheless impaired substantially due to an abnormality of mind. Diminished responsibility therefore is available to an offender who was suffering from an abnormality of mind as defined under section 243 but not mentally impaired, as defined under section 28 the defence of mental impairment.

16. Now let’s have a look at Mental impairment is under section 28 of the Crimes Act;

Mental impairment

28(1) *A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that—*

- *(a) the person did not know the nature and quality of the conduct;*
or
- *(b) the person did not know that the conduct was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or*
- *(c) the person was unable to control the conduct.*

.....
(8) *In this section—*

Mental Impairment

includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.

(9) *The reference in subsection (8) to mental illness is a reference to an underlying pathological infirmity of the mind (whether of long or short duration and whether permanent or temporary), but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli.*

(10) *A condition that results from the reaction of a healthy mind to extraordinary external stimuli may be evidence of a mental illness if it involves some abnormality and is prone to recur*

17. Thus, diminished responsibility is a mitigatory defence to murder which, if proven, reduces the liability from murder to manslaughter. Whereas mental impairment (insanity)

is a general exculpatory defence for any criminal offence. These defences are based on a general principle of our criminal jurisprudence that a person's responsibility for committing an offence should be assessed in light of any substantial mental impairment or abnormality of mind which that person suffered at the point of committing such offence. Let me first consider the legal position of diminished responsibility. The defence of diminished responsibility may potentially be pleaded on the basis of one of a wide range of mental disorders, provided that the disorder results from a cause listed in parentheses in section 243. In this sense, the scope of diminished responsibility is much wider than the defence of mental impairment as defined by section 28 of the Crimes Act. The defence of mental impairment applies only to those mental conditions which can be shown to affect the Accused's cognitive process to such an extent as to render that person incapable of knowing the nature or quality of his or her act, or incapable of knowing that that act was wrong. In contrast, diminished responsibility requires a substantial impairment caused by an abnormality of mind. This may cover, for example, uncontrollable urges and extreme emotional states, as well as cognitive disorders falling outside the defence of mental illness.

Admitted facts

18. The follow are admitted facts in this case; That Kiala Marcellino Henri Penakoy Lusaka the Accused is generally known as Henri Lusaka was born in the Democratic Republic of Congo on the 17th July 1980 was 39 years old at the date of the alleged incident; 23rd July 2019. He married Jennifer Anne Downes the deceased in this case on the 17th November 2012 in Congo. Jennifer was a dual national of Australia and the United Kingdom and was born in England on the 3rd July 1973. The couple had 3 children together namely Matilda aged 6 years, Ella Lusaka aged 4 years and Henri aged 3 years old as at the date of the alleged incident. As at the time of the incident they, lived in a rented flat at No. 30 Service Street, Domain Suva Jennifer was living in Fiji because she was working as a Logistic and Project officer for the World Food Program of the United Nations covering the Pacific Region.
19. It is also admitted that the alleged offence occurred on the 23rd July 2019 and at 3.30 p.m., PC 3592 Joseph and PC 5433 conveyed the body of Jennifer to the CWM Hospital where Dr Manisha Lata Tuima examined Jennifer and pronounced that she was dead on arrival. Christopher Downes is the father of Jennifer identified the body of the deceased.

Dr James Kalougivaki MBBS PG Dip Path conducted the post mortem examination on the body of Jennifer the deceased on the 25th July 2019. The post mortem report, the medical cause of death certificate and the certificate of death of the deceased is tendered with consent as a prosecution exhibit. According to the post mortem examination the cause of death is asphyxia due to manual strangulation

Prosecution case

20. The Prosecution presented 16 witnesses and tendered PE1-22 and MFI 1-10 in total 22 items as exhibits in the course of the prosecution case.

Summary of the prosecution evidence

21. PW 1. **Mr. Christopher Downes** is the father of the deceased Jennifer. According to his evidence Lusaka and Jennifer after their marriage travelled to Australia and lived with Mr. Downes. He is able to speak as to the events and conduct of the Accused during the past 2 to 5 years. Jennifer due to the nature of her employment was had to travel and at the time of her death she had was living in Fiji. Lusaka had joined her in mid-2019 and prior to that Lusaka had been in Australia whilst Jennifer worked overseas. Mr. Downes narrated a series of incidents and events during Lusaka's stay and work in Australia. Sometime in 2018 Lusaka had been working in Orbust New South Wales engaged in some agriculture related employment when Mr. Downes was informed of an alleged attempt of self-harm by Lusaka. Hearing this Mr. Downes had made inquiries from hospitals and medical institution in Orbost if a person named Lusaka and of his description was treated at any of those institutions, but had drawn a blank. Mr. Downes had proceeded to Orbust where he met Lusaka at his house with some white cream around his mouth which appeared and smelt like sun cream. However, Lusaka had shown some white tablets in a bottle but Mr. Downes believes that this whole episode was an act.
22. When the Accused was in Fiji, he through the platform of Messenger and WhatsApp was communicating with Mr. Downes. They have also been speaking to each other. Mr. Downes has called Lusaka on the 17th of July 2019 to wish him for his birthday. On that day the Accused had been extremely agitated, emotional and angry due to some information that Jennifer was having an affair with a co-worker. Mr. Downes said that Lusaka was certainly upset agitated primarily because of alleged infidelity of Jennifer and then also having seen a photo of Jennifer in Hawaii with a traditional Hawaiian floral

head decoration he had believed that she was preparing to get married to that other. Mr. Downs attempts to calm him down has not been successful. Jennifer had subsequently returned to Fiji on 21st July 2019.

23. According to Mr. Downes between 17th and the 23rd of July 2019 there were several messages sent by Lusaka all of which are which are produced in evidence (documents MFI1 to MFI10). These are abusive and threatening messages and photos. There was also an allegation of a conspiracy to poison Lusaka and threats of harming Jennifer and even the kids. The screen shots and the messages MFI1 to MFI10 was identified as been messages sent to him by the Accused Lusaka. Mr. Downs denies any attempt to poison Mr. Lusaka and says it is baseless. The prosecution led in evidence the messages and photos sent and forwarded by Lusaka to Mr. Downes during the week preceding the date of incident.
24. The following were sent on the 23rd of July 2019.
- i. A photo of a black frog was sent twice at 00.56 a.m and 5.14 am (early hours) of 23/07/2019 (Australian time)
 - ii. Then on the same day the following messages were sent.
“Why gilen did to you and you send poison to your Jenna to kill me. I all ready take it so what did you think I must do” (vide MFI 2) (at 8.18 Australian time)
 - iii. *“Be strong puk up phone.
Like when you were sending her also poison to kill me.
You mother fock
Make plan to kill me.
I not going alone.”*(At 8.49 Australian time).
 - iv. *“You loose mother fuck I win”*
 - v. *A photo of Jennifer dead with two coins on her eyes was sent at 8.50 a.m. Australian time.*
25. Mr. Downs said that the worst of the photos were the photograph of his daughter lying apparently lifeless on a bed with what appeared to be coins or some circular objects placed over her eyes and what seem to be bruises around her arm and neck. That was photographs, there was also a brief video that was accompanied by some commentary

that was clearly Mr. Lusaka's voice even though it was not his usual voice. Saying words to the effect 'look what you have made me do' or words of that effect. Some of the other photographs were parts of the room showing the foot of the bed with some just objects on the floor so there have been some struggle. And another photograph again showing his daughter's face with the bruises to him has appeared to be lifeless.

26. Upon receiving a threatening message around 8.50 am (Australian time) of the 23rd of July 2019 with a screen shot showing Jennifer lying down with two coins on her eyes and bruises on the neck. Mr. Downes has alerted the authorities in Fiji through the UN officers. Subsequently he had been informed of Jennifer's death, upon which he had arrived in Fiji attended to the post-mortem inquiry and identified Jennifer's body.
27. **Mr. Charles O'Hanlon** the UN Security In-Charge was detailed to look in to certain safety concerns due to a family issue of one their staff Ms. Jennifer. He had visited Lusaka on several occasions for the said matter and is a direct witness to events and the actions of the Accused between the 17th to the 23rd of July 2019. Charles is has a great deal of experience in relation to sensitive domestic issues and to evaluating of persons. He is strictly not an expert psychologist in the medical sense but is extremely competent and a reliable witness as far as observing and identify various facets of human conduct. As he met Lusaka on several occasions between the 19th and 23rd and had the occasion to talk to him, meet him and observe him. According to his observations Lusaka is a person who is highly opinionated, dominating and of a controlling nature. He had observed him being able to change his mood and style pretty fast and of short temper. On the several occasions he visited him. Lusaka had been abusive and without reservation uses extreme language even of a racial flavor and also appear accommodative and friendly and hospitable when necessary.
28. When Charles visited his house on the 19th with the police for a house check Lusaka was unhappy and responded by saying "fuck off, you white cunt" and has been extremely hostile and rude to him and simultaneously had been quite friendly and nice to the police officers who accompanied Charles. Lusaka was agitated about the infidelity of his wife but has told that he had no issue about she having an affair and it does not concern him and that once she returns he will wash her cunt with a water hose and that she will be his again.

29. On the 21st of July Jennifer had arrived and Mr. Charles had been worried about her safety and made arrangements to take her to a safe place with her children. Jennifer had point blank refused notwithstanding the persistence of Charles. According to Charles Ms. Jenifer was earning approximately \$7,500 US dollar per month and house subsidy of \$500 with another US dollars \$247 per day allowance when she is overseas. However her contract was due for extension in August. According to Charles drug abuse various family issues relating to drug or alcohol may jeopardise her chances of renewal of the contract.
30. The night she arrived at home he had observed Lusaka exhibiting a great sense of love and affection publicly and Charles had had his reservations on his conduct and says it was more of an act. Arrangements were made for the family to see a psychologist. On the 22nd he has visited the house with Angela Bamblett to evaluate and review and spent about 1½ hours. On the 23rd Jennifer and Lusaka were due to meet Doctor Michell in the morning. The Accused, the three children and Jennifer have been the only occupants of the house. However as they failed to go Charles had called and messaged Jennifer around 9.45 a.m but there had been no response. He had alerted the police and with police officers gone to the house with several police officers including WDC Varisila, WD Penny.
31. When they reached the house around 12.30 midday, the front door was closed and all the curtains were drawn. They have knocked on the door and called out but there was no response. Then a police officer had shouted out and told that they were from the police and will be breaking in. Just as then the Accused had opened the front door. The front door has a wooden door opening into the house and a grill gate with a fly mesh opening out. Both these can be locked separately. Though the wooden door was open, one cannot gain access as the grill gate with the fly screen remained closed and locked.
32. Lusaka had been clearly agitated and alarmed and told them *to go away and that they were not needed*. Mr. Charles had then said that they were here to see Jennifer and would not leave without seeing her. Mr. Lusaka had then responded that *she was busy and could not come to the door*. When Mr. Charles O’Hanlon insisted that they would not leave until they see Jennifer, Mr. Lusaka had been extremely agitated and started swearing and said *“fuck off you white cunt, no need to be here, go away, she is not coming to the door,”*

and then slammed the door. They have continued to rattle and bang on the door and explaining that they would not go and he needs to open the door. After several minutes, Mr. Lusaka, had opened the wooden door again, this time bear bodied only in a pair of shorts with a kitchen knife in one hand and a bottle of whiskey in the other. He had been having both his hands up. When asked for Jennifer, Mr. Lusaka had looked angry, bewildered and there was facial expression of panic. Mr. Charles and the police have been trying to talk and negotiate and insisted that they be allowed to see Jennifer for just a few minutes.

33. Mr. Lusaka had gone to the pantry area left the knife on the kitchen table and then gone to the room down the hallway. Mr. Charles having persuaded a child, got the bunch of keys, opened the grill gate and all of them have gone up to the room and found the bedroom door was locked from inside. As there was no response to the calls they shouldered and forced open the door. Inside the room they have seen Jennifer on the floor upright and Lusaka lying next to her with the right hand beneath her neck and the other hand on her chest. Jennifer had two coins one on each eye. They found that Jennifer was not responding and had no pulse. There was no one else in the room. Then Mr. Lusaka had been carried out and dispatched to the hospital and Ms. Jennifer's body transported to the hospital and was pronounced dead on admission.

34. **PW6 Noel Singh**, this boy was 16 years of age when he gave evidence and has been around 14 years in 2019. On the 23rd around 7.00 a.m he was driven by his mother to school when his mother received a call from the Accused also known as Marco. They have gone to the house of the Accused and parked the car along the driveway. He had visited the Accused's house 5 to 6 occasions prior to this day with his father. The time had been around 7.00 a.m. Noel and his mother walked up the steps as the Accused signaled them to come in and as they went in Lusaka had told that his wife left him the night before and had taken the children and his passport. Accused was crying and Noel has not seen him cry before. The Accused had not looked very good, had been limping around and then given the following items to Noel and his mother. A music box (PE12), Bank Card (PE13), one necklace and watch (PE14), and two rings (PE14) and a black jacket (PE15). Then the Accused had hugged him and told them it is time to go. Noel with his mother have walked down the steps and come to the car. After coming to the car Noel's mother was trying to call his uncle and it has taken a little time. Then the Accused

had come down tapped on the car window and told again it's time to go and that they have to leave and they left. These items have been handed over to the police. He says that the Accused's behavior that day was weird.

35. **PW10 Esica Menani** she had been the house help of Jennifer and the Accused since January 2017. She had been looking after the three kids and also attending to housekeeping. During the said period as she had been working in the house she was known both to the Accused as well as Jennifer. In July 2019 Accused and Jennifer along with the children had shifted to 30 Service Street where this witness continued to work. Generally Jennifer use to go to work and also go abroad regularly. The Accused remains at home with the children. She also said that the Accused used to go out in the evenings and used to return during the early hours and says that he is out for business. On a Wednesday in the middle month of July 2019, the Accused had given her \$10 and asked her to leave and come back the following day. On the 19th Friday when she came in the morning the Accused was on the balcony, and he was angry and asked her to go back. She had asked if anything was the matter the Accused had responded "no go home" and the witness had gone back. Next, on 22nd of July being a Monday she had not been well and as such sent a message around 6.30am informing the Accused that she is unable to be there. Then around 9.30am the Accused had called her and asked why she was not there, the Accused had sounded angry and she also had heard Jennifer in the background. Jennifer had shortly thereafter called and told that she herself was working from home and for her to get well and come later.
36. **PW 11 Mecatoa Evans.** He is a neighbor has overheard heard the telephone conversations in English between Lusaka and his wife during the week preceding the killing. Accused has been extremely agitated and angry and been inquiring as to whom she was with and going out and heard on one occasion shouting out, "I will kill him".
37. **PW17 Simmon Kumar**, he had been a nurse attached to the Fiji Correction Services and has been attending to the Accused whilst he was held there and was under medical care. In November 2019 the Accused was visited by Dr. Kiran Gaikwad once a week. The Accused has asked Simon how a psychiatric patient behaves in front of the doctor. The witness had told him that there are 5 to 6 other psychiatric patients for him to look and observe. In cross examination he admitted that the Accused was taking medicine and

spoke in broken English. It was suggested to him that he was of an Indian decent and his first language is not English. It was suggested that what the Accused in fact asked was how he should behave. Simon had told Dr. Kiran Gaikwad of this incident.

Police Evidence

38. **PW9 Sgt. Naupoto**, he is the Crime Scene Officer who photographed the crime scene with OIC Petero Loli and Sgt. Patricia Liga. They commenced at 2.25pm and the photo booklet containing 65 photographs was produced as exhibit PE2 and PE1 an enlargement. In cross examination it transpired that photo number 13 was taken by him and this shows the key hole covered with tape form inside of the room.

39. **PW8 IP Petero Loli** was with the photographer and directed the taking of photos. He identified PE 2 as the photo booklet. When they arrived at the scene Sgt. Ajit and other officers were there. He had instructed Sgt. Patricia Liga to uplift the exhibits. He admitted that the room was in a mess with items scattered. There was a piece of wire one end connected to plug and other exposed. He had observed a partially used open bottle of Whisky in the room. His observations had been that a struggle had taken place in the room. He had observed bruise marks and injuries on the body of Jennifer. There were two coins placed on her eyes. He admitted that a black pot was found in a closet nearby. He had uplifted the passport of Mr. Lusaka, however could not recall where it was found from. A broken laptop had been found in the dining room. He had also found an uplifted a note on a pantry table as seen in photos 8 and 9. It had a note which said "*just meet her with the poison from dead! Is dad sent her poison to kill me. Ps. So let go together*". He had observed the items namely peanut butter bottle, chocolate wrapper, a small bottle and a large bottle on it. There had been a kitchen knife on the table.

40. **PW7 Sgt. Patricia Liga** uplifted the exhibits from the scene. She had uplifted from the room in which the body was. A Bottle of alcohol (photo 29), mobile phone on the bed (photo 34) PE3, wallet PE4, pillow (PE5) (photo 21) PE5, a cord (Photo 25 and 31) PE6, a pot (photo 10, 26, 27) PE7, laptop (Photo 41, 42, 43) PE8. 2 coins (Photo 18, 19) PE9, the note on the kitchen counter (PE10)(Photo 9) PE10. She had also made a sketch plan the rough as well as the final sketch were marked together as PE11. In cross-examination certain discrepancies between the two sketches transpired and she said the rough copy is

what she made first and that is the correct sketch. It was suggested that there was never a note on the table.

41. **PW5 DC Jone Naitini** had assisted Mr. Charles D O’Hanlon on 20th July, 2019 he had visited Lusaka’s house during the day but has found Lusaka was out with the children. He had contacted Lusaka and was informed he was in the Vatuwaqa Industrial area repairing his vehicle. This officer had gone there seen two of the children and other had been at a French class. Lusaka had told him that his wife was having an affair with Johnny her work colleague. On the 21st DC Naitini has accompanied Mr. Charles to Lusaka’s house. There was a discussion about picking up Jennifer from airport. Late in the evening this officer had gone to the Nausori airport with Charles and others and picked up Jennifer. A statement from Jennifer had been recorded, however Jennifer had refused to go to a safe home and insisted that she should go home. She had been brought to the house.
42. **PW12 WDC Varisila** on 23rd July she had assisted and accompanied Charles to Lusaka’s house. Sgt. Ajit had joined them and they have gone to the house around 12.30 mid-day. They have gone up to the door and as the door was locked and the curtains drawn they had called out for Lusaka. After some time the door was opened but not the grill with the fly mesh. She says Lusaka had at first told that Jeni had gone to see Mr. Charles at his office and was not there. Then Charles had inquired about Jennifer, Lusaka had been angry after swearing at Charles slammed the door. Once again after calling out Lusaka had opened the door this time with a knife and a bottle of Whisky in his hands then he had said Jennifer was sleeping and did not want anyone to disturb her. He was drunk and was swearing and was angry. WDC Varisila said that she was suspicious because at first Lusaka said that she had gone to see Charles but later he said she was sleeping. She had gone around and found a window looking into the pantry. She had observed Lusaka coming into the pantry and wrapping a silver tape around his neck and then going towards the passage. She describes the setting of the house that it is on an inclined with the front part having two levels and towards the rear end the upper level is at the ground level because of the gradient of the landscape.
43. Then she narrates that Mr. Charles got the front grill open and all of them went in but the room door was locked. Then it was forced to open and Jennifer was on the floor upright

and Lusaka lying partially on her. Jennifer was lifeless and dead with two coins on her eyes. Lusaka was carried away by four officers. In cross-examination she said she was in front closer to the door with Sgt. Ajit next to her. She smelt liquor and observed that Lusaka was drunk and but not confused or dazed.

44. **PW3 PC Samuela Finau** he is an IT expert attached to the police. He has extracted information from the iPad Pro of the Accused. He explained the method of extraction and he had found images screen shots and messages sent to Mr. Christopher Downes a print containing the said messages had been made available and he had identified them to be MF1 to MF10. In addition to that he has also extracted information from Lusaka's Facebook page and recovered a comment posted to Aline Peters which he identified to be PE17. He explained that upon identifying URL of Lusaka's Facebook account he went into Facebook page and recovered this post. In cross-examination the main suggestion was put to him was that he cannot with certainties tell who was behind the keyboard when the said Facebook post was made. Said post was in Swahili and is as follows "Dada bibiyangu alitiliya poison namiya na muhuwa".

45. **PW15 DC Subhi Raj** he is the investigating officer and also has accompanied Charles between the 19th and 23rd to Lusaka's house. On the 19th of July they have gone there around 12.30 mid-day. When they arrived, Lusaka had appeared angry for bringing the police to his house. Then he had also gone on the 23rd around 1 pm and seen officers investigating and Jennifer's body was removed in a body bag to the hospital where she was pronounced dead. The death certificate (PE18) was produced. He had uplifted from the scene the birth certificate (PE19), the passports of both Lusaka and Jennifer (PE20). On the 21st of July when he visited Lusaka he remembers Lusaka telling about an affair between his wife and another. After the incident he had visited Lusaka 2 to 3 times at the CWM Hospital.

46. **PW 18 Dr. James Kalougivaki** performed the post mortem examination. The post mortem examination report was tendered as exhibit PE21. His qualifications, experience and expertise are undisputed and the postmortem report was admitted and tendered with consent. With his experience of having performed over 2000 medical autopsies Dr. James Kalougivaki's experience and expertise is beyond reproach. The autopsy on the body of Jennifer had been performed on 25th July 2019. On the external examination of the

Pathologist has observed *engushment* and fullness of blood above the level of the neck, lips and mouth, swelling on the left cheek with pinpoint hemorrhages in the eyes as seen in photo No. 46 and 47. On the front of the neck, there was a bruised scratch horizontally as seen in photo No. 50 and 52. Gushing of blood above the neck level and *engushment* of blood above the neck is due to pressure being exerted on the neck. He had observed several bruises in the upper arm, cheek, abdomen, right lower limb all of which he said were anti-mortem injuries. Upon considering the nature of the hemorrhage and the bruise around the neck he expressed the opinion that the cause of death was Asphyxia due to manual strangulation.

47. The pathologist explained how death is caused due to manual strangulation. Based on the injuries his opinion as to manner in which Jennifer's death came about may be summarized as follows. Jennifer had been either lying on the floor or against a wall at the point of strangulation and the perpetrator should necessarily be in front of her. A great pressure ought to have been exerted on the neck and Jennifer has moved her head from left to right. This is to escape and is the natural reaction. The violent movement of the head is inferred from the internal hemorrhage between the brain and the membrane above it. The doctor had observed several injuries on the arm and forearm which are defensive injuries. He says that it would take between 3 to 8 minutes to cause the death by strangulation. As for the time of the death his opinion is that in view of the freshness of the body it may be within 12 hours of finding the body and it may extend even up to 24 hours.
48. The defence did not challenge the pathologist's opinion and his evidence is based on reason and science which I accept. Thus, the pathologist's evidence proves that Jennifer died due to Manual strangulation within 12 hours or 24 hours preceding 1.30 p.m. of 23rd July 2019.
49. **PW5 Joel Kimutai Bosek** as he was conversant with the Swahili language he was called to read and interpret a comment on the Facebook of Aline Peters on 20/7/2019 in the Swahili language. The post reads, "*dada bibiyangu alitiliya poison namiye n muhuwa.*" According to witness Joel Kimutai Bosek in English it is, "*Sister my wife put poison on it and I am going to kill*". (vide PE 17). It was suggested that the last word is not "kill"

but “leave” and that the dialect in is different in Nigeria which the witness denied this and explained.

The Credibility of the Prosecution Witnesses

50. I will consider the testimonial trust worthiness of Charles and Mr. Downes together and then of the police officers and of other lay witnesses. As for Charles and Downes to the certain degree they may be somewhat partial towards Jennifer. At certain times in cross-examination, it transpired that some dis-respect or estrange feelings appeared to have been present between Lusaka and these witnesses on racial lines. This appears from the utterances and the issues Lusaka had with these two witnesses. However, attentively observe the manner in which these witnesses gave evidence both of them were forth right despite their connection to Jennifer they did not deliberately conceal or distort any fact. I did not see any exaggeration being made or other malicious disposition whilst giving evidence. In the circumstances especially Mr. Downes was extremely dispassionate and both witnesses acted with restrain. I did not see any improbability or inconsistency in their evidence. Neither was any suggestion made that they were lying. In these circumstances I am satisfied that these two witnesses are credible and reliable and truthful.
51. As regards Noel, PW17 Simmon Kumar, PW 11 Mecatoa Evans and PW10 Esica Menani are concerned they are all disinterested witnesses and persons known to the accused as various times. They merely testified as to what they have seen and even in cross examination there was no serious challenge or any attack on their truthfulness. No contradictions or omissions were raised of any nature. Considering heir demeanour and deportment I accept them as being truthful and reliable witnesses. As regards the police witnesses there was no serious challenge or allegation of any deliberate partiality. There were some instances of discrepancies as to the sequence of events and the places from where exhibits were uplifted and between the draft sketch and the final sketch. By and large these were routine lapses due to human errors and not deliberate. There was no partiality alleged nor did I observe any such partiality or undue interest. They testified as to the duties performed and I am satisfied these police witnesses are truthful and reliable witnesses.

(The evidence of the Psychiatrists and the psychologist will be considered later).

Evaluation of circumstantial evidence

52. In the first instance the prosecution is required to prove all ingredients of the charge of Murder. It is only and only if that burden is satisfied the question of diminish responsibility will arise. Hence, I will now proceed to evaluate the evidence and consider if it is possible to inferentially establish that the death of Jennifer was committed by Lusaka.

53. The fact that Jennifer's body was found at around 1.00 p.m of 23rd July 2019 is undisputed. According to Charles O'Hanlon, WDC Verasilla and DC Penny when they arrived, the house was locked from inside and apart for the front door there is no other way into the house. Jennifer's dead body was in the bed room floor in an upright position with two coins on her eyes. (vide-photos 18 and 19). A screen shot of Jennifer on the floor had been received by Mr. Downes at 8.49 a.m (Australian time) from Lusaka. This is around 10.49 a.m Fiji Time. (Vide MFI 1). The position of Jennifer, coins on the eyes and the surroundings are almost same when the police went in as in the screen shot. Thus the inference is that Jennifer had been in the same positions at 10.49 a.m.

54. According to the pathologist when Jennifer was manually strangled, she had struggled and had shifted her head sideways vigorously. This view was expressed based on the observation of internal hemorrhage between the brain and the membrane above the brain. virulent left to right movement of the head is the natural reaction of a person when subjected to strangulation. This being so if the coins were on her eyes at or before the point of strangulation they would necessarily have been thrown aside and displaced. Thus, the only inference is that the coins have been placed on the eyes after strangulation after Jennifer was killed. Then necessary inference is that, by the time Lusaka sent the picture or photo of Jennifer to Mr. Downes at 10.49 a.m., (aprox) Fiji time Jennifer was dead. Jennifer was last seen alive at 19.15 hours of 22nd by Ms. Bamblett and Charles O'Hanlon (Ms. Bamblett's report). That is the night of the 22nd. Thus, her death had been caused between 19.15 hours or 7.15 p.m of the 22nd and 10.49 a.m of the 23rd of July 2019. (Fiji Time).

55. Noel Prasad with his mother comes to Lusaka's house around 7.00 am of the 23rd of July. Accused is at home and calls them up to the house and tells them that Jennifer had left last night with the children and has taken his passport. Accused has been crying and then

given his credit card, a necklace made of a coconut shell, watch, two rings, music box and a lady's jacket. Then Lusaka was keen and anxious that they leave immediately. This evidence was not challenged in cross examination. Thus, it remains proved and even admitted to that extent. However, Mr. Lusaka under cross examination advanced an explanation. He says that around 6.00 in the morning of the 23rd both he and Jennifer woke up. Then he left to a nearby shop the Flagstaff Supermarket to get diapers and when he returned within 10 minutes, he found Jennifer was gone with the kids. As he had promised the previous day to give money to Noel, he remembered this and called Noel that morning. When Noel came, he gave his bank ATM card and the PIN number for him to withdraw the money.

56. Now if I may evaluate this, in the first instance when Noel gave evidence this was not suggested (the reason for giving the card). Thus, this is an afterthought and no more than an unsuccessful and lame attempt to give a false reason for calling Noel. Be that as it may if Mr. Lusaka found his wife and kids suddenly gone around 6.10 a.m the natural and normal conduct would be to look for them and in the present context to alert the police, Mr. Charles or neighbours. He had done nothing. Then within the next 50 minutes he calls Noel's mother and gets them down and tells them that Jennifer had left "LAST NIGHT" with the children. If Lusaka found Jennifer gone between 6 and 6.10 a.m., of the 23rd why should he tell Noel that they left "Last Night". This gives rise to two the inference that, his explanation given in evidence to this court is false. This false utterance considered in conjunction with the fact of giving a necklace, two rings, a watch and a lady's jacket to Noel and his mother with his bank card leads to inferences that at 7.00 a.m of the 23rd Lusaka knew Jennifer may not return. The conduct of Lusaka to send off Noel and the mother as soon as possible shows that he had something to hide in the house, isn't it Jennifer's body in the room? The fact that he called, got them down and narrated all that and then was keen to get them off as soon as possible shows that he was cautious, calculating and knew what he was doing. This utterance "she left last night" appears to be an planned attempt to put in place a version to exculpate himself from a situation he was in at that time. This certainly proves that something had happened to Jennifer by that time and that Lusaka was aware what has happened. That being so why did Lusaka also say that Jennifer took the children with her? Now the message sent to Mr. Downes between 10.18 a.m and 10.49 a.m Fiji time throws light on this. The said message reads thus "*make plane to kill me. I not going alone. So together with your grandkids*". Mr.

Downes said that he understood this to be a threat that he will harm or die with them. Thus, it is clear that utterance to Noel was the laying of the ground for his next course of action so to speak.

57. The said circumstances inferentially establish that Jennifer's death has occurred between 7.15 p.m of the 22nd and 7.00 am of the 23rd of July. The only evidence as to what transpired during this period will have to be inferred from the posts and emails and the conduct and utterances of Lusaka and his evidence. I will start with the post sent on 21st July at 20.29 hours Australian time. This is around 10.30 pm Fiji time of 21st July. The message reads thus *"Het dad Jenny got home so the police look all SMS Jenna's colleague put on Facebook so they really be put the bad thing and Jenna doesn't speaking to Fiji, and me I was right so is the guy have a problem to job"*. Now this coincides with the time Jennifer arrived home with Charles O'Hanlon and the others including police officers. This text indicates that some SMS or posts put on Facebook by the colleague was taken by the police. This post does indicate that some material pertaining to the affair was taken by the police.
58. Be that as it may, after this post there appear to have been no posts or messages until the night of Monday 23rd July around 12.56 (Fiji Time) shortly after midnight of the 22nd the photo of the black frog had been sent to Mr. Downes. The same photo had been sent again at 5.14 am (Fiji time). This is with the text *"My parents loose me so what about you? Good you to..."*. *"Fuck all"*. *Whay Gilien did to you and you send poison to your Jenna to kill me I all ready take it. So what did you think I must do."*
59. Now let's consider these posts and messages in context of the events of this case. The picture of the black frog is posted twice Mr. Lusaka said in evidence that he found some messages indicating that Chris and Jennifer were planning to poison him with frog poison. This had been repeated in the Facebook post to Aline Peters. In the scenario what the said posts convey is that you tried to poison and kill me, look out you too will face a 'similar fate' and what else do you expect me to do. Then subsequent post *"I not going alone"* is a clear indication that others too will die with him. Clearly these posts and photos prove that Mr. Lusaka was in a revengeful thought process of harming those who tried to poison him. Finally, when he says *"you loose mother fuck I win"* and sends the photo of Jennifer with coins on the eyes what he conveys to Mr. Downes that 'I did what

you tried to do to me and that I succeeded before you'. Mr. Lusaka had been careful and not directly said I killed your daughter in so many words but has conveyed the same thing by these messages and photos. This indicates that he knew what he was doing though he was in a state of psychosis.

60. What did Mr. Lusaka say he was doing that night? His said that he was celebrating the return of his wife, she asked for forgiveness for the adultery committed and both of them were drinking and using drugs and enjoyed the whole night. These posts and photos are not denied by Mr. Lusaka, nor does he deny sending them. In the contrary he gives explanations to some of them. Only thing he said was that the photo with the coins on the eyes was not sent by him but when he was on video call, Mr. Downes may have captured it. His position of celebrating becomes extremely improbable in view of the said nature of the posts and messages This is another false explanation.
61. Mr. Lusaka admits that by downloading an app he was able to receive his wife's calls, messages and posts to his phone and by this means he had found out that she was having an extra marital relationship with a colleague. No doubt this had caused a great deal of agitation, anger emotional distress and had affected Mr. Lusaka. This was no doubt a very likely motive for him to harm his wife. His Facebook post to Aline Peters confirms this.
62. Upon considering the totality of these circumstances the only irresistible and necessary inference from the said proved facts is that Jennifer was manually strangled and killed between 12.51 a.m and 7.00 a.m of 23rd July 2019. This is her time of death. Who killed her? The only persons who were with Jennifer during this period are Mr. Lusaka and the 3 kids between 6 and 3 years. Considering the medical evidence of struggling and resistance (defence injuries) it is impossible and extremely improbable that the small kids could have ever manually strangled Jennifer who was quite big made. Especially according to the pathologist Jennifer has been pinned down to the floor or against a wall to strangle her. Strangulation takes place in the midst resistance and struggling. Thus, it is Lusaka and only Lusaka who was there who had the exclusive opportunity and the ability to kill Jennifer by manual strangulation during the said period. Thus, I hold that the only irresistible inference is that it was no one but Lusaka who caused the death of

Jennifer by manual strangulation. There is no other reasonable hypothesis that arise from the proved circumstances.

63. What was his intention? According to the pathologist it takes between 3-6 minutes to cause the death of a person by manual strangulation. When a person puts such pressure despite struggling and resisting what would be the intention of the perpetrator. The law presumes that persons intend the natural and probable consequences of their acts [*R v Woollin* (1999) AC 82, *Hyam v DPP* (1975) AC 55 and *R v Moloney* (1985) 1 AC 905]. It is common knowledge that natural and necessary consequence of strangulation is the acceleration of death. Acceleration of death with the requisite intention is murder. To my mind the death of Jennifer was virtually certain to occur as a result of Lusaka manually strangulating and he ought to have certainly foreseen death as being virtually certain. Thus, when Lusaka manually strangled Jennifer in these circumstances the only irresistible inference is that he did so with the intention of causing the death of Jennifer Anne Downes and his conduct caused the death of Jennifer. This inferentially proves that the Accused committed the murder of Jennifer Anne Downes as charged.
64. That being so, now I will consider the Defence case and evidence of the Accused to ascertain if there be or may thereby create any reasonable doubt on the prosecution case or evidence.

Defence Case

65. The Accused gave evidence and called Dr. Sefanaia Qaloewai and marked and produced Ms. Angela Bamblett's report on behalf of the defence and produced exhibits DE1-11. During the prosecution case a recording of the accused crying was produced as Exhibit DE1, emails sent by Mr. Charles were produced as exhibits DE 3, 4, 5 and 6.
66. **The Accused Henri Lusaka** took the stand and gave evidence. According to the Accused he met the deceased in South Africa and then married her in Congo. By 2018 he had been living in Australia and his wife in Fiji as she was attached to the WFP of the UN. Accused had been working in Orbost in New South Wales and his father-in-law Mr. Christopher Downes too had been living some distance away in another part of New South Wales.

67. Whilst in Orbost Accused said that he consumed battery acid and attempted to commit a suicide and his father-in-law visited him and took him to a Doctor. The Accused testifies he was treated by a doctor named Phillips at a hospital in Orbost. In 2019 he had come to Fiji and lived with the deceased and their three children and continued with the medication for some mental condition. However, he has neither seen any doctor in Fiji nor purchased many medicines whilst in Fiji as he had brought a sufficient stock when he came from Australia.
68. He said that he does not know how his wife died. However, he clearly narrates the events and incidents during and before the 23rd July in the following manner. That his wife returned a few days before the 23rd. Whilst she was away, he has found out she was having an adulterous affair with one of her colleagues. However, upon her return she was sorry about it and they made up so everything was settled and fine. Then from the night before into the 23rd they were celebrating her return and both were drinking alcohol and using the cannabis throughout the night.
69. The Accused says that he cannot remember if he killed her and if he had done so he cannot remember because he was under the influence of alcohol and drugs. Then he claims to have seen the Police and they told him his wife was on the other side but later on he was told that she was dead.
70. In cross examination he admitted that on the 23rd morning Noel Singh the son of a friend came to his house and that he gave his bank card to him. When asked the reason his explanation was that the previous day, he had promised to give some money for a payment to school.
71. He admitted finding out that Jennifer was having an affair by reading her messages by installing an App by which he received all her messages to his phone. When asked if he was angry with her, his response was that after she returns and has a bath that she will be back with him.
72. When shown DE1 the screenshot of the Accused holding a knife in a threatening manner he explained that this was captured by Jennifer when he was on video call with her and cutting onions to cook for the children. When questioned about sending a message on

messenger written in the Swahili language threatening to kill his wife, he said that there are several Congolese dialects and what he has written is not “*will kill her*” but “*will leave her*”. When questioned by court if he sent the message, he did not deny but responded with a question “*will I send a message to a wife of a colleague of Jenifer*”. When questioned about the screenshot showing Jenifer with two coins on her eyes this too, he said that he was on video call with Chris Downes because he wanted his help and was showing Jenifer lying down and that his father-in-law may have taken the screen shot then. He denied being rude to or swearing at Mr. Charles but did not deny telling him about washing his wife’s cunt with a hose. However, he gave an explanation and said what he meant was once she has a wash, she will be his wife again. The prosecution suggested to him that he killed his wife, he strangled her manually and watched her die and that he squeezed her life out of her which he denied.

73. Accused admitted consuming alcohol and using “Ice and Grass” and said that grass is cannabis. He admitted that from the night prior to the 23rd both he and his wife were drinking and taking drugs and on the 23rd morning too it continued. He does say that they slept at some point and got up around 6.30 in the morning of the 23rd.
74. When questioned about telling Noel Singh that Jenifer had left with the children and the passport, his response and explanation was that he went out to buy diapers for the kid and when he returned Jennifer and the children were not at home. In the meantime, Noel had come and at that time he believed that Jennifer has left him and was the reason for him to say so. However, he said that Jennifer was in the neighbourhood and she arrived shortly after Noel left.
75. Accused admits that Mr. Charles O’Hanlon and the police arrived on the 23rd and that he told them she was busy and not to disturb her. His explanation was that he did not want Mr. Charles O’Hanlon or the UN to find out that Jenifer was using drugs as she would lose her job. Finally, it was suggested that he killed his wife because he suspected her of having an affair. The Accused denied this and said that all families have problems. Accused’s consistent position was that he did not kill his wife and if he did he cannot remember doing so.

Evaluation

76. In evaluating the Accused's evidence, I would consider his demeanour at the very outset. The Accused was extremely alert and did understand the questions and responded intelligently. He had the ability to demonstrate some degree of emotion and simultaneously the ability to control himself and answer calmly. Especially in cross examination when he was shown photograph DE1 where he was holding a large knife, he was quick to respond and explain that he was cutting onions and to give an innocent explanation. This photo was produced through Mr. Charles O'Hanlon as being a threatening picture. However, it was not suggested at any stage that he was cutting onions or give any other innocent explanations. However, the facial expression, the manner of holding the knife which is very much bigger than a kitchen knife this certainly cannot be cutting of onions as explained by the Accused. I am more than convinced that this photo depicts the Accused in a state of agitation threatening some person and by no stretch of imagination can this be innocent cutting of onions. This explanation of the Accused is extremely improbable and I am of the view that this is a false explanation.
77. Then the Accused went on to explain why his bank card was given to the boy Noel. He admits that they arrived at his house between 7 and 8 in the morning. He admits giving the bank card, and the reason as he says was to help the boy as the boy's father was his friend. What was the help? Help promised was to pay the boy's school fees and as he trusted the boy he gave the boy the card and the pin number (secret code). When Noel gave evidence nothing of that sort was suggested. The Accused at the end of the trial suddenly brings this reason for the first time. As to the probability of this explanation; it is relevant to note that the Accused claims to have gone out in the morning to buy diapers. If so, he could have very easily withdrawn the money. In any event in the normal course of conduct one does not give the card and the pin number to a boy of 16 years, if he has done so one would certainly expect the defence to have suggested that to the boy. It is not only the bank card but 2 rings, a watch, a coconut shell necklace and a small music box along with a black colour lady's jacket too were handed over. The Accused did not deny the handing over of these items. If he wanted to help the boy with his school fees one cannot understand and there is no rational reason for him to give the other item at that time especially, the lady's jacket. In these circumstances this is another instance of the Accused attempting to advance a false explanation or a reason for his conduct. This utterance of falsehood is certainly not due to any lapse of memory but an attempt to

cover-up the real reason. What was then his real reason? The Accused that morning calls the Noel's mother and wants her to come to his house immediately. When they go there, he tells them that Jenifer left the previous night taking the children had his passport then shows great sadness and hugs the boy. Then he gives the aforesaid items to the boy and his mother. However, the Accused is extremely careful and keen at Noel and the mother leave his house immediately and without delay. He repeatedly and firmly tells that it's time to go and to leave now. When there was a short delay in the driveway Accused comes up to the car and tell them to leave now. This is not the normal conduct of a person in agony or distress. It shows that he got them down for a particular purpose and did not want them to be there any longer than necessary.

78. The utterance that *Jenifer left the previous night taking the children and his passport* is not a mere inadvertent utterance either. It is a deliberate utterance with a purpose and a plan. The purpose is to show that Jennifer has left on her own the previous night.
79. The Accused whilst under cross examination said that frog poison had got into his body and as a result he is now blind in his left eye. However, according to the discharge summary of 8/8/2019 under Axis iii there is a note to that effect "*L- eye blindness due to asphyxiation*". The medical folder confirms that Lusaka had attempted self-harm whilst in the hospital in July 2019, a ligature and in the process suffered an injury to his left eye and that is the cause of his blindness in the left eye. Lusaka is being untruthful on this matter too. He is falsehood to support his position that frog poison has got into his body.
80. As regards the Facebook post to Aline of 20th of July (PE17) Lusaka does not deny sending the post but only asks if he would send such a post to work colleague's wife of Jennifer. He tries to explain that, this was posted after 23rd and it is "*will leave her*" and not "*kill her*". If Jennifer was dead then no question of leaving her will or killing her will arise after the 23rd. Thus, this explanation too is a false.
81. That being so, lets go the vents of the 23rd. Unexpectedly and without warning by mid-day the Charles arrives at his door with the police. At this point too, the Accused does not open the door. When the police informed that they know that Jenifer is in the house and that they will come in, Lusaka opens the wooden door but not the grill gate with the fly mesh. First when he saw the police, he says that Jennifer has gone to see Charles but

then when he sees Charles, he says Jenifer was busy at the time and couldn't come to the door.

82. When Charles says that they will not leave until they see Jennifer, the Accused gets in to an extreme state of agitation and aggression and gets abusive and says "*fuck off you white cunt, no need to be here, go away, she is not coming to the door*" and then slams the door. This utterance and the conduct clearly indicate that the Accused did not want Mr. Charles or the police to come in. First, he says that Jenifer was busy then says that she is not coming to the door. This is the conduct of a person acting with a guilty mind and who is aware of what has happened to Jennifer and wants to conceal that she was dead in the room. It is a conscious and a deliberate attempt to keep any outsiders from knowing or finding out as to what has happened to Jenifer.
83. The Accused takes up the position that he cannot remember how or when Jennifer was killed in short he takes up the position that he had a memory lapse or a brief period of total impairment of his mind. However, on this own admission and evidence he had explained how he spent the whole night drinking and enjoying with Jennifer. He remembers the time he woke up, the time Jennifer woke up and the minute details of his conversations with Noel which was at 7 o'clock of the 23rd. he claims to have gone out to a supermarket and purchased certain items. He remember a promise to Noel on the previous day. The Accused admits that he was communicating with Mr. Downes throughout that period. Considering this sequence of events it is highly improbable that he suffered any loose of memory or an absolute impairment of his mind during this period. (This aspect will be considered further, subsequently).
84. In the above circumstances the Accused's evidence especially in respect of the denials and the explanations given to events and incidents immediately before, during and after the alleged incident are extremely improbable and false and untruthful, Thus, I reject the Accused's evidence in its totality. However merely because the defence evidence is determined to be false and is rejected it does not in any way prove the charges against the Accused. The burden of proving all ingredients of the charge beyond reasonable doubt continues to be with prosecution. Now I will consider if the Accused is entitled to have the benefit of the defence of diminished responsibility.

Defence of diminished responsibility

85. Upon considering the evidence I have found that the prosecution has proved that Lusaka did commit the murder of Jennifer Anne Downs. For the Accused to be entitled to the benefit of the defence of Diminished Responsibility the court should be satisfied of the following 3 elements:
1. that at the time of the killing, the Accused was suffering from an abnormality of mind;
 2. that the abnormality of mind arose from one of the causes listed within the parentheses in section 243 of the Crimes Act; and
 3. that the abnormality of mind substantially impaired the Accused's capacity to understand what he is doing; or control his actions; or know that he ought not to do the act or make the omission.

Was the Accused suffering from an abnormality of mind?

86. To have the benefit of the defence of diminished responsibility under Section 243 of the Crimes Act it is necessary for the defense to satisfy court that Lusaka suffered from a state of abnormality of mind as contemplated by the parenthesis of Section 243. This will be determined primarily on the evidence of the psychiatrists and the psychologist. Dr. Sefanaia Qaloewai in his final report and in evidence express as the opinion that Lusaka was suffering from a mental abnormality in the nature of a psychotic illness namely paranoid schizophrenia satisfying DMS criterion. He proceeds further and expresses a conclusive opinion that Lusaka did not know and was unaware of the nature of the act committed by him.
87. As opposed to this Dr. Kiran Gaikwad's assessment that Lusaka may have been under the influence of a mental illness at the time of the alleged crime and his assessment and conclusion is that the Accused exhibited signs of psychosis however it is substance induced in nature. He excludes schizophrenia.
88. Apart from these two assessments a report prepared by psychologist Ms. Angela Bamblett too was admitted and produced. According to her assessment Mr. Lusaka has exhibited signs consistent with psychosis, possible drug induced or schizophrenia. In these circumstances there are conflicting assessments by two psychiatrists and another by the psychologist. The two psychiatrists gave evidence and this court is possessed of a

great deal of material on psychosis as well as schizophrenia and the underlying causes. I will now consider these conflicting assessments.

Dr. Sefanaia Qaloewai

89. Dr. Sefanaia Qaloewai has treated and attended to the Accused between the 25th of July 2019 and 8th August 2019 whilst Lusaka was at CWM Hospital. Dr. Sefanaia Qaloewai's report dated 29th June, 2022 (DE11) and his evidence is that Lusaka showed signs and symptoms that were consistent with as psychotic illness namely paranoid schizophrenia satisfying DMS criteria. His position was that the Accused did not know what he was doing and could not control his actions and also, he did not know that he should not kill his wife. In shot that there was a total impairment of his cognitive faculty and capacity. The final conclusion is that Lusaka was suffering from a psychotic illness of such a nature that his mental capacity was totally impaired. His statement dated 9th July 2022 (DE10) and the report dated 29th July 2022 were produced as exhibits DE 10 and DE11 respectively. Medical folder of Lusaka maintained at the CWM Hospital was produced as exhibit DE8 and Ms. Bamblett's report was produced as exhibit DE9.
90. In cross-examination the prosecution challenged his final assessment. Dr. Sefanaia Qaloewai's qualification, expertise and experience are not in issue. When an expert expresses an opinion this court now as the sole trier of fact and law is required to consider the via-media or the reasons for his opinion and come to a determination on the issue of the mental status upon considering the opinion/s of the expert/s as well as other relevant facts.
91. At the very inception on the 8th of August 2019 when Lusaka was discharged Dr. Sefanaia Qaloewai has assessed and prepared the discharge summary and also issued a letter to the Commissioner of Police. In both these Dr. Sefanaia Qaloewai had made a provisional diagnosis of *Acute and Transient Psychosis* with a *differential diagnosis of substance induced psychosis* (referred to as DDX in the discharge summary). On the medical folder DE8 in several places there is mention of *paranoid schizophrenia* and it was lead in evidence that Dr. Sefanaia Qaloewai as well the psychiatric team has been mindful, conscious and adverted their minds to paranoid schizophrenia in the course of evaluating and treating and assessing Mr. Lusaka's mental illness. It is after so considering that Dr. Sefanaia Qaloewai has made a provisional diagnosis of *Acute and Transient Psychosis*

with a *differential diagnosis of substance induced psychosis*. Hence this is a considered assessment made as at 8th August 2019.

92. Then 3 years hence, in June 2022, Dr. Sefanaia Qaloewai is called upon to provide a statement to the defence counsel which he had prepared on the 9th of June, 2022 according to which assessment of Lusaka's mental condition is *acute and transient psychotic disorder*. However, he concludes that on *his further observations and collection of past history paranoid schizophrenia was being considered as a provisional diagnosis*. However, it is also stated that *psycho active substances such as cannabis as a potential primary cause cannot be entirely ruled out*. This assessment made on the 9th June, 2022 in his report marked DE10 is somewhat different to the assessment made on 08/08/2019 in which *schizophrenia* was not mentioned in any form.(vide DE8 medical folder)

93. Then in his medical report exhibit DE11, submitted to this court dated 29th June 2022, his assessment is that Mr. Lusaka's *symptoms are consistent with that of a psychotic illness, namely **paranoid schizophrenia** and satisfying DMS criterion*. *Use of psycho active substance such as cannabis can also contribute as a primary cause, or exacerbating factor to Lusaka's existing underline schizophrenia's illness*. Dr. Sefanaia Qaloewai further qualifies this assessment by stating that role of cannabis as a primary cause cannot be entirely ruled out. The assessment of Lusaka's mental condition between the 8th August, 2019 and 29th August, 2022 shows some form of change from substance induce acute and transient psychotic disorder to that of paranoid schizophrenia. Dr. Sefanaia Qaloewai was cross examined as to how and why this opinion and assessment changed. His position was that the original assessment at the point of discharge was provisional and after further observations and consideration of past history and especially as Lusaka was continuing with his treatment he had come to this assessment of schizophrenia and on principle he does not admit that there is a change of his assessment.

94. Dr. Sefanaia Qaloewai categorically admitted that apart from treating Mr. Lusaka between the 25th July and 8th August, 2019 he had had no opportunity to treat him or see him or evaluate him thereafter. He also admitted that the material which he had with him on the 8th August, 2019 including Angela Bamblett's report was the same as he had in 9th June and 29th July, 2022. The only additional feature or information he had was the mere fact of Lusaka's continuing with his treatment and no more. As to what treatment or the

nature of the treatment he does not have had any information either. Thus, Dr. Sefanaia Qaloewai in cross examination admitted and conceded that he did not have any fresh material when he re-formulate his assessment in 2022.

95. When asked as to the symptoms of schizophrenia and transient psychotic disorder he admitted that delusional hallucination was common to both except that in schizophrenia it will be prolonged and long lasting which may be 6 months or over. As far as the observations made of Lusaka's delusions as documented in the medical folder and of in Angela Bamblett's report these paranoid and persecutory type hallucinations of Lusaka have been observed only during the initial period when he was in hospital between the 23rd July and 8th of August and the week preceding the 23rd of July. According to the medical folder by the first week of August 2019 the persecutory delusional ideas and delusions have seized and Lusaka has responded well to medication. This is the material Dr. Sefanaia Qaloewai was in possession as at 8th August 2019 and as well as in 2022.
96. However, Dr. Sefanaia Qaloewai in all his assessments including in 2022 has always maintained that the underlined primary cause of cannabis or psycho active substance being a contributory primary cause and that cannabis as the as the primary cause cannot be cannot be ruled out. This is exactly the basis of his initial provisional diagnosis on 08/08/2019. When Lusaka was transferred to the General Psychiatric Unit of the CWM Hospital Sukuna Ward the nursing assessment made on Lusaka on 02/08/2019 is at page 79 and also the form filled (annexed in the folder) based on information obtained from Lusaka states that the patient smoke marijuana and twice a week. This same information is there in Bamblett's report. Dr. Sefanaia Qaloewai and Dr. Kiran Gaikwad too confirm this. Dr. Sefanaia Qaloewai went on to say that basically the same symptom namely hallucinations is common to both substances induced psychosis as well as Schizophrenia and the distinguishing feature is just the duration. He said that, "If it's like one day to 1 month its acute and transient psychotic disorder if it's up to 6 months and over then it becomes Schizophrenia". Mr. Lusaka admitted using cannabis. This evidence considered along with the fact that Mr. Lusaka's paranoid hallucinations of persecutory type were limited to less than a month as per the medical folder, it excludes any possibility of his condition being schizophrenia. In these circumstances according to evidence and the reports of Dr. Sefanaia Qaloewai the mental condition which Lusaka had suffered during

the period of offence is substance induced acute and transient psychotic disorder and certainly it cannot be schizophrenia.

97. Accordingly, this court sees no reason as to how and why the original assessment of *Acute and Transient Psychosis* could have been changed and transformed into *paranoid schizophrenia*. Therefore, this court is not inclined to accept Dr. Sefanaia Qaloewai's assessment and conclusion in his statement of 9th June DE10 as well as in his report of 29th July DE11 and his evidence to that extent.

Dr. Kiran Gaikwad

98. Now let's consider the evidence and opinion of Dr. Kiran Gaikwad in respect of this issue. He has perused the medical folder the disclosers in this case and met the Accused and assessed him on 6 occasions between 21 July 2020 and 1 September 2020. His assessment is that Lusaka had suffered substance induced psychosis. He had considered delusions and hallucinations and at the time he examined Lusaka he had not shown any such signs. Lusaka had consistently said that Jennifer was having an extra marital affair and she was trying to poison him. Dr Kiran Gaikwad's opinion is that suspicion of the spouse's infidelity is not a delusion and such suspicions do exist between spouses.
99. In cross examination based on the medical folder it was asked whether schizophrenia has been considered during treatment at CWM Hospital. Answering in the affirmative his response was that when assessing a patient of this nature the doctors come with differential diagnosis of two or three types of probable psychotic disorders and then rule out as they gather information and observe. According to Dr. Kiran Gaikwad's observation of Lusaka he was not *syndromatic* and had shown much improvement and his diagnosis of Lusaka's mental abnormality is that of substance induced psychosis.
100. Dr. Kiran Gaikwad also went on to say that when he examined, Lusaka was showing complete recovery and there was no residual symptoms, no signs or any psychosis moods. When asked whether persecutory delusions were existing in 2020, Dr. Kiran Gaikwad explained that there is a difference between delusions and persecutory thoughts. Persecutory thoughts are sometimes normal between husband and wife and may suspect each other of having extra marital affairs and trying to harm each other that is not a delusion. Merely on this one ground such as disorganized thoughts you cannot conclude

or diagnose a person to be suffering from paranoid schizophrenia. His assessment and conclusion is that the Accused exhibited signs of psychosis however it is substance induced in nature. He excludes schizophrenia.

Ms. Angela Bamblett

101. Ms. Bamblett's report was marked as exhibit DE9 and produced with consent and agreement of both parties. Her assessment of Lusaka is that signs were consistent with *psychosis possibly drug induced or schizophrenia*. Thus she has kept it open and did not come to any positive determination. Ms. Bamblett is not a psychiatric but a psychologist. On the 22nd July 2019 she had visited the Accused at his house and made observations. Her assessment is based on these limited observations. However, she seems to have gathered information from various sources which she herself refers to as unconfirmed. However, the opinion expressed by Ms. Bamblett will be taken into consideration as well as the observations she had made of the Accused. She had observed ruminations, sad mood underpinned by hostility and anxiety, paranoid cognitions (including that other were talking about him and that his wife was planning to leave him and take the children, that his wife had canceled his Australian visa), agitation, occasional incoherence in speech and at times he looked distracted and jumped between topics.

Evaluating the medical evidence

102. The two psychiatrists have expressed contrary opinions by way of assessments of the mental condition and the disorder. They are paranoid schizophrenia and psychosis due to substance inducement. Psychologist Ms. Bamblett's assessment is drug induced psychosis or schizophrenia. In determining schizophrenia, the main factors considered by Dr. Sefanaia Qaloewai are;

- i. previous history of treatment and medications,
- ii. to continued hallucinations and delusions namely infidelity of wife and suspicion that others trying to poison him and
- iii. incoherent speech, disorganized thoughts evident by messages sent to Mr. Downes.

103. Now let's consider the veracity of these factors. The previous history of prior treatment for a mental issue emanates from Lusaka himself. The two psychiatrists as well as Ms. Bamblett refer to Lusaka claiming to have seen a psychiatrist or received treatment for

some mental condition whilst in Australia. According to Lusaka he has received treatment and was prescribed medicine whilst he was in Orbust, New South Wales. Dr. Sefanaia Qaloewai or Ms. Bamblett have not been provided with or given the name of the hospital or the institution he obtained treatment or the type of medicine prescribed. He only mentions that he was treated by a doctor named Phillips. However, Lusaka has told Dr. Kiran Gaikwad that he was treated at Orbost Regional Health Hospital. Doctor Kiran Gaikwad as made inquiries and it has been confirmed that the said hospital did not have any record of a person by the name of Lusaka, there is no Dr. Phillip and this hospital does not conduct any mental health clinic. Mr. Christ Downes too have made inquiries in the Orbust area and has not been able to locate or identify any medical institutions which had treated Lusaka despite making inquiries. Orbost is said to be a small town with about 3,000 inhabitants. Apart from this nobody had been able to locate a doctor Phillips who is said to have treated Mr. Lusaka for his mental sickness. In addition, when Lusaka was giving evidence the defence counsel repeatedly asked him as to the name of the medical institution which he received treatment for the mental condition. Mr. Lusaka did not answer directly but tactfully evaded these questions from his own counsel. The said questions and answers are as follows;

Ms. Vaurasi: You told the court that you were seeing a medical person, which medical institution that you were seeing or you attending?

Mr. Lusaka: After all what I did, they thought that I had a mental illness because they thought that was not normal that someone just want to kill themselves

Ms. Vaurasi: Which hospital that he saw the doctor?

Mr. Lusaka: It was the same hospital. I was hospitalised for 2 days. After my recovery, they sent me to doctor Phillips, and he started to see me twice a week, and then I was on medication.

Ms. Vaurasi: Thank you. During the time when you being in Fiji, can you tell the court whether you have seen any medical professionals?

Mr. Lusaka: No, I don't need because I always brought my medicine with me. And I was working in Australia, so I didn't stay long enough here in Fiji.

104. In cross examination his response was that Mr. Downes is his witness as to treatment and visits to the doctor and that Mr. Downes took him to the hospital. When Mr. Downes gave evidence, nothing was suggested as regards taking Lusaka to any hospital despite

Mr. Downes testifying that he could not find any Dr. Phillip or any hospital in which Lusaka was treated in Orbost. Lusaka did not produce any prescription, receipt or other document to establish that he was so treated. None of the doctors who had treated him including Dr. Sefanaia Qaloewai have been provided with this information either. Then in examination in chief said that he cannot remember the name of the medicine he was taking which evidence was as follows;

Ms. Vaurasi: Okay. And at that time, were you seeing any doctors at that time, Sir?

Mr. Lusaka: After this incident, that was when I started to visit doctors and take medicines.

Ms. Vaurasi: Do you recollect what medicines you were taking, Sir?

Mr. Lusaka: I don't remember.

105. However, whilst under cross examination said that he was under treatment and was taking 2 to 3 tablets a day since 2018 and said that it was “Aero Panadol” and that he has some in his bag even now. This he said at the end of the case after listening to the medical evidence where a similar name of a medicine was mentioned by Doctor Sefanaia Qaloewai. Using a medicine of this name was not suggested to either Mr. Downes or Dr. Kiran Gaikwad. In Dr. Kiran Gaikwad’s report at page 4 he has observed that though Lusaka claims to have taken medicine for 3 years he does not know the name. Mr. Lusaka went on to say that he brought all the medicines necessary when he came from Australia and that he did not visit or see any medical practitioner whilst in Fiji.

106. On consideration of the aforesaid I am of the view that if Mr. Lusaka had been receiving treatment since 2018, he would know and remember the name of the hospital or the place of receiving treatment. Further such person in the normal course would have some document or prescription but nothing of that sort was available. Whatever information he gave when checked has drawn a blank. In these circumstances the assertion that he was undergoing treatment (prior to July 23rd, 2019) is highly improbable and has all the hallmarks of it made up for his benefit very likely after this incident with a view to develop a defence.

107. The second factor considered by Dr. Sefanaia Qaloewai is regards delusion of infidelity. Dr. Sefanaia Qaloewai’s interpretation on what a delusion is relevant. According to him

a delusion is “*a fixed false belief persistently upheld fixed false belief that is not in keeping with once culture and it is persistently held even after being provided evidence that doesn't agree with that belief that is the delusion.*” However, according to the Accused he comes to know of the infidelity of his wife from Facebook and other messages received and sent by Jennifer. He gained access by an App installed which enabled him to see all communications of his wife through his own phone or devise. Mr. Lusaka by a process of manipulating technology has received this information of Jennifer's infidelity. Therefore, it certainly cannot be considered to be a delusion in the light of Dr. Sefanaia Qaloewai's own definition but it is information received by Lusaka. Considering this has a delusion by Dr. Sefanaia Qaloewai is inconsistent with his own definition of delusion. Thus, the only such delusion that remains is the belief his wife was trying to poison him.

108. The third factor considered by Dr. Sefanaia Qaloewai is the incoherent speech, and disorganized thoughts as seen in messages sent to Mr. Downes. As to my mind Lusaka was consuming liquor as well as cannabis throughout that night and with his depressive state after finding out of his wife's infidelity it appears he has been consuming some substance. This is evident from the screen shot holding a knife and from the video clip and his own admission that he is a regular user of cannabis. In such a state it is more probable than not that his incoherent speech and disorganized thoughts was due to substance inducement. Thus, I hold that the assessment of paranoid schizophrenia made by Dr.Sefanaia Qaloewai is unsubstantiated and erroneous.

Was Lusaka suffering from any abnormality of mind?

109. Now it is necessary to consider what the state of mind of the Accused was on the day of the murder. For the Accused to successfully plead the defence of diminished responsibility under section 243 of the Crimes Act this court should be satisfied on a balance of probabilities that Lusaka was suffering from a state of abnormality of mind and that the abnormality of mind arose from one of the causes listed within the parentheses of Section 243 of the Crimes Act, that is from a condition of arrested or retarded development of mind, or from any inherent cause, or induced by disease or injury. According to the evidence in this case Lusaka was for the first time demonstrating a great sense of agitation when Mr. Downes called him on the 17th of July to wish of his birthday. Lusaka had been agitated and a state of anger as he had found out of the

infidelity of his wife Jennifer. Without doubt as explained by Mr. Downes, Lusaka was affected in the extreme by the infidelity of his wife. Not only did he know of her infidelity but after seeing a photo of Jennifer with her Hawaiian floral decoration he was under the belief as she was getting married to her work colleague John. This is followed by a post or video clip sent to Mr. Downes on the 19th of July in which Lusaka appears to be crying with two of his kids besides him. His reaction and conduct show great agitation and anxiety had been observed by Charles and Ms. Bamblett (vide-her report). Lusaka had brought it to the notice of both Charles and Ms. Bamblett that his wife is having an extra marital relationship with a colleague. This state of disturbed mentality is further demonstrated by the screen shot D12 in which Lusaka is seen holding a large knife and is visibly emotional. Therefore, between the 17th and the 23rd Lusaka was in this extreme state of agitated mind due to the alleged infidelity of Jennifer.

110. Further, according to Mr. Downes, Mr. Charles and the observations of Ms. Bamblett, Lusaka was a person of quick temper, highly dominating, opinionated and of a controlling nature. He did not have permanent and gainful employment so to speak. He was without doubt living comfortably because off Jennifer's employment and earnings and his stay in Australia and Fiji was on an account of his marriage to Jennifer. In these circumstances upon finding out of the extra marital affair Lusaka had been extremely disturbed and agitated. It is apparent in addition to the sense of insecurity he also demonstrated a sense of extreme and morbid jealousy of his wife's relationship with another. As explained by Dr. Kiran Gaikwad suspicion of infidelity and jealousy between married couples is nothing unusual and Mr. Lusaka being from a different cultural background may have contributed to this mental state. These circumstances considered with the evidence of psychologist and the psychiatrists established that this can lead to a state of psychosis. On the 20th of July his Facebook post to Aline Peters (PE17) shows that he suspected Jennifer of trying to poison him. The messages sent on 23rd of July to Mr. Downes contain delusional beliefs of this attempt to poison Mr. Lusaka. It is uncontradicted and admitted that the Accused was a regular user of cannabis and alcohol. The behavior when the police arrived at his house on the 23rd and how he reacted to Mr. Charles on previous occasions along with the observations of witnesses puts it beyond doubt during this period and on the 23rd he was under the influence of an intoxicant substance. The evidence of psychologists and the psychiatrists is that psychosis can be triggered or can be induced or exacerbated by such substances.

111. The behavior on the 23rd thus proves on a balance of probabilities that Lusaka was suffering from an abnormality of mind which according to the evidence is voluntary drug induced acute and transient psychosis. This was the assessment made by Dr. Sefanaia Qaloewai on 8/8/2019 and later on Dr. Kiran Gaikwad too makes a similar assessment. The paranoid delusions have been observed during the first week in hospital between the 23rd of July and the 02nd of August. As discussed above and as explained by Dr. Kiran Gaikwad this is due to the withdrawal of the substance during that period. By the 2nd of August 2019 Lusaka's paranoid and other delusions have ceased to a great extent and between the 2nd and 8th of August there had not been any substantial observations of delusions (vide-the medical folder). As discussed above this fact clearly excludes schizophrenia and is consistent with drug induced psychosis. Dr. Kiran Gaikwad's finding is that this is psychosis which is drug induced. Ms. Bamblett's does not make a definite assessment but keeps it open between psychosis possibly drug induced or schizophrenia. Dr. Sefanaia Qaloewai as at 8/8/2019 assessed Lusaka to be suffering from acute and transient psychotic disorder with a differential diagnosis of substance induced psychosis. This assessment of drug induced psychosis is consistent with the evidence that I have considered above. Therefore, considering the evidence and the opinions and assessments of the medical experts I am satisfied on a balance of probabilities that the state of mind of Lusaka on the 23rd of July 2019 was substance induced acute and transient psychosis.

Does substance induced psychosis suffered by Lusaka come within the parentheses in section 243?

112. The abnormality of mind of Lusaka is substance induced psychosis. Now it is necessary to consider if substance induced abnormality of the mind (psychosis) comes within the scope of section 243 and if the Accused is entitled to the benefit of the plea of diminished responsibility. To successfully plead this defence the abnormality of mind should come within the meaning of one of the forms of mental infirmities referred to in the parenthesis of section 243. They are abnormalities;

- i. arising from a condition of arrested or retarded development of mind or
- ii. arising from inherent causes or
- iii. induced by disease or by injury.

113. Of the above the first refers to certain pathological conditions of the mind the second to inherent causes and the third induced by disease or injury. External stimuli by substance inducement will certainly not come within the meaning of the first two grounds. The following decisions are self-explanatory on the scope and applicability of the parenthesis. In **Further R V Dowds** [EWCA Crim 1305] it was opined that voluntary intoxication ‘could not be readily be brought within the expression “inherent causes” in the original form of diminished responsibility. (original form was similar to section 243).

In the case of **R v Cooper**, [1980] 1 SCR 1149 Dickson J., defined *Disease of the mind* as follows. “*Disease of the mind*” embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.” (emphasis added)

Then in **Dietschmann v Regina** CACD 5 Oct 2001 [(2001) EWCA Crim 2052] the defendant was convicted of murder. He claimed diminished responsibility arising from a disorder, being either according to one psychiatrist, arising from alcohol dependence syndrome, or according to another, a depressed grief reaction. Rose LJ., held that, that drink does not give rise to an abnormality of mind due to inherent causes.

In **R v Fenton** [(1975) 61 Cr App Rep 261] the defendant had shot four people in two different locations. He suffered a number of conditions, including paranoid psychopathy, which raised the possibility of diminished responsibility, although the jury had rejected that defence. He now appealed complaining that the jury had not been allowed to consider his heavy intoxication as possibly establishing diminished responsibility. It was held that the effect on the mind of voluntary intoxication could not give rise to diminished responsibility and Lord Widgery CJ., opined that ‘..... *we do not see how self-induced intoxication can of itself produce an abnormality of mind due to inherent causes.*’

In **R v Jones** (1986) 22 A Crim R 42 (NSW CCA) considering s 23A of the Crimes Act 1900 of New South Wales (of which the provision is similar to section 243), court refused to regard self-induced intoxication on its own as a condition coming within the defence of diminished responsibility. It was excluded on the basis that it does not cause damage or destruction of brain cells, but temporarily affects the way in which they function, and is therefore not an “injury” under s 23A of the Crimes Act 1900 (NSW).

In **Woods [2008] EWCA Crim 1305**, it was opined that,

“public policy proceeds on the basis that an offender who voluntarily takes alcohol or drugs and behaves a way in which he would not have behaved when

sober is not normally excused responsibility. In our judgment it would be wrong to allow him to escape full responsibility for his actions simply on the basis that he took drugs at a time when he was at risk of developing a mental illness.”(emphasis added)

114. In *R v Dowds* [2012] EWCA Crim 281, the defence argued that acute intoxication is a recognised medical condition because it appears in the International Classification of Diseases and the DSM-IV. The court, having considered the history of the legislation, the legal principles and the policy behind not allowing offenders to rely upon their voluntarily induced state of intoxication to escape responsibility for their drunken actions, stated at that,

"It is enough to say that it is quite clear that the reformulation of the statutory conditions for diminished responsibility was not intended to reverse the well-established rule that voluntary acute intoxication is not capable of being relied upon to found diminished responsibility. That remains the law. The presence of a 'recognised medical condition' is a necessary, but not always a sufficient, condition to raise the issue of diminished responsibility."

The learned counsel for the Sate Ms. Rice submitted that voluntary acute intoxication is analogous to substance induced psychosis and cited the following commentary in Blackstone’s (2020 at B1.19) which provides that:

*“the inclusion of acute intoxication and alcohol intoxication as disorders on the international classification systems ICD-10 and DSM-V respectively, does not alter the previous rule that voluntarily intoxication does not give rise to the defence (of diminished responsibility). The same considerations ruled out a drug induced psychosis (arising from voluntary drug taking) in **Lindo** [2016] EWCA Crim 1940.’*

115. In the light of the above authorities, I am convinced that self-induced abnormalities of mind caused by alcohol or drugs does not come within a disease of the mind, inherent cause or injury of the parenthesis. Therefore, I hold that substance induced psychosis which the Accused Lusaka was suffering does not come within the scope of the parentheses of Section 243 and the Accused is not entitled to the benefit of this defence.

Did the abnormality of mind substantially impair the Accused’s capacity to understand or control or know?

116. Upon considering the medical, psychological and other evidence this court is satisfied that the Accused at the point of causing the death of Jennifer was suffering from an

abnormality of mind namely, substance induced acute and transient psychosis. That being so now it is necessary to consider if it substantially impaired the understanding, control or the knowledge of the Accused as contemplated by section 243. The following circumstances are relevant to determine this issue. The Accused behavior and conduct at the time Charles and the police arrived on the 23rd; Uttering false hood to Noel stating that Jennifer left the previous night and the Accused uttering untruths and falsehoods and making an effort to prevent the police from entering the house as discussed above are clear indications that by mid-day of the 23rd he was mindful and knew that Jennifer was dead and was in the house. His conduct clearly proves that he did not want others to find out and was trying to conceal. Further, he immediately runs into the room and locks it from inside. The photographs show the existence of two locks bolted from inside and broken due the forced entry by the police. Apart from this the photograph number 13 which shows the inside of the door of the room where the key hole is covered with tape. The police witnesses confirm this in their evidence. These vital pieces of evidence indicate that the Accused had was conscious and aware of the nature of his act and knew he ought not to do it. The inference is that he had ensured that whatever that was done in the room will not be seen from outside. Be this before or after the killing the same inference can be drawn.

117. Then we have evidence of Noel. At 7.00 in the morning of the 23rd the Accused uttering another falsehood that Jennifer had left the previous night with the children and taken his passport too. As evaluated above this conduct clearly proves that the Accused was aware of what he had done and was now pursuing a cover up plan. This is certainly not the conduct of a person who did not know or was not in control of what he did at the time the death was caused and certainly not the conduct of a person who had not known that Jennifer was dead.
118. The Accused's explanation for the utterance falsehood that Jennifer was resting was made to save Jennifer's job and to prevent others from finding out that she had consumed narcotics. If that be so, why did he have to utter a falsehood to Noel as early as 7.00 a.m? Thus, the explanation given to court is improbable and false. The reason for giving the bank card as explained in court by the Accused was just to help Noel financially and to pay some dues to the school. This was never suggested to Noel. If the entire exercise of calling Noel was to help him with a payment then why did he give the other items, the

necklace, rings, watch, music box and a lady's black jacket? Then why was he so anxious to get rid of Noel and his mother urgently? The said explanations given in evidence are so improbable that they have to be in all probabilities false. The only inference that arises is that the Accused was in fact aware and knew that Jennifer was dead by 7.00 a.m. of the 23rd. Assume for a moment that the Accused did not know that Jennifer was killed by him due to some mental state and if he subsequently discovered that Jennifer was dead what should have been the normal and natural conduct? Wouldn't he seek help? This would have been so if he in fact did not know who killed or how she died. But his subsequent conduct clearly proves that he was on a voyage of covering up and trying to conceal and create a false scenario of Jennifer having left the previous night. The only and necessary inference from this conduct is that Lusaka knew that Jennifer was dead and he knew that it was he who killed her.

119. The series of messages and photos sent to Mr. Downes during the early hours of the 23rd also is relevant to this issue. It clearly demonstrates a great degree of anger due to the alleged adultery of Jennifer and the belief that she was trying to poison him. It is true that some of these messages are incoherent and does not make sense. It is admitted by the Accused that he was consuming cannabis and drinking alcohol throughout that night. It is natural for person under such substance influence to be incoherent in communicating and this will be compounded as Mr. Lusaka's command of the English Language was not the best. The sequence and the contents of these messages show that the Accused was blaming Jennifer and Mr. Downes for what he had done. There are threats and utterances which are indicative of Mr. Downes losing his daughter Jennifer. Finally, when he says *you loose I win* and then send the photo of Jennifer lying dead, it means none other than that the Lusaka knew that Jennifer was dead. In these circumstances the only inference is that Mr. Lusaka notwithstanding that he was suffering from an abnormality of mind certainly was aware and understood what he was doing and was in control of his actions and also, he knew that he had done something which he ought not to. The evidence proves that the abnormality of his mind has not substantially impaired Lusaka's mind or his capacity to understand or control or know. Therefore, the defence of diminished responsibility cannot succeed in this case.

120. In the present case as admitted by the accused to both psychiatrists and his evidence in this court the consumption of drugs and alcohol has been voluntary. The evidence established as a matter of fact that the accused's psychosis resulted from substance use. In, the circumstances of this case it is proved that drugs consumed by the accused as the specific external factor leading to psychosis. Therefore, even if one assumes that the accused's mental capacity was impaired by psychosis the fact that the substance inducement was voluntary will disentitle and deny Lusaka of the benefit of the defence of Diminished Responsibility (section 243).
121. As for mental impairment (section 28) the evidence does not prove that the accused was suffering any form of mental illness that brings him within section 28 and as it is proved that the substance inducement was voluntary will in any event deny him of the benefit of the defence of mental impairment in view of section 28(9) of the Crimes Act. In the above circumstances I hold that the defence has failed to establish that the accused is entitled to either of these defences.

Conclusion

122. I have considered the Accused's evidence and rejected the evidence as well as his defence as they are false and unreliable.
123. In the aforesaid circumstances I hold that;
- a. the prosecution has proved beyond reasonable doubt that the Accused did commit the death of Jennifer Anne Downes by manual strangulation and the said act was committed with the intention to cause her death,
 - b. the Defence has proved on a balance of probabilities that the Accused was under the influence of substance induced Acute and Transient Psychosis at the time of the murder,
 - c. the Accused is not entitled to the benefit of the defence of diminished responsibility as the said substance inducement is self-induced and voluntary and also the mental illness Psychosis did not cause a substantial impairment to the understanding, control or the knowledge of the Accused,

124. Accordingly, I hold that the prosecution has proved beyond reasonable doubt that the Accused Kiala Marcellino Penakoy Henri Lusaka committed the murder of Jennifer Anne Downes as charged and I find the Accused guilty and convict him for offence of murder as charged.



At Suva

08th of August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Shekinah Law for the Accused.