

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 84 of 2021

BETWEEN : **THE STATE**

A N D : **ISEI TAMANIKALOU**

Counsel : Mr. S. Seruvatu and Ms. S. Naibe for the State.
Ms. A. Bilivalu and Ms. K. Vulimainadave for the
Accused.

Dates of Hearing : 14, 15, 16, 19, 20, 21 September, 2022

Closing Speeches : 26 September, 2022

Date of Judgment : 27 September, 2022

JUDGMENT

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

MURDER: Contrary to section 237 of the Crimes Act 2009.

Particulars of offence

ISEI TAMANIKALOU on the 30th day of June, 2021 at Nadi in the Western Division murdered RATU MARA BATINA.

2. In this trial, the prosecution called nine witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the offence of murder as charged.

BURDEN OF PROOF AND STANDARD OF PROOF

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

ELEMENTS OF THE OFFENCE

4. The prosecution must prove the following elements of the offence of murder beyond reasonable doubt:
 - (a) The accused
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of the deceased; and
 - (d) the accused intended to cause the death; or
 - (e) was reckless as to causing the death of the deceased by his conduct. The accused is reckless with respect to causing the death of the deceased if;
 - (i) he was aware of a substantial risk that death will occur due to his conduct; and
 - (ii) having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
5. What this court will have to consider with regard to this particular state of mind is whether the accused was aware of a substantial risk that death will occur due to his conduct and having regard to the

circumstances known to him, it was unjustifiable for him to take that risk.

6. The first element is concerned with the identity of the person who committed the offence.
7. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is a voluntary act by the accused or is a result of the will of the accused.
8. The third element is the conduct of the accused that caused the death of the deceased. Conduct means an act done by the accused it can be anything such as punching, kicking, stomping, strangling etc. The law requires a link between the conduct of the accused and death of the deceased. This court must be sure that the conduct of the accused caused the death of the deceased.
9. In other words, whether hitting the deceased with a tree branch three times on the head caused the death of the deceased. It is also kept in mind that the act need not be the sole cause but should substantially contribute to the death of the deceased.
10. With regards to the final two elements of the offence which concerns the state of mind of the accused the prosecution must prove beyond reasonable doubt either that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased by his conduct. The prosecution has to prove only one of the two limbs of this element.
11. The prosecution is saying that the accused did not necessarily intend to kill the deceased but they say he was reckless in causing the death of the deceased. A person is reckless with respect to causing death if he is aware of a substantial risk that death will occur by his actions and having regard to the circumstances known to him it was unjustifiable to take that risk.

12. What this court has to consider with regard to this particular state of mind is whether the accused did foresee or realize that death of the deceased was a probable consequence or the likely result of his conduct and yet he decided to go ahead and engage in the conduct regardless of the consequence.
13. This means the accused must foresee that death was a probable consequence or the likely result of his conduct and after realizing that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
14. The prosecution says the accused was reckless when he struck the deceased three times on the head with full strength on the first hit with a tree branch which broke after the second hit. The final hit was followed by kicking as seen by Tarusila whilst the deceased lay on the ground.
15. The prosecution further says the accused knew that death was a probable consequence of his conduct yet he went ahead with his conduct.
16. It is for the prosecution to prove beyond reasonable doubt that it was the accused who was engaged in a conduct and the conduct caused the death of the deceased and the accused was reckless to cause the death of the deceased by his conduct.
17. If this court is satisfied that the prosecution has proved all the above elements beyond reasonable doubt then this court must find the accused guilty of murder by recklessness.
18. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty.

19. If this court accepts that the accused did not intend to cause the death of the deceased or was not reckless as to causing the death of the deceased but this court is sure that the accused intended or was reckless as to the substantial risk that the conduct will cause serious harm, then this court must find the accused not guilty of murder, but guilty of manslaughter.
20. Manslaughter has the first three elements of murder, that is to say that the accused engages in a conduct which caused the death of the deceased and the accused intended or was reckless that his conduct will cause serious harm to the deceased.
21. Manslaughter is the killing of someone by unlawful conduct if this court is satisfied that the accused was engaged in a conduct which caused the death of the deceased and the accused intended or was reckless that his conduct will cause serious harm to the deceased then this court must find the accused guilty of manslaughter. Moreover, the evidence of voluntary intoxication cannot be considered in determining the state of mind of an accused person in respect of the offence of manslaughter.
22. In this case there is evidence that the accused had struck the deceased with a tree branch three times on his head.
23. Whether the accused intended to cause the death of the deceased by his conduct or was reckless as to the risk that the conduct will cause serious harm to the deceased by his conduct is a matter entirely for this court to decide on the basis of the facts and circumstances of the case.
24. With regard to the offence of manslaughter, what should be established is that the accused did foresee or realize that serious harm to the deceased was a probable consequence or the likely result of his conduct and yet he decided to go ahead and engage in the conduct regardless of that consequence.

25. The accused whilst denying the allegation states that on the evidence before the court he was not reckless in his conduct in causing the death of the deceased or was reckless in causing him serious harm.

ADMITTED FACTS

26. In this trial the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
27. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

PROSECUTION CASE

EVIDENCE

28. The first witness PC 5243 Lemeki Racule informed the court that he was part of the crime scene investigation unit. His duties included attending to crime scene, photographing and uplifting of exhibits, trace evidence and photographing the suspect.
29. On 30th June, 2021 at about 11pm the witness was instructed to attend to an alleged murder scene at Prince Charles Park. The witness was accompanied by DC Bibi upon reaching the crime scene the area was cordoned and a crime scene appreciation was carried out.
30. The witness and DC Bibi identified the exhibits and after the initial action they waited for their team leader Cpl. Pita to arrive. When Cpl. Pita came he instructed the witness to be the photographer and DC Bibi to be the exhibit collector.

31. The witness took the photographs of the crime scene, the deceased body, all the exhibits and the post mortem examination at the mortuary. All the photos were downloaded in the CSI computer. After downloading the photos the witness prepared a photograph booklet. The photograph booklet of the crime scene was marked and tendered as prosecution exhibit number 1.
32. In cross examination, the witness agreed when he arrived at the crime scene the deceased body was still at the scene. According to the witness there were police officers at the crime scene and no one had touched anything the deceased body was not moved by anyone. In respect of photos 10 and 11 the witness said the body of the deceased had to be tilted to take the picture of blood coming out of the ear. No other part of the body had blood but there was only a scratch on the side of the ribs.
33. In respect of the pieces of tree branch found at the scene the witness stated exhibit no's 1 and 3 in the photograph were found next to the deceased and exhibit 10 was found 31 meters away from the deceased. The witness further mentioned that although the place was dark at night but one could see things around because there was light coming from the street light along the road and flood lights from the pavilion a couple of meters away.
34. The second witness PC 4695 Edward Bibi informed the court that he was part of the crime scene investigation unit that attended to an alleged murder case inside the boundary of Prince Charles Park in the night of 30th June, 2021. When he arrived at the scene he saw police officers from Nadi Police Station and the deceased was lying down. The witness went to get the crime scene tape from Namaka Police Station and on the way to the scene he picked PC Lemeki the photographer.
35. The witness informed the Lautoka O.C Crimes Department Insp. Sakiusa Jitoko whose instructions were to cordon the scene and wait for his team to arrive. When Inspector Jitoko arrived the witness was instructed to be

the sketcher and exhibit recorder. The members of the team were Cpl. Pita, PC Lemeki and the witness.

36. The team leader Cpl. Pita examined the scene, did a visual examination of the deceased, and numbered all the exhibits. Thereafter, the photographer was instructed to take photos and then the witness was instructed to uplift the exhibits. The exhibits were put inside a brown bag, sealed and time was written, which was kept in the crime scene lab.
37. A piece of tree branch measuring 40cm was marked and tendered as prosecution exhibit no. 2 (a). This exhibit was seen at photo no. 19. A broken piece of tree branch measuring 35 cm was marked and tendered as prosecution exhibit no. 2(b). This exhibit was seen at photograph no. 24. Another broken piece of tree branch measuring one meter was marked and tendered as prosecution exhibit no. 2(c). This exhibit was marked as crime scene exhibit no. 10 in the photograph booklet.
38. The witness had also drawn the fair sketch plan of the crime scene which was marked and tendered as prosecution exhibit no. 3(a) and draft sketch plan as prosecution exhibit 3(b). This witness had also videoed the reconstruction of the crime scene and on the third day he took the buckle swab of the accused.
39. The scene reconstruction was done on the 2nd July, 2021 at Prince Charles Park in the evening. The video recording was stored in the crime scene computer which was downloaded into a CD and kept in a brown envelop. The CD of the scene reconstruction in the Itaukei language was marked and tendered as prosecution exhibit no. 4.
40. In cross examination, the witness agreed prosecution exhibits 2 (a) and 2 (b) were from the same branch and all put together were a bit heavy. The witness disagreed there was no light at the back of the pavilion. The witness agreed during the scene reconstruction they had to use a torch light to get a clear video recording where it was needed.

41. According to witness there were streetlights on the road near Prince Charles Park and there were lights at the back, middle and corner of the pavilion as well.
42. The third witness Cpl. 4949 Pita Davuiqalita informed the court that he was part of the crime scene investigation his role was to examine the crime scene, uplifting and analysing of exhibits uplifted from the scene. In this case, the witness guided and instructed the crime scene officers namely DC Bibi the exhibit collector and note taking officer and DC Lemeki to photograph the crime scene.
43. When the witness first arrived at the crime scene he conducted a scan through the whole crime scene. He saw the body of a male Itaukei lying shirtless and shoeless on the ground. He also saw pieces of wood beside the deceased and some other exhibits.
44. After doing the initial scan of the scene the witness instructed Constable Lemeki to photograph the scene and he instructed Constable Bibi to draw a rough sketch plan of the crime scene including the measurements of each exhibits. After photographing the exhibits were packed and sealed by DC Bibi. The photographs were stored in the computer and printed into a booklet.
45. The witness identified the photograph booklet and was able to explain the crime scene photographs. The witness was also able to recognize the pieces of the tree branches being prosecution exhibits 2 (a), 2 (b) and 2 (c). The witness was able to put together crime exhibits no. 1 and no. 3 and no. 10 together as a complete piece.
46. According to the witness during the crime scene examination he spotted blood like stain on crime exhibits 1 and 3 so he instructed DC Bibi to swab the blood which had dropped on the ground from the deceased ears.

47. After the deceased body was removed all the exhibits were collected. The witness instructed the CSI officers to conduct another round of search around the scene before taking all the exhibits to the crime scene lab. On 2nd July the witness instructed PC Lemeki to attend to the post mortem examination of the deceased and photograph the same.
48. Finally, the witness attended to the crime scene reconstruction with the interviewing officer, DC Lemeki and DC Bibi. The witness guided DC Bibi who was recording video reconstruction and DC Lemeki also took photographs during the scene reconstruction. At the end of the scene reconstruction the witness had observed the accused was remorseful and crying.
49. In cross examination, the witness stated that photographs 2 and 3 were taken the next morning of the alleged murder to show clearly the crime scene from outside the fence. When it was suggested that the back of the pavilion would be dark at night that is why they had to use a torch and police vehicle lights the witness stated that even without a torch and the police vehicle lights there was enough light from the street light across the road.
50. According to the witness the two pieces of tree branches found beside the deceased were fresh. Upon further questioning the witness said after the examination of the deceased body he saw blood coming out from his left ear he did not see any other external injuries on the deceased body.
51. The fourth witness Tarusila Erenavula informed the court that on 30th June, 2021 in the afternoon the witness and her friends were drinking in Nadi town. Before the curfew began they went to Prince Charles Park. The witness was drinking beer with Ratu Mara (the deceased), Tevita and Arieta.

52. Thereafter Tevita and Ratu Mara left, the witness went towards Nadi market where she met the accused and Setoki. They all planned to buy some more beer, after buying beer the witness, Setoki, Arieta and the accused went to Prince Charles Park before the curfew began at 8pm. They went to Prince Charles Park because they would be late on their way home.
53. At Prince Charles Park they climbed over the fence and started drinking on the left side of the pavilion. The witness knows the accused through his girlfriend Arieta who is a friend of the witness. After a while Tevita and his friends came to Prince Charles Park. The witness and her friends at this time moved to another spot to drink.
54. Whilst drinking the accused and Arieta had an argument for about 5 minutes, after the argument the witness and Arieta stood up and walked away to the police post in the park. The accused followed them thereafter, Arieta and the accused again started arguing. Tevita came and took Arieta with him. According to the witness there were enough lights to see people walking inside the ground.
55. After Tevita took away Arieta the witness went through the passage to the pavilion sat on the right side and smoked a cigarette. Shortly after she heard an argument from where the ticket booth was between the deceased and Mere. The witness was able to see this from the pavilion after she had walked to the top. There was light on the passage wall and she was able to see clearly the deceased and Mere. The witness then went to sit on the pavilion, after about 5 minutes the lights went off.
56. After sometime the witness heard a voice calling for help "*kere veivuke*" meaning "*please help*". The witness ran in the direction of the voice, she ran through the passage and saw someone kicking the head of the person lying down outside the passage in front of the ticket booth and canteen. The person lying was kicked once and she was able to see this due to street light.

57. As the witness started to walk forward the person who had kicked started walking towards her when he touched her she saw it was the accused. The accused took her outside when she climbed the fence to go outside the accused said *“if something comes up about what happened to Mara I will come and find you”*. The witness did not respond because she was afraid he was threatening her. When the witness reached the main road she did not see the accused.
58. At this time the witness ran back towards the park and started to call Tevita after climbing over the fence she went to where the deceased was lying to check on the deceased. By this time Tevita and the others came, Tevita sat down and rested the deceased on his chest and massaged the chest of the deceased. The witness checked the pulse but there was none. After this the witness hugged the deceased and cried.
59. The witness sent one of the boys to run to the police station, after the police officers came everyone was taken to the police station. The witness could not remember if the accused was holding anything when he kicked the deceased. The witness identified the accused in court.
60. In cross examination the witness agreed there was a heated argument between Arieta and the accused at the Prince Charles Park on 30th June, 2021 whereby Arieta was shouting. The argument lasted for 5 minutes and the accused was really angry at Arieta.
61. According to the witness she did not hear Tevita arguing or punching the accused on his chest or tell the accused that Arieta was his girlfriend. The witness agreed when Tevita intervened the accused and Arieta were arguing with each other. She could not recall the deceased swearing at anyone.
62. The witness was in a 3 year relationship with the deceased but had separated at the time of the incident. The witness was referred to her

police statement dated 2nd July, 2021 to page 1, second last sentence as follows:

“...but the girl was telling Ratu Mara Batina that someone is standing by the entrance, that the time I heard Ratu Mara Batina [deceased] swearing to Isei in Fijian saying “caiti tamana qori. Caita and magaitinana meaning fuck your father and fuck your mother’s vagina”

63. The witness confirmed that this is what she told the police officer writing her police statement and this was what she heard the deceased say to the accused. After the swearing she heard a scream *“please help”*.
64. The witness stated that when the accused was walking towards her after kicking the deceased she was afraid but the accused had not threatened her at any time.
65. In re-examination the witness stated that it was the deceased who was swearing at the accused. She was afraid of the accused because he had his hands on her shoulders and was gripping it tightly when they were walking towards the fence. The witness clarified that she had said yes to the question that she was never threatened by the accused because she did not understand the question asked.
66. The fifth witness Tevita Roqica informed the court that on 30th June, 2021 he met the deceased at 4pm who was drinking with some others. The witness also joined in as soon as the drinks finished the others left, the accused and the witness went and met up with Arieta and Tarusila.
67. They all went to buy more drinks and they went to a vacant orange house at the town end to drink. At 7pm the drinks finished so the witness asked Tarusila to buy some more drinks. After half an hour Tarusila came with more beer, they planned to drink at Prince Charles Park.

68. Arieta and Tarusila took the lead, the witness had one bottle of spirit with him he went with the deceased to the handicraft park to drink which was shared with 3 others. At around 7.45 pm they all made their way to Prince Charles Park. They climbed over the fence and continued drinking the left over methylated spirit. At the pavilion the deceased and Rusiate were not with them.
69. After a while the witness went towards Arieta and the accused who were arguing beside the police post. As the witness went near he heard the voice of Arieta screaming. The witness knows Arieta for the last 4 years.
70. The witness knew Arieta was not happy with the accused so he told Arieta to come with him and drink with his friends. The witness does not know the accused as they turned the accused was preparing to throw a punch at the witness so the witness asked him if he wanted to fist fight. At this time the witness swore at the accused saying “*sonalevu*” meaning arse hole or big arse and “*caiti tamamu*” meaning fuck your father. The accused did not reply.
71. After walking with Arieta to the pavilion they continued drinking but the deceased and Rusiate were not there. After sometime the witness heard the gate in front open so he went to check near the ticket booth the witness saw the deceased was lying down.
72. The witness was able to recognize the deceased since the lights were on. He went to look for the person who could have done something to the deceased. There was no one around so he made his way back to where the deceased was lying.
73. The witness sat down held the deceased head on his chest and tried to revive him the witness was not able to get any pulse on the neck and wrist. When Tarusila came she started to cry shortly after the police officers came and everyone was told to move away.

74. In cross examination, the witness denied telling the accused Arieta was his girlfriend and he did not punch the chest of the accused to stop the accused from arguing with Arieta.
75. The sixth witness Shashi Kumar informed the court that on 30th June, 2021 he was on night duty with DC Shonal. At around 10 pm there was a message received to proceed to Prince Charles Park since there was a fight in progress. The witness immediately drove towards Prince Charles Park.
76. The witness drove the police vehicle in the park since it was dark from the vehicle lights he saw a person lying on the lap of another. When the witness left the vehicle and went near he heard cries and effort was made to revive the person lying down. The witness felt the pulse but there was none and his tongue was out as well. The witness secured the scene and made all the people present to move away.
77. In cross examination, the witness said it was not that dark there were lights at a distance but he had to keep the vehicle lights on to see things.
78. The seventh witness PC 5450 Isireli Ratulevu informed the court that he had arrested the accused from his home at Rakiraki Settlement, Sonaisali. The accused was informed of the allegation and he was explained his constitutional rights in the Itaukei language.
79. According to the witness the accused was cooperative, and he could smell liquor in the breath of the accused. In the police vehicle the witness asked the accused whether he was at the alleged incident the response was yes. Upon reaching the police station the witness again explained the reason why he was brought to the police station and his constitutional rights were given in the Itaukei language.

80. The witness also stated that when they approached the Navo bridge the accused started crying when questioned why he was crying the accused did not reply. The accused was handed over to the day shift personnel at the Nadi Police Station.
81. In cross examination, the witness said he had asked the accused if he was drinking at Prince Charles Park.
82. The eighth witness DC 4202 Timoci Tavurunaqiwa informed the court that he had caution interviewed the accused on 1st July, 2021 at Nadi Police Station. The witnessing officer was D/Sgt Yagavito the interview was conducted with the use of a computer in question and answer format. After the interview was completed all the pages were signed by the accused, the witnessing officer and the witness.
83. The interview was conducted in the Itaukei language which was tendered as prosecution exhibit no. 5 (a). After this, the witness had compiled the English version which as marked and tendered as prosecution exhibit no. 5 (b). The scene reconstruction was carried out on 2nd July, 2021 which was video recorded, since the conversation was conducted in the Itaukei language the English translation was marked and tendered as prosecution exhibit no. 5 (c).
84. The witness explained the entire scene reconstruction including the questions asked and the response received from the accused. The witness said during the caution interview the accused was not assaulted, threatened or any false promises were made to him, the accused gave the answers voluntarily on his freewill.
85. In cross examination, the witness agreed that the video played in court and the explanation he had given was a true reflection of the conversation he had with the accused during the scene reconstruction. During the caution interview the witness had not asked the accused if he had intended to kill Ratu Mara. The accused during the interview had

stated that he did not mean or expect Ratu Mara to die. The witness also agreed that the accused had stated that it never crossed his mind that his act would result in this “brothers” death.

CAUTION INTERVIEW

86. The answers in the caution interview is for this court to consider as evidence but before the admissions are accepted, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for this court to accept or reject the answers given in the caution interview.
87. It is for this court to decide whether the accused made those admissions and whether those admissions are the truth. If this court is not sure whether the accused made the admissions in his caution interview then those admissions will be disregarded. If this court is satisfied that those admissions were made by the accused, then this court should consider whether those admissions are the truth. What weight is to be given to those admissions is a matter entirely for this court. The defence did not raise any issues with the answers given by the accused during his caution interview.
88. The final prosecution witness Dr. James Kalougivaki tendered his curriculum vitae which were marked as prosecution exhibit no. 6 (a). Dr Kalougivaki is the Head of Pathology in Fiji and the Pathologist who had conducted the post mortem of the deceased works under his supervision.
89. The witness is aware of the report compiled by Dr Daniella John who joined the service in 2013 and is now a Senior Forensic Pathologist. When shown the post mortem report the witness was able to confirm the signature of Dr John on the report. The post mortem examination of the deceased was conducted on 2nd July, 2021 at the Lautoka Hospital Mortuary. The post mortem report was marked and tendered as prosecution exhibit no. 6 (b).

90. The witness also confirmed the photographs in the photograph booklet taken at the mortuary. Since this witness was a replacement witness he read the report and explained the important features as follows:

(a) External Examination

- (i) Right shoulder shows the presence of bruises of different measurements over the right back portion of the shoulder as per photographs 72 and 73.
- (ii) Abdomen has the presence of multiple straight and irregular shaped bruises of different measurements over the left side.

(b) Skull

Fracture over the side of the skull which extends to the left side of the skull.

(c) Dura

(a) Shows bleeding underneath the first covering of the brain.

(d) Lepto-meninges

(a) Shows the presence of bleeding under the second covering of the brain.

(e) Brain

(a) Shows the presence of haemorrhage within spaces inside the brain.

91. According to the doctor the immediate cause of death was the presence of severe bleeding within the skull cavity which included the skull

fracture due to traumatic head injury. The doctor further stated that sub-arachnoid haemorrhage meant there was bleeding underneath the second covering of the brain which in this case was very extensive or widespread. It was highly likely that someone hit over the head will show the same outcome. Here there was indication of severe trauma to the head of the deceased.

92. In cross examination, the doctor once again stated that the severity of the bleeding and injuries noted were quite extensive and severe hence there was a high possibility of more than one blow to the head or associated with a fall.
93. Upon further questioning the doctor said the fracture was on the left side of the skull and it went down to the floor of the skull which is noted at photograph 81.

DIRECTION ON EXPERT EVIDENCE

94. This court has heard the evidence of Dr. Kalougivaki who had been called as an expert on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the post mortem examination report of the deceased is before this court and what the doctor said in his evidence as a whole is to assist this court.
95. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the expert I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.

96. I have also kept in mind that this evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.
97. This was the prosecution case.

DEFENCE CASE

98. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
99. The accused informed the court that on 30th June, 2021 he was in Nadi town when he met his friend Setoki Ceinaturaga they went and bought one litre bottle of methylated spirit and they went to drink at Koroivolu Park. After finishing the drink they met Arieta and Tarusila. Arieta was the girlfriend of the accused and Tarusila was Arieta's friend.
100. The two girls had two packs of Joske and Woodstock beer with them. All of them drank beer and after it finished they all went to buy more. This time they only bought one pack of Joske and Woodstock beer.
101. After buying beer they decided to go to Prince Charles Park to drink. By this time it was 8pm they climbed over the fence and went to drink at a spot. Whilst drinking the accused slept after sometime he was woken up and told to move to another spot since there were other people coming. The accused and the group walked towards the police booth in the park.
102. As the drinking continued the accused was checking his pockets for his phone but he could not find it. He asked Arieta and they almost had an argument, at this time one person by the name of Tex Body came. Tarusila was standing about 15 meters away, Tex asked about Tarusila

and Arieta who is also known as Eta and then punched the accused on his chest and said “*do you know Arieta has a boyfriend*”. The accused said the girl is there if you want the girl you two can go. Tex also asked about Tarusila and was harassing him, the accused got furious.

103. After this Tex and Arieta walked away towards the ground, the accused followed them. He asked Arieta about his phone she replied the phone was where he was sleeping. Later the accused found his phone and he walked towards the first pavilion so that he could leave the park.
104. Whilst walking outside the accused was angry he walked to the first pavilion and then went through the passage to go behind the pavilion. At this time he heard someone swore at him from behind by this time he was beside the pavilion and canteen.
105. The person who was swearing at the accused was about 8 meters away standing in the dark. The accused could not recognise this person because he was drunk. The person was saying “*sonalevu*” meaning big arsehole and *caiti tamanu* meaning fuck your father and your mother’s vagina.
106. The accused was very angry since he did not know why the deceased was swearing at him. The deceased whilst swearing was walking towards the accused when within reach the deceased head butted the accused three times when the fourth one missed the deceased kicked the accused. The accused explained when he was head butted he was going backwards. The deceased then kicked his left leg. Since the accused was in pain he sat beside the rubbish bin, however, the deceased kept swearing and attacking him by this time the accused was one meter away from the fence. When asked to explain how the deceased was attacking him, the accused said “*when I was on the ground moving backwards he was putting his foot on me or stepping on me*”.

107. At this time the accused saw a dry broken tree branch beside the rubbish bin he then swung the branch whilst in a sitting position upwards to hit the deceased on his head after this he stood up and again hit the deceased on his head the second time. The deceased then bend over and he hit the deceased the third time on his head.
108. After this the accused threw the stick and walked away. The reason to use the broken tree branch was because the deceased was attacking him and the accused was trying to do something to stop the deceased.
109. At this time the accused was furious according to him if the deceased had sworn at him it would not have mattered, but he was swearing at this mother and father this made him very angry in addition to this the deceased was attacking him and he did not know why. The third head butt was painful and also when he fell beside the rubbish bin he was hurt.
110. The reason why the accused was moving backwards was because he did not want the deceased to touch him again so he hit the deceased but he did not know that his assailant would die from what he did.
111. Upon further questioning the accused said after the second hit the tree branch broke that's when the deceased stood in a bent over position so he swung his right hand and hit the deceased for the third time on his head. Even in bent over position the deceased kept on swearing at the accused. The accused did not know the deceased.
112. When asked to explain the time duration between the hits the accused said there was a minute difference between the first hit and the second one and then it was after 3 minutes the deceased was hit for the third hit. When the accused was hitting the deceased the accused was angry. While going away at the entrance of the park he met Tarusila who also wanted to go outside. At no time he had threatened Tarusila both climbed over the fence and went outside. The reason why he hit the

deceased three times was because he was furious after the deceased swore at his father and mother.

113. In cross examination, the accused agreed he had quite a bit to drink that day. He denied that Arieta was shouting or arguing with him. When Tex came and took Arieta away he did not do anything but told Tex to take the girl with him. Tex had at no time sworn at the accused when the accused found his phone he was relieved and not upset anymore. According to the accused the deceased was standing near the ticket booth of Prince Charles Park.
114. The accused did not stop the deceased from head butting him he maintained that the deceased had head butted him and he fell towards the fence after he was kicked. The accused denied the suggestion that because it was dark and he was walking backwards he had tripped over. When the broken tree branch was shown to the accused he agreed it was the same one that he had used to hit the deceased.
115. The accused agreed the tree branch was quite heavy and when he hit the deceased it was done with all his strength. The accused confirmed that he was caution interviewed and he gave the answers on his freewill and which was the truth. The accused agreed that the answer in Q.165 stated that after the second hit the deceased had fallen to the ground. The accused disagreed and said the deceased had not fallen but was just bending over after the second and the third hit. The accused agreed it is very dangerous to hit somebody over the head with a piece of tree branch.
116. The accused said he did not know his act would cause the death of the deceased. The accused agreed the deceased was unarmed and he had the advantage over the deceased and was in a better position. The accused denied threatening Tarusila at any time.

117. The accused denied that he was reckless in killing the deceased he did not intend to cause his death but was stopping the deceased from attacking him. The accused maintained that he was provoked by the deceased.
118. In re-examination, the accused stated that he did not tell the police that the deceased had fallen to the ground he told the police the deceased was in a bent over position. The version he told the court was correct.
119. The accused further clarified that when he agreed it was dangerous to hit someone over his head he meant it was the deceased who was attacking, head butting, kicking and making him fall on the ground. The accused stated his first hit on the deceased was with all his strength.

PREVIOUS INCONSISTENT STATEMENT

120. This court directs its mind to the fact that the defence counsel during cross examination of prosecution witness Tarusila and the state counsel during the cross examination of the accused had questioned these two witnesses about some inconsistency in their police statement and caution interview respectively which they had given to the police when facts were fresh in their mind with their evidence in court.
121. This court is allowed to take into consideration the inconsistencies between what these witnesses told the court and their police statement and caution interview when considering whether these witnesses were believable and credible. However, the police statement and the caution interview is not evidence of the truth of its contents.
122. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.

123. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witnesses. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then this court may conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
124. This was the defence case.

ANALYSIS

125. The prosecution alleges that during the night of 30th June, 2021 the accused had hit the deceased with a tree branch on his head three times. The deceased was unarmed whereas the accused was. There was no reason for the accused to strike the deceased in the manner he did. Firstly, a tree branch was used to hit an unarmed person three times on the head which is a delicate part of the human body. Secondly, the force with which the tree branch landed on the head of the deceased was of high intensity which caused the death of the deceased.
126. The post mortem report is self-explanatory and the evidence of the pathologist is before this court which speaks of severe injuries on the deceased head leading to his death. The prosecution also submits that the accused did foresee or realize that death of the deceased was a probable consequence or a likely result of hitting the deceased on his head three times with a tree branch which eventually broke during the second hit yet the accused went ahead and continued hitting him the third time.
127. Finally, the prosecution submits that the defence of provocation and self-defence is not available to the accused in the circumstances of this case. There was nothing done by the deceased other than swearing at the accused. The answers given by the accused in his caution interview and

his evidence in chief blaming the deceased is far-fetched in light of what the accused said in his cross examination that he do not stop the deceased from attacking him.

128. Furthermore, there was no need for the accused to hit the deceased three times with such a force that the tree branch had broken. This court should look at whether the accused had indeed lost his self-control and whether the retaliation by the accused on the deceased was proportionate to the provocation alleged. There was no loss of self-control by the accused. The accused also did not tell the truth when he said the deceased was continuously swearing is unbelievable considering the force of the strikes on the deceased head.
129. It is also submitted that one of the elements of the law on provocation is that the retaliation by the accused must be proportionate to the provocation. For this, the prosecution says the evidence of the doctor is crucial particularly the force used on the deceased which was disproportionate and excessive.
130. On the other hand, defence says this court should consider the fact that it was the deceased who had provoked the accused by swearing at him for no reason directed to his parents in the Itaukei language. The swears were vulgar and unforgiveable the deceased was the initial aggressor in that he was the one who had confronted the accused head butted him three times. It would have been four times had the deceased not missed, if this was not enough the deceased kicked the accused making him fall and stepped on him whilst the accused was on the ground.
131. At all times the accused did not want to be in this situation that is the reason why he was going backwards when the deceased was moving towards him. In fact the accused was on his way out of the park when the deceased came into the scenario. The defence is asking this court to consider the caution interview of the accused which is the truth of what happened that night.

132. The defence is asking this court to look at all the acts of the deceased cumulatively and not in isolation. The continuous swears followed by the attack on the accused were enough to get any ordinary person to lose his self-control. The accused as per the evidence was very tolerant and he did not react until the deceased went too far which made the accused lose his self-control.
133. The accused did not have any time to “cool off”, the sequence of events is continuous and the deceased was relentlessly going for the accused. The accused was so overwhelmed with what the deceased had been doing to him that he acted in the way he did. The scene construction video played in court also shows that the accused is affected by what the deceased had said and done to him.
134. The defence is asking this court to consider the extent of alcohol consumption by the accused as well. The sequence of events that had taken place and the manner in which the deceased had acted towards the accused is a crucial factor in this case. The provocation was extreme and anyone in place of the accused would have lost his or her self-control.
135. Finally, the defence submits that the accused was not reckless in what he did that night he was provoked by the deceased which led to the accused lose his self-control and an impulsive reaction by the accused was the only way to stop the deceased which was proportionate to the provocation advanced by the deceased.

DETERMINATION

136. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. In this case the prosecution has to disprove provocation and self-defence beyond reasonable doubt.

137. There is no dispute that what was supposed to be a drinking session between two groups separately turned into a tragedy. The accused had hit the deceased that night with a tree branch three times on the head that eventually led to the death of the deceased.
138. The post mortem report of the deceased is self-explanatory in respect of the serious injuries suffered by the deceased resulting in his death. The issue in this case is whether the accused was reckless in his conduct which caused the death of the deceased that night and whether the accused was provoked by the deceased which led to the actions of the accused resulting in the death of the deceased. There is also evidence of alcohol consumption by both the deceased and the accused.
139. For this court to come to a decision it is important to consider all the evidence holistically. The evidence of Tarusila is that she saw the accused kicking the deceased on the head who was lying on the ground. This witness also said that she was threatened by the accused not to say anything about what she had seen that night.
140. After carefully considering the evidence of the accused and the evidence of Tarusila in what she had seen that is the deceased lying down and the accused kicking his head I do not give any weight to the evidence of the accused and the answers he had given in his caution interview that the deceased had attacked him as unbelievable on the totality of the evidence.
141. In answer to question 155 of the caution interview the accused stated that the deceased had tried to head butt him. I do not believe and accept that the deceased had head butted, kicked and stepped on the accused as narrated by the accused in his evidence. The accused did not tell the truth in answer to question 156 of the caution interview and also in his evidence when he said the deceased was the initial aggressor in assaulting him.

142. The following questions and answers are important considerations in respect of the accused conduct that night:

Q.160 Then what did you do?

A. When I stood up Mara came towards me and I lifted up the piece of stick and aim his head but he duck and I hit the back part of his head.

Q. 161. How many times you hit Mara on the stick?

A: I hit him 3 times.

Q. 162. Which place you hit on Mara's body?

A: On his head.

Q. 163. What happened when you hit Mara on the first time?

A: He shout but kept on standing.

Q. 164. What happened when you hit him on the second time?

A: He fell down to the ground.

Q. 165. Which place you hit Mara on the second time?

A: I know that I hit his head.

Q. 166. What happened when Ratu Mara Batini was lying down?

A: I again hit his head.

Q. 167. How many times you hit Ratu Mara Batina?

A: 3 times.

Q. 168. Which part of Ratu Mara's body you hit?

A: Only his head.

Q. 169. How hard you hit Ratu Mara Batina?

A: *I used all my strength.*

Q. 170. *What was the reason of you using all your strength to hit Ratu Mara's head??*

A: *I was very very angry.*

Q. 171. *Do you know while using all your strength to hit Ratu Mara Batina's head?*

A: *I did not expect him to die.*

143. The above gives a true picture of what the accused had done that night. The sequence of events explained by the accused above without doubt makes it clear that it was the accused who had hit the deceased on the head with a tree branch with all his strength since he was very, very angry with the deceased.
144. The above is supported by the evidence of the doctor who stated that the deceased died of extensive injuries from trauma to the head.

INTOXICATION

145. Intoxication by alcohol is a relevant matter to be taken into account in determining whether the accused person had the knowledge that death was a probable consequence of his conduct and he decided to go ahead with the conduct, regardless of the consequence.
146. An intoxicated person may still be capable of forming the necessary state of mind to commit an offence. This court directs its mind to the question, whether the accused decided to go ahead with his conduct, having realised that death was a probable consequence, although he was drunk.
147. It is a matter for this court to decide whether the accused was affected by alcohol at that time and the extent of that intoxication. I have taken into account the fact that at the time of the assault the accused was drunk as

a result of voluntary intake of alcohol, however, I am unable to accept that intoxication had any role to play in what the accused did at night.

148. The accused knew what he was doing when he struck the tree branch three times on the head of the deceased forcefully. He could have stopped after the first hit which was with his full strength but he did not.
149. During the caution interview the accused was also able to recall what he had done and was able to narrate the same clearly to the interviewing officer even two days after the alleged incident. In this regard, it is reasonable to infer that the accused knew what he was doing and therefore the accused must have foreseen that death was a probable consequence or the likely result of his conduct and after realizing that, he did not stop but went ahead and engaged in that conduct regardless.
150. Considering the above, I am unable to accept that the accused was intoxicated to the extent that he could not have foreseen that his conduct would cause the death of the deceased. I also accept that the accused was aware of a substantial risk that death will occur by what he was doing and having regard to the circumstances it was unjustifiable for him to take the risk yet he took that risk.

LAW ON PROVOCATION

151. In *Puratake Tapoge v State* [2017] FJCA 140; AAU121.2013 (30 November 2017) the Court of Appeal had succinctly stated the law on provocation and the test that needed to be satisfied from paragraphs 15 to 20 as follows:

[15] Provocation is not a complete defence to an unlawful killing. It is a partial defence. Killing with provocation reduces culpability from murder to manslaughter. This lesser culpability is the effect of section 242 of the Crimes Act 2009, which states:

(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.

(2) The term “provocation” means (except as stated in this definition to the contrary) any wrongful act or insult of such a nature as to be likely when –

a) done to an ordinary person; or

b) done in the presence of an ordinary person to another person –

(i) who is under his or her immediate care; or

(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person-

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

(3) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as state in sub-section (2), the former is said to give to the latter provocation for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an

assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who believes and has reasonable grounds for believing the arrest to be unlawful.

[16] There is a general duty on the courts to consider a defence, even if it was not expressly relied upon by the accused at trial. The scope of that duty in relation to provocation was explained by Lord Devlin in Lee Chun Chuen v R (1963) AC 220 as follows:

Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.

[19] In Isoa Codrokadroka v The State unreported Cr App No. CAV of 2013; 20 November 2013, the Supreme Court endorsed the judicial approach to provocation at [16]:

The Court of Appeal summarised at paragraph 38 the judicial approach that should be taken in relation to provocation as follows:

"1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.

2. There should be a credible narrative on the evidence of provocation words or deeds of the deceased to the accused or

to someone with whom he/she has a fraternal (or customary) relationship.

3. There should be credible narrative of a resulting loss of self-control by the accused.

4. There should be a credible narrative of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.

5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.

6. There must be an evidential link between the provocation offered and the assault inflicted."

152. The accused relies on the defence of provocation. Provocation is not a complete defence but is a partial defence reducing what would otherwise be murder to the lesser offence of manslaughter. Since the prosecution must prove the accused's guilt, it is for the prosecution to make sure that this was not a case of provocation and not for the accused to establish that it was.

153. This means before this court can find the accused guilty of murder the prosecution must satisfy this court beyond reasonable doubt that the accused was not 'provoked' to do what he did. 'Provocation' has a special meaning in this context. If the prosecution satisfies this court beyond reasonable doubt that the accused was not provoked to do what he did, then the accused will be guilty of murder.

154. If, on the other hand, this court considers either that he was, or may have been, provoked, then the accused will be not guilty of murder, but guilty of the less offence of manslaughter. It is not for the accused to

prove that he was provoked, but it is for the prosecution to prove beyond reasonable doubt that he was not provoked.

155. How then does this court decide whether the accused was, or may have been, provoked to do what he did? There are a number of questions this court has to consider when deciding whether the accused was, or may have been, provoked to kill the deceased.
156. The first question has two parts to it. The first is did the deceased's conduct, that is the things he did or said, or both, provoke the accused, or may have provoked him? If he did, or may have done, then this court must consider the second issue, which is did the provocation cause the accused to suddenly and temporarily lose his self-control?
157. When considering whether the accused was provoked this court must take the accused as this court finds him. For example, if the accused was disabled in some way, to call him a cripple might be very much more hurtful than it would be to someone who is not disabled.
158. This court will also note that it is necessary that the accused must have been provoked to "suddenly and temporarily" lose his self-control. That is because the law only permits the defence of provocation where the accused is for the moment not the master of his mind. If he had time to think about what has provoked him, to reflect on how he is going to react, and to decide how he is going to react, then the essential element of the defence of provocation of a sudden and temporary loss of self-control does not exist.
159. When considering whether the accused's loss of self-control was sudden and temporary this court must consider the length of time which had passed since the actions or words of the deceased that are relied upon as provocation took place, and whether the accused had in fact regained his self-control before he killed the deceased. Finally, the force used by the accused must be proportionate to the provocation.

160. If this court is satisfied beyond reasonable doubt that the accused was not provoked, or if he was, or may have been provoked, that he had regained his self-control before he killed the deceased, and the retaliation was disproportionate to the provocation then the accused cannot rely on provocation to reduce his alleged crime to manslaughter, and this court should find him guilty of murder, and that is the end of the matter.
161. If, however, this court accepts that the accused was, or may have been provoked, and that his loss of self-control was, or may have been, sudden and temporary, then this court must go on to consider a further question, which is whether everything done and said by the deceased was, or may have been enough to make a reasonable person do what the accused did?
162. A “reasonable person” in this context means an ordinary person of the accused age and sex who is not exceptionally excitable or aggressive, but is possessed of such powers of self-control that everyone is entitled to expect that people will exercise in community as it is today. In other words a reasonable person is a person of ordinary self-control.
163. This court should bear in mind that community requires ordinary people to exercise reasonable control over their emotions and their tempers. It is for this court to consider what control over emotions and tempers is to be expected today of people of ordinary self-control.
164. If this court is satisfied beyond reasonable doubt that the provocation was not enough to make a reasonable person do what the accused did, then this court should find the accused guilty of murder.
165. On the other hand, if this court considers that the provocation was, or may have been, enough to cause a reasonable person to do what the accused did, then this court should find the accused not guilty of murder, but guilty of manslaughter.

166. I accept that Tarusila told the truth to the police officer writing her police statement that it was the deceased who was swearing at the accused. I also accept that Tarusila had seen the accused kicking the deceased on his head when the deceased was lying on the ground.
167. However, I do not accept that the accused told the complete truth in court when he said he was attacked by the deceased which compelled him to hit the deceased on his head with the tree branch. I also do not accept that the deceased had not fallen after the third strike with the tree branch when the accused told the police in his caution interview (Q. & A. 164) that after the second hit the deceased had fallen down.
168. Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation.
169. In this case, the accused had used force by hitting on the head of the unarmed deceased three times. This is supported by the evidence of Dr. Kalougivaki which confirms the injuries sustained by the deceased as a result of excessive force on his head.
170. After considering all the evidence adduced, this court is satisfied beyond reasonable doubt that the accused did foresee or realize that death of the deceased was a probable consequence or the likely result of his conduct and yet he decided to go ahead and engage in the conduct regardless of the consequence.
171. I accept the deceased ought not to have sworn at the accused which was a provocative act directed towards the parents of the accused. However, the swears in my considered judgment would not have enabled the accused to lose his self-control and react in the manner he did.
172. The issue that also needs to be taken into account is the delay between the first and the second hit which was of one minute and between the

second and the third hit there was a delay of three minutes. I am unable to accept that the accused had lost his self-control and had reacted with proportionate force.

173. In my considered judgment the delay between the three hits was sufficient to allow for the cooling off period to set in.
174. On the totality of the evidence and the sequence of events that unfolded the accused conduct was not proportionate to the provocation alleged. There was no need for the accused to hit the deceased on his head three times at an excessive force on an unarmed person.
175. In my judgment the swearing of the deceased on the accused would not have caused an ordinary person to react in the way the accused did. On the evidence before this court it is difficult to accept that the accused had lost his self-control due to the swearing, and that the retaliation by the accused was proportionate to the provocative words or deeds of the deceased.

SELF DEFENCE

176. It is also noted that when the accused was giving evidence he told the court that the deceased was attacking him and he had no choice but to hit the deceased on his head with the tree branch to stop him.
177. This aspect of the accused evidence directs me to consider whether the accused was acting in self-defence. Self-defence if validly made out is a complete defence to the charge of murder, so if this court thinks the accused was acting in self-defence then this court will find the accused not guilty of the offence of murder. Since the prosecution must prove the guilt of the accused it is for the prosecution to prove that the accused was not acting in self-defence.
178. It is not for the accused to establish that he was acting under self-defence. This court must consider this defence in light of the situation

which the accused honestly believed he faced. Firstly, whether the accused honestly believed that it was necessary for him to use force to defend himself. Secondly, whether the type and amount of force the accused used was reasonable. Obviously a person who is under attack may react on the spur of the moment and he cannot be expected to work out exactly how much force he needs to use to defend himself.

179. On the other hand, if the accused goes and uses excess force or force out of all proportion to the anticipated attack on him or more force than is really necessary to defend himself, the force used would not be reasonable so this court must take into account both the nature of the attack on the accused and what the accused did as a result.
180. The accused informed the court that the deceased had head butted him three times and on one occasion he missed and then the deceased kicked him making him fall beside the rubbish bin and when the accused was on the ground the deceased continued to step on him. The accused then got hold of a tree branch hit the deceased on the head whilst in a sitting position and then after one minute the second hit again to the head. Thereafter three minutes later whilst standing the accused delivered the final hit to the head. The first hit to the head of the deceased was at full strength.
181. If this court is sure that the force the accused used was unreasonable then the accused could not have been acting in self-defence, but if this court is satisfied that the force used by the accused was or may have been reasonable then this court should find the accused not guilty of anything.
182. The prosecution is saying the deceased was unarmed and there was no need for the accused to hit the deceased three times with a tree branch with excessive force. The doctor's evidence and the post mortem report also confirms excessive use of force which resulted in serious injuries on

the deceased which was not proportionate to what the deceased had allegedly done to the accused.

183. The eye witness Tarusila has stated that she saw the accused kicking the deceased on the head which shows the deceased was lying on the ground and not bent over in standing posture as mentioned by the accused in his evidence is unbelievable. Upon considering the evidence this court accepts that the force used by the accused was not proportionate and reasonable therefore self-defence is not available in the circumstances of this case.
184. The prosecution has proven beyond reasonable doubt that the accused was not provoked by the deceased and/or not acting in self-defence on the evidence before this court.

CONCLUSION

185. Upon considering the evidence adduced by the prosecution and the defence this court is satisfied beyond reasonable doubt that the accused on 30th June, 2021 had murdered Ratu Mara Batina.
186. For the above reasons, the accused is found guilty for one count of murder by recklessness as charged and he is convicted accordingly.
187. This is the judgment of the court.

Sunil Sharma

Judge

At Lautoka

27 September, 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.