

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 27 of 2019

BETWEEN : **THE STATE**

AND : **APISAI LOMANI JUNIOR and LEONE NAISAKE**

Counsel : Mr. Vosawale M. with Ms. Mishra P. for the State
: Mr. Rabuku J. with Mr. Cati L. for the 1st Accused
: Mr. Vosarogo F. for the 2nd Accused

Judgment : 2 November 2022

JUDGMENT

The charges

1. The Accused are charged with the following offences:

COUNT 1

Statement of Offence

UNLAWFUL CULTIVATION OF AN ILLICIT DRUG: Contrary to section 5 (a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

APISAI LOMANI JUNIOR together with another, between the 1st day of August 2018 and the 26th day of December 2018 at Wailoaloa Farm, Nakasaleka, Kadavu in the Southern Division unlawfully cultivated 23 plants of Indian hemp botanically known as Cannabis Sativa, an illicit drug weighing 10.5kg.

COUNT 2

Statement of Offence

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

Particulars of Offence

APISAI LOMANI JUNIOR and LEONE NAISAKE on the 26th day of December 2018 at Wailoaloa Farm, Nakasaleka, Kadavu in the Southern Division murdered FILIPE LOMANI JUNIOR.

COUNT 3

Statement of Offence

GIVING FALSE INFORMATION TO A POLICE OFFICER:
Contrary to section 201 of the Crimes Act 2009.

Particulars of Offence

APISAI LOMANI JUNIOR between the 26th day of December 2018 and 29th day of December 2018 at Kadavu in the Southern Division gave false information to W/CPL 3654 Moli, a Police officer, knowing it to be false.

Burden and standard of proof

2. The Prosecution brings the charges against the accused and therefore bears the burden of proving the Accused persons' guilt beyond reasonable doubt. The Accused are presumed innocent until proven guilty by the Prosecution. They have no duty to prove their innocence.

Elements

3. To prove the charge of unlawful cultivation in Count 1, the Prosecution must prove beyond reasonable doubt that
 1. Accused 1 with another
 2. cultivated Indian hemp, an illicit drug
 3. without lawful authority.
4. To prove murder in Count 2, the Prosecution must prove that
 1. the Accused persons
 2. engaged in conduct that caused the death of Filipe Loloma Junior
 3. the Accused persons intended to cause death or were reckless as to causing death by the conduct
5. The offence of giving false information in Count 3 requires the Prosecution to prove that

1. Accused 1
2. gave information which he knew or believed to be false
3. to Cpl Moli, a person employed in the civil service
4. causing Cpl Moli to do something she would not have done if she knew the truth of the information given to her

Agreed Facts

6. Agreed between the 1st Accused and the Prosecution are the following facts:
 1. Accused 1 is Apisai Lomani of Vacalea village, Kadavu.
 2. He has been residing in Vacalea village since 1996.
 3. He was born on 9 May 1977.
 4. The deceased in this matter is Filipe Loloma Junior, 36 years old of Vacalea, Kadavu.
 5. The deceased was known to Accused 1 and Accused 2.
 6. Dr. Ravale Inikasio noted the following injuries on the deceased:
 - a) Bruised and red spots on the forehead
 - b) Bilat eye swelling o/c bruises
 - c) Laceration on the left upper eyelid
 - d) Bruises over the facial area- back,, left upper limb, abdomen and chest. left leg.
 - e) Laceration on the left leg
 - f) Swollen lips
 - g) Facial area - blood stained offensive odor emanating from the body.
 7. The deceased's body was identified as that of Ro Filipe Loloma by Pita Loloma and Edward Loloma.
 8. The deceased's belongings were identified by Mafi Tuifagalele.
 9. Dr. James Kalougivaki conducted a post mortem examination on the deceased on 29 December 2018 at the Kadavu Hospital mortuary.
 10. The cause of death was
 - a) Extensive sub-arachnoid haemorrhage and traumatic brain injury;
 - b) Antecedent causes were severe traumatic head injury and multiple traumatic injury.
 11. The 23 uprooted plants from the Wailoaloa farm tested positive for cannabis sativa (marijuana) weighing 10.15 kilograms
 12. Agreed documents tendered by consent, with contents undisputed:
 - a) Post mortem report of Filipe Loloma Junior (deceased) dated 29/12/18;
 - b) Toxicology analysis report of the Deceased
 - c) Medical cause of death certificate of the deceased
 - d) Fiji Police Forensic Analysis Report of Cannabis dated 04/01/19
 - e) Photographic booklet of the alleged murder scene at Wailoaloa Farm dated 27/12/18
 - f) Birth certificate of the Deceased
 - g) Rough and fair sketch plans of the alleged murder scene at Wailoaloa Farm, Vacalea, Kadavu

7. The following facts are agreed between the 2nd Accused and the Prosecution:
1. The 2nd Accused is 26 years old, farmer of Vacalea Village, Kadavu
 2. The deceased: Filipe Loloma Junior, originally of Rewa, is 36 years old, unemployed of Vacalea village.
 3. Seremaia Kaci is a farmer from Vacalea village, Kadavu. In December 2018, he was farming at his farm at Vacalea.
 4. Seremaia Kaci's farm is next to the farm where the deceased was farming.
 5. On 25 December 2018 around midday, the 1st and 2nd Accused persons drank liquor under the mango tree beside the AG Church at Vacalea village with the following:
 - a) Ilai Cila Tubuna Becirua
 - b) Timoci Nauagunu
 - c) Aminiasi Seru
 - d) Ilaisa Tadulala
 - e) Leone (from Rewa)
 - f) A few others
 6. On 27 December 2018, the 2nd Accused and others took the Deceased body to the Vunisea Hospital.
 7. On 27 December 2018, staff nurse Resina Qio of Vunisea Hospital called the Vunisea Police Station and reported the death of the deceased.
 8. Constable Timoci and Constable Ovini came to Vunisea Hospital and unwrapped the body which was wrapped in a grey coloured tarpaulin which was secured with ropes and bedsheet. The bedsheet was stained with blood around the head area.
 9. Injuries noted by Dr. Ravaele Inikasio. (See #6, Agreed Facts for Accused 1)
 10. Deceased identified by Pita and Edward Loloma as their brother, Filipe Loloma Junior.
 11. Postmortem conducted by Dr. Kalougivaki on 29/12/18.
 12. Cause of death as found by Dr. Kalougivaki. (See #10, Agreed Facts for Accused 1)
 13. Documents agreed to be tendered by consent. (See #12, Agreed Facts for Accused 1, except for the birth certificate of the deceased)

The Prosecution evidence

8. Sergeant 3205 Patricia Liga of the Forensic Services, Crime Scene Unit took photographs of the post mortem of the deceased on 29th December 2018 and of the alleged murder scene at the Wailoaloa farm, Kadavu, on 30th December 2018. She also prepared rough and fair sketch plans of the crime scene at Wailoaloa. The photographs and sketches were tendered as part of her evidence.
9. Timoci Nauagunu is originally from Tailevu. At the time of the alleged offences, he was working as a carpenter for the 1st Accused. He and the 2nd Accused and four other carpenters lived with the 1st Accused and his parents at the 1st Accused's home at Vacalea, Kadavu. He said the 2nd Accused was also known by the name of Kone.

10. From the drinking party beside the AG Church, he went to sleep at about 1am on 26 December 2018 while the others continued drinking. He returned to the drinking party again at about 7am. Present were the two Accused, Ilai Tubuna, another Leone, Tadu and Seru.
11. He "knocked out" around 1pm and when he woke up, the 1st Accused said for them to go somewhere. The 1st Accused sounded angry. The 2nd Accused also spoke up angrily and started swearing. He did not know why they were angry or who the 2nd Accused was swearing at. When the 1st Accused said for them to go, he thought they were going to buy more beers. They went with the two accused persons and Seru, Tubuna, Tadu, and Leone to Wailoaloa where the 1st Accused's farm was. It was his first time in Wailoaloa. The 1st Accused had about a thousand yaqona plants, more than a thousand dalo, less than a hundred cassava plants, and 23 marijuana plants. He knows the plants belonged to the 1st Accused because the 1st Accused had a farm house there. The second farm house on the farm belonged to Filipe, the deceased.
12. The trek to the farm took more than two hours. At the hilltop overlooking the farm, the 1st Accused divided them into two groups. One group was to go down on the left side, the other on the right. They were to go down to Filipe's farm house. As they were descending, he saw Filipe run out from the farm house. The 2nd Accused ran after Filipe, apprehended him and started punching him. He tried to stop the 2nd Accused but the 2nd Accused pushed him back. The 2nd Accused was angry and swearing at Filipe. Tubuna also tried to stop the 2nd Accused but was also pushed back. The 2nd Accused continued punching Filipe all over his face and chest. The punches landed on Filipe's nose and eyes. He saw ten punches thrown and they were heavy, forceful blows.
13. The second group were at the farm house and then the 1st Accused came to where the 2nd Accused and Filipe were. The 1st Accused was very angry. He looked serious and was clenching his teeth. The 1st Accused punched Filipe on the head and chest and hit Filipe's chest many times with the flat surface of the cane knife. The 1st Accused's punches were heavy. He swore at Filipe. The 2nd Accused was also punching Filipe and jumping and stomping on Filipe's chest and kicked him on the left side of his abdomen while Filipe was on the ground, pleading with the 1st Accused for his life.

14. In cross-examination, PW2 denied the Police told him to blame Apisai and Leone or he would be blamed for the things that happened at Wailoaloa farm. He agreed that the Police had told him he needed to give a statement in relation to the 1st and 2nd Accused persons if not, they would pin the murder charge on him and then he would never see his family in Namena again.
15. Aminiasi Seru is a cousin of the 1st Accused. He identified both accused persons in Court. His evidence is that he joined the drinking group at around 8:30 on the morning of 26 December 2018. Apisai was the leader of the group. At around midday, Apisai said for them to go. He thought it was to get more drinks. At the boat, they were told to go to Nasogoseivou and up to see a man from Rewa named Professor Ju. "Professor Ju" was Filipe, also known by the name of "Kai Rewa". Apisai and Kone gave instructions. He could see that both were very angry. He heard at the drinking party that they were to go and see Filipe because he had taken people up to the farm in Wailoaloa.
16. Prior to this day, he had been up to Wailoaloa three times as his elder brother used to farm there. At the top of the hill at Wailoaloa, they were split into two groups. They were told not do anything to Filipe. Apisai said whoever saw Filipe was to tell him to stay still. There was no discussion for Filipe to be assaulted or punched by anyone.
17. Aminiasi said he was part of the group that went down on the right and as they were descending, he saw Filipe and one Seremaia at the farm house. Seremaia was punched and Filipe ran towards where Kone and his group were. He heard Filipe shout. Apisai told him to go tell the 2nd Accused not to do anything but when he got there, Filipe was already injured. He saw the 2nd Accused punching Filipe on the face and on the body. Filipe was on the ground, crawling. He was being punched and rolled from side to side. Filipe could not avoid the blows. When Filipe tried to escape, Tubuna pushed or threw him back. Filipe's face was cut and swollen and blood was coming from his mouth and nose. He was scared when he saw the injuries on Filipe and did not try to stop the assault.

18. When Apisai got there, he stopped the 2nd Accused. The 1st Accused was angry too and asked Filipe who all had come to the farm. The 1st Accused punched Filipe on the chest while Filipe was lying down "folded" on the ground, pleading that he wanted to live.
19. He went to Filipe's farm house and after about 10 minutes, the accused persons came. Apisai told him and Ilaisa to get Filipe and they went. Filipe could not see properly. Blood was coming from his face and he could not walk.
20. He knew the 1st Accused had a farm house at the place because Apisai used to camp there. Apisai planted dalo, cassava and marijuana. He knew Apisai planted marijuana because he heard about the reason for the assault and heard Apisai and Leone having a heated discussion about this. Both were very angry.
21. He later said that it was Leone from Rewa and Tadulala that brought Filipe back to his farm house. Although Filipe was already injured, Apisai continued to punch him again and his head hit a rock. He saw the 1st Accused punch Filipe three times. Filipe was lying there unable to move. After that, Apisai said for them to take Filipe's marijuana and carry it to the village. He felt sorry for Filipe and wanted to take him. He could only take him for a short while because Filipe was heavy, so he left him there and followed the others up the hill. Apisai told them not to tell anyone about what had happened at Wailoaloa and he did not do so because he was scared of Apisai. All the marijuana was taken to Apisai's place.
22. The next day, Apisai told them Filipe had died and for them to go get Filipe's body. The body was at Apisai's farm house, wrapped in a bedsheet and tarpaulin when they went up. Apisai said for him and Kone to take the body to Vunisea.
23. At Naluvea, he got a vehicle to take the body up to the hospital. Kone took the body to Vunisea while he returned to Vacalea.
24. He said he and Ilaisa and Leone from Rewa assisted the Police with the photographs. Three police officers went with them to the scene and took photographs. While at the farm, they saw marijuana plants near Apisai's farm house. The plants belonged to Apisai and Kone and he knew this because while they were drinking that day, Apisai and Kone were discussing for them to go see Filipe because he was also farming there.

- Apisai and Kone were angry because Filipe had taken some people to the farm. He helped the Police officer uproot the marijuana plants from the farm and took them down to the boat. The Police took the plants on to Vunisea.
25. In cross-examination, Aminiasi Seru said they were taken by the Police on 28 December 2018. He spent the night at a senior Police officer's place while Ilaisa and Leone Qerea slept at another Police barrack. They were interviewed separately in a house at Vacalea and then afterwards taken to Vunisea.
 26. Isaia Tuinuku Sogosogo was the driver of the vehicle that took the body of the deceased from Naluvea jetty to Vunisea on 28 December 2018 at about 2:45pm. He was the Chaplain of the Vunisea Secondary School at the time. He was flagged down by a male who asked for assistance to take a deceased body from the boat at Naluvea to the hospital. The body was wrapped in a tarpaulin and tied with a rope. The gentleman who had been with the body in the boat took the body to the hospital.
 27. At the hospital, they were directed by Staff nurse Resina to take the body to the front of the mortuary and wait there because it was now a Police case. At the mortuary, he got out of the vehicle and sat down while the male who had brought the body was moving around. He asked this person who had brought the body where he was from and he replied he was from Naqali, Naitasiri.
 28. He saw the Police unwrap the body and noticed blood stains on the sheet around the head area. The body was that of an *itaukei*.
 29. Constable Ovinu Burekalou was on beat patrol at around 4pm on 27 December 2018 when he received a call from the Station to go and view a body at the hospital. The body was wrapped in a tarpaulin and tied with a rope. He untied and unwrapped the body. Inside the tarpaulin, the body was wrapped with bedsheets. There was blood in the mouth and nose area. He saw injuries around the jaw, abdomen, and leg of the deceased. He then wrapped the body up and put it inside the freezer.
 30. Outside, the 2nd Accused was telling the Talatala, handyman and hospital staff that he had been in a fight with the deceased, resulting in the deceased's death. He arrested the 2nd Accused and escorted him to the Police Station.

31. Dr. Ravacle Kelekele, the Senior Medical Officer at the Vunisea Hospital on 27 December 2018 viewed the body of the Deceased with the Police officers at the mortuary. The Prosecution did not have a copy of this officer's medical report and he was not able to give any evidence of the injuries. The injuries he noted form part of the facts agreed by the prosecution and both accused persons.
32. Special Constable Vilikesa Tokaiqali said on 30 December 2018, he was instructed by Cpl Moli to go Vacalea village for a case of drugs and murder. They left the Station with Cpl Moli, Sgt Patricia who was a crime scene officer, and PC Rokoseru. They spent the night at Vacalea and left for Wailoaloa at 4am the next morning with three civilians, namely, Aminasi Seru, Ilaisa Tadulala, and Leone Qerea. These witnesses showed them the farm house belonging to Filipe, the farm house belonging to Apisai, and also the scene where the alleged incident happened. Sgt Patricia took photographs of the places pointed out by the witnesses.
33. They found 23 marijuana plants about 6 to 7 paces from Apisai Lomani's farm house. The civilian witnesses told him everything belonged to Apisai Lomani. Cpl Moli instructed him to uproot the marijuana plants and he did so with the help of the civilians. The plants were divided amongst them and taken down to the boat. At the village, he recounted the plants and then took them to the Kadavu Police Station where he handed them over to the Station Orderly, WSC Selai.
34. Resina Qio was the staff nurse at Vunisea hospital on 27 December 2018 when the body of the deceased was brought in by the chaplain and another male. The chaplain who drove the vehicle bringing the body to the hospital told her there was a deceased body on board. She asked the person standing with the driver what happened and how the person died. He replied that there had been a fight between them and he beat the deceased until he died. He said he was from Naitasiri. She identified the 2nd Accused in Court as the said person.
35. In cross-examination, staff nurse Resina agreed her statement given to the Police on 28 December 2018 did not say that the 2nd Accused had told her he beat the deceased until he died. The statement she had given was that the 2nd Accused had said they had been involved in a drinking party and he had beaten the deceased to death.

36. WPC Selai Masa received a call from Vilikesa on 30 December 2018 about 23 marijuana plants uprooted from Vacalea. She recounted the 23 plants and recorded them in the exhibit register under the number RCE 338/18. She packed the plants in three brown exhibit bags and locked them in the exhibit room. These were later released to Constable Rokoseru to escort them to Suva for analysis. She came into contact with the exhibits again last year when they were moved from the Nabua Police Station to the storage container at PSRU, and again on the week before trial, in preparation for Court. She said the exhibits were damaged in storage owing to the heat and some of the labels on the brown exhibit bags were also damaged. All the plants however were there though now all dried.
37. She identified her handwriting with the Kadavu exhibit number on the brown exhibit bag and tendered the bags as Prosecution exhibit 3.
38. Venti Vanil Chandra, Senior Scientific Officer at the Fiji Forensic Chemistry Laboratory of the Fiji Police Force received 23 plants from Constable Rokoseru of the Kadavu Police Station on 4 January 2019. The roots of the plants were removed and samples randomly selected from the 23 plants and tested. She recorded her findings on the table of results on the Government Analyst Form. The dried plants were Indian hemp botanically known as cannabis sativa with a height range of 45cm to 201cm and a total weight of 10.5 kilograms.
39. Not all 23 plants were tested. The procedures followed were in line with UNODC guidelines and samples were randomly selected. She tendered the Certificate of Analysis as well as the Analysis of Cannabis as part of her evidence. After the tests, the plants were wrapped with brown paper bags and then packaged in a separate brown paper bag from the Lab, sealed with evidence tape. PC Rokoseru was thereafter contacted to collect the reports and exhibits.
40. In cross-examination, she agreed that it was possible that not all the 23 plants before her were in fact marijuana.

41. PC Rokoseru received the three brown paper bags from WPS Selai at the Kadavu Police Station and escorted them to Suva on 31st December 2018. They were handed over to WPC Eleni of the Nabua Police Station.
42. On 4 January 2019 at 9:53am, he received the drugs from WPC Selai at the Nabua Police Station and took them in a Police vehicle for analysis at the forensics lab in Nasese. The bags had exhibit number on them and Kadavu Police Station written on it. He handed the brown bags to forensics officer, Venti.
43. He returned in the afternoon to collect the drugs and analysis results from the analysis officer and took the same to the Nabua Police Station. The bags were given to WSC Selai, the exhibit writer at the Station while he kept the analysis report.
44. Selai Lalabalavu was the exhibit writer at the Nabua Police Station on 4 January 2019. She gave the three brown bags from the Kadavu Police Station to PC Roko to take to the forensics department. The bags were given an exhibit number RCE 183/19 at the Nabua Police Station. She received the same bags back from PC Roko when he returned from the Forensic Department, and kept them in the exhibit room for safekeeping.
45. Sgt Moli was the investigating officer for this matter. On the afternoon of 27 December 2018, she put together a team of about 8 officers and started gathering information – first from the staff nurse and medical officer at the hospital who received the body of the deceased from the 2nd Accused. The information the Police received was that the incident had happened at Vunikaboa Settlement near Vacalea. They made arrangements to proceed to Vacalea to collect information from those who had been part of the drinking party.
46. She went with a team of about 6 officers to Vacalea on 28 December 2018. With the help of the village headman, they managed to locate all the people who had been at the drinking party. She was at the village headman's place when the 1st Accused came voluntarily to where they were. She spoke with him and he seemed surprised about the incident saying he had been drinking with the group but then went to sleep. She asked him if he could show them the place where the incident happened. They did not regard Apisai as a suspect at the time as he was assisting them with the enquiry. Apisai was

helpful and agreed to show them the place, offering to take them in his fibreglass boat and called another person to take them to the scene. When they got off the boat, Apisai pointed out the place where he said the incident took place. She suspected it was not the scene because it looked undisturbed but was grateful for Apisai's assistance and cordoned off the place as the scene of crime.

47. They returned to the village and separately made enquiries with the witnesses who gave different stories. The witnesses did not say anything when asked as to what took place. She directed to take all the individuals they had identified to the Station for further questioning, and for two Police officers to remain at Vunikaboa to look after the scene of crime.
48. The individuals were kept in separate rooms including one of the cells at the Station to prevent them from conversing with each other and changing their initial stories. When they were interviewed, it was revealed that they were not part of the incident and that Apisai and Leone were the two that had taken part in the incident. They found out that Apisai had actually been present and that his boat had been used to go from Vacalea to Nasogoseivou before the trek up to Wailoaloa where the incident actually took place. The deceased had not been part of the drinking party. She decided to end the interviews and record the statements of the witnesses.
49. The two officers manning the scene at Vunikaboa remained there until the arrival of the forensic officer the next day since it was too far from the Station to contact them. On 29 December 2018, Apisai was brought in for questioning.
50. If she had known Vunikaboa was not the scene of crime, she would not have conducted any investigation there or cordoned off the place. They would have tried to locate the real scene of crime. She identified both accused persons in Court.
51. The final witness for the Prosecution was Dr. James Kalougivaki, Head of Forensic Pathology, Fiji Police Force. He conducted the post-mortem examination on the deceased on 29 December 2018 at the Kadavu Hospital. He noted a bruised graze on the forehead, black eyes and swelling of the eyes. There was bruising underneath the skin and inside the muscles of the face on both sides, particularly over the lower half of the face.

52. There was severe widespread bleeding over the brain, extending around and at the bottom of the brain. The bleeding extended into the covering of the spinal cord. There were bruises in the brain tissue.
53. Multiple areas of bruised abrasions or grazes of many sizes were noted on the outside of the nose, and severe swelling and multiple bruised grazes and tearing of the skin on the inside of the upper and lower lips.
54. There was also bruising underneath the skin and in the muscles of the front and at the back of the neck.
55. The front part of the chest area over the left showed many areas of bruised grazes of different sizes. Internally, there was bruising within the muscles between the ribs over the lower left chest and the upper right chest, due to severe blunt force trauma. A really good stomp or blunt force would have been needed to cause such injury, he said. The force needed to cause such an impact would be quite severe.
56. The cause of death was severe bleeding within and underneath the second covering of the brain, or brain injury due to severe blunt force trauma to the head. Bleeding and bruising between the last layers of the skin over the skull indicated severe force applied to the head.

Analysis

Count 1 – Unlawful cultivation of an illicit drug

57. The Prosecution alleges that the 1st Accused and another had unlawfully cultivated 23 plants of Indian hemp, an illicit drug. Upon discovery of the 23 plants about 6-7 paces from the 1st Accused's farm house, they were uprooted and taken by the Police to the Kadavu Police Station and then on to the Nabua Police Station. They were tested by and found to be Indian hemp, botanically known as *cannabis sativa*, with a total weight of 10.5kg. The plants, when produced in Court, were, unsurprisingly, completely dried. In my view, the chain of custody of the 23 plants was unbroken.
58. The analyst Ms. Venti Vanil Chandra was cross-examined on testing only a sample of the 23 plants and admitted it was possible that not all the plants were Indian hemp. She said the method adopted complied with testing procedures of the United Nations Office

of Drugs and Crime but did not state how it was concluded that all the plants sent in for testing were in fact Indian hemp.

59. While the findings of the analyst formed part of the agreed facts between the Prosecution and the 1st Accused, the evidence of the analyst in the ultimate cast doubt as to whether the 23 plants were Indian hemp. The analyst was not sure and said about 7-8 samples were taken from the plants brought in for testing. The Prosecution did not lead evidence to diminish the doubt created by her evidence on the number of plants tested.
60. While the contents of the analyst's report is an agreed fact, the Prosecution led evidence from the analyst herself which cast doubt on her report.
61. Neither Timoci Nauagunu nor Aminiasi Seru had been to the 1st Accused's farm prior to 26 December 2018. Their evidence as to cultivation by the 1st Accused was based on inadmissible hearsay. Aminiasi did say he knew the 1st Accused planted marijuana because ^{he} heard about the reason for the assault and heard the accused persons having a heated discussion about it, but did not say what the discussion was.
62. I do not consider the Prosecution has proved the charge of unlawful cultivation beyond reasonable doubt.

Count 2- Murder

63. In respect of the murder charge, the Prosecution relies on the direct evidence of Timoci Nauagunu and Aminiasi Seru. The defence say these witnesses are accomplices and their evidence must therefore be treated with caution and if accepted, required corroboration.
64. I propose to deal first with whether these witnesses are accomplices.
65. According to the *Oxford Dictionary of Law*, an accomplice is one who is a party to a crime, either as a principal (the one who actually carries out the crime) or as an accessory (a person who aids, abets or counsels someone else to commit a crime).
66. In *Lalagavesi v State* [2012] FJSC 25; CAV0004.2012 (24 October 2012) at 14, the Supreme Court stated:

The meaning of the term “accomplice” was laid down by House of Lords in Davies v DPP [1954] AC 378; [1954] 1 All ER 507 that “includes (i) persons who are participles (sic) criminis in respect of the actual crime charged, whether as principal or accessories before or after the fact (in felonies) or persons committing procuring or aiding and abetting (in the case of misdemeanours); (ii) on a trial for larceny receivers as regards the thieves from whom they receive the goods; (iii) where a person is charged with a specific offence on a particular occasion, and evidence is admissible and had been admitted of his having committed crimes of the identical type on other occasions, as proving system or intent or negating accident, parties to such other similar offences. No further extension of the term ‘accomplice’ should be accepted. This definition was adopted with approval by the Court of Appeal in Mudaliar v State [2007] FJCA 16; AAU0032,2006 (23 March 2007).

67. In this case, there is no evidence that either or both of the witnesses had been involved or taken part in the assault on the deceased. They were held by the Police and interviewed but were not charged. They were not granted immunity and did not give evidence under such immunity.
68. Aminiasi Seru’s uncontradicted evidence is that the 1st Accused told them not to do anything to the deceased. It was suggested to both witnesses in cross-examination that they had taken part in the assault and both denied. In such a case, neither the question nor the answer denying the suggestion can be considered evidence for the proposal. (See State v Matia - Summing Up [2019] FJHC 189; HAC260.2018 (13 March 2019) at [13], per Goundar J)
69. In Lalagavesi (supra) at 17, the Court cited R v Cox [1986] 2 Qd R 55; (1986) 24 A Crim R 434, stating that the onus of establishing that a witness was an accomplice lay on the Accused.
70. The Accused persons did not give evidence and the only evidence before the Court is that of the two eye witnesses denying any involvement in the assault on the deceased. It was not suggested that by their presence, they had encouraged the accused persons in the commission of the alleged offence. In any event, Timoci Nauagunu said that he and Aminiasi had tried to stop the 2nd Accused but he pushed them back. Aminiasi said he was afraid to stop Apisai because he had a cane knife and he could see that Apisai was very angry.

71. I have considered whether by their presence, the witnesses could be seen to be giving encouragement or assistance. The evidence is that they had tried to stop the 2nd Accused from assaulting the deceased but were pushed away by the 2nd Accused. They said they were afraid to do anything seeing how angry the accused persons were. Aminiasi said he went to the farm house while the accused were still assaulting the deceased. Mere presence at the scene does not necessarily make them accomplices. They did not know the accused persons would assault the deceased. They did not participate in or encourage the assault. Timoci tried to stop the 2nd Accused and was pushed away. Aminiasi said he was scared to intervene because the 1st Accused had a cane knife and was very angry.
72. In *Singh v State* [2018] FJCA 146; AAU134.2014 (4 October 2018), the Court of Appeal stated at [20]:
- An accomplice is one who is a '*particeps criminis*' in the actual crime charged, whether as a principal and accessory. To be an accomplice it must be shown that the witness intentionally gave assistance and encouragement to the criminal activity of the accused. It is not sufficient to be a mere bystander, because a mere bystander is not at risk and therefore lacks the incentive falsely to implicate the accused which is the basis of the rule pertaining to accomplice evidence.
73. On the evidence before the Court, I do not consider the witnesses Timoci Nauagunu and Aminiasi Seru are accomplices.
74. I have also considered Timoci Nauagunu's evidence that the Police had told him that he needed to give a statement in relation to the accused persons otherwise they would pin the murder charge on him and he would never see his family again. He denied being told to blame the accused persons or he would be blamed. Being told to give a statement in relation to the accused persons is not the same thing as to blame them for the alleged offences. Notwithstanding, I treat with some caution his evidence.
75. Having done so, I found him to be a reliable and truthful witness. I believe his evidence that the 2nd Accused had punched the deceased numerous times on the face and chest, and stomped and kicked the deceased's chest. I believe his evidence that when the 1st Accused arrived at the scene, he too punched the deceased on the head and chest, and hit his chest with the flat side of the cane knife.

76. Resina Qio said when the 2nd Accused and the chaplain brought in the body of the Deceased, she had asked the 2nd Accused how the deceased had died and he replied that they had fought and he beat the deceased until he died. She was cross-examined on why this piece of information was not in her statement to the Police and she replied that she had told the Police. Sgt. Moli testified that Resina Qio had told her the same thing. She had not given it in her statement thinking Resina Qio would give it in hers.
77. A statement given to the Police or made out of Court is not evidence. The Court relies on evidence given on oath in Court. Any inconsistencies between an earlier out of Court statement and the evidence on oath goes to the weight the Court can give to the evidence. I believe Resina Qio's evidence. I believe Sgt. Moli's account that she did not include this piece of information in her statement thinking Resina Qio would include it in hers. Resina Qio's evidence corroborates Timoci's evidence of the 2nd Accused assaulting the deceased.
78. I have considered the evidence of Aminiasi Seru. In his evidence, he apologized for giving incorrect evidence in Court by saying that he had been sent by the 1st Accused to get the deceased to the farmhouse, and also for the inconsistency between his Police statement and his evidence on oath. The inconsistencies in my opinion are on peripheral matters and do not shake the basis of the prosecution case. He said before the groups descended at the farm, the 1st Accused had told them not to do anything to Filipe. He gave evidence exonerating the 1st Accused from a plan to assault the deceased, and also evidence that the 2nd Accused and 1st Accused had punched the deceased on the head and on the chest. His evidence of the assault was consistent and unshaken.
79. Similarly, any inconsistencies between the evidence of Timoci and Aminiasi do not in my opinion shake the basis of the prosecution case. Each gave evidence of what they saw and as they remember the events that happened. They were in different groups as they descended and so would have seen events from different places and angles.
80. Was there a joint enterprise, a common intention between the accused persons to assault the deceased?
81. Aminiasi Seru said that the 1st Accused had said for no one to assault the deceased. However, not too long afterwards, both accused persons were seen punching the

deceased's head and chest, the 1st Accused also hitting the deceased's body with the flat surface of the cane knife, while the 2nd Accused was stomping on his chest.

82. In Nacagilevu v State [2016] FJSC 19; CAV 023.2015 (22 June 2016), the Supreme Court stated at [36]:

...joint enterprise is a legal doctrine that is well settled in Fiji. The Supreme Court in Rasaku v State (2013) FJSC 4; CAV0009, 2009 (24 April 2013) expounded the doctrine of joint enterprise in paragraphs 44 and 45 as follows:

"If two people jointly commit an unlawful act, each is equally liable no matter who did what. There does not have to be any prior agreement either written or oral. It can be spontaneous. The doctrine of common enterprise has been applied consistently in a large number of cases in England and other jurisdictions, including those such as Fiji in which the Penal Code is structured on the foundations of the Common Law of England. The formation of a joint enterprise may be spontaneous, and the fact that the participants acted on the spur of the moment does not negative their criminal liability on the basis of joint enterprise."

83. The 2nd Accused apprehended and punched the deceased on the face and chest. When the 1st Accused arrived, he too punched the deceased on the head and hit his body with the flat surface of the cane knife. The 2nd Accused stomped and kicked the deceased on the chest and abdominal area.
84. There can be no doubt that in assaulting the deceased together in this way, the accused persons were committing an unlawful act together and in concert with each other. The fact that they acted spontaneously on the spur of the moment by no means negatives the criminality of their assault on the basis of joint enterprise. There was a shared intention to assault the deceased and their actions demonstrated this. Under the doctrine of joint enterprise, they are equally liable regardless of who did what.
85. On offences committed by joint offenders in prosecution of common purpose, section 46 of the Crimes Act provides that:

When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature

that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

86. The cause of death of the deceased was severe bleeding within and underneath the second covering of the brain, or brain injury due to severe blunt force trauma to the head. Bleeding and bruising between the last layers of the skin over the skull indicated severe force applied to the head.
87. The Prosecution says the accused persons were reckless in causing the death of the deceased.
88. A person is reckless with respect to a result if he or she is aware of a substantial risk that the result will occur and, having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
89. The 2nd Accused was the first to apprehend and assault the deceased. Timoci Nauagunu said the 2nd Accused threw ten punches to the deceased's face and chest. He continued to pull and punch the deceased when he was on the ground. The blows were forceful and heavy he said. When the 1st Accused arrived, he too punched the deceased on the head and chest. His punches were also heavy and forceful. The 2nd Accused continued the assault by stomping on the deceased's chest and kicking him in the left abdominal area. I have no doubt that in repeatedly punching the head, face and chest of the deceased and in jumping, stomping and kicking his chest and abdominal area, the 2nd Accused would have been aware of a substantial risk that Filipe would die and, having regard to the circumstances known to him, it was unjustifiable to take the risk.
90. In joining the 2nd Accused in the act of assaulting the deceased, the 1st Accused demonstrated he shared the same intention to assault the deceased and actively participated in an unlawful purpose. Causing the death of the deceased was a probable consequence of the heavy and forceful punches to his head. Under the doctrine of joint enterprise, both accused persons are deemed to have committed the offence.
91. I feel sure of the accused persons' guilt and am satisfied beyond reasonable doubt that they had engaged in conduct, namely the punching of the deceased person's head and face. I feel sure that this conduct caused the death of the deceased and that the accused persons were reckless by their conduct.

Count 3 – Giving false information to a Police officer

92. On the charge of giving false information to a Police officer, the undisputed evidence of Sgt. Moli is that the 1st Accused had told her that the alleged murder was at Vunikaboa at Vacalea. As a result, she had directed for the place shown at Vunikaboa to be cordoned off, and left Police officer there to man the said scene while they returned to the Police Station. When they were told of the real scene of crime, she could not get in touch with the officers left at Vunikaboa and so they remained there until they went with the scene of crime officer on 30 December 2018.
93. It is submitted that the decision to charge the 1st Accused with this offence together with a charge of murder is an abuse of the prosecutorial discretion in that despite the Police having evidence pertaining to Count 3 during investigations, he was neither investigated nor interviewed for this offence.
94. Pursuant to section 117 of the Constitution, the Director of Public Prosecutions is given the power to institute and conduct criminal proceedings.
95. Section 198 of the Criminal Procedure Act is in the following terms:

Filing of an information

(1) An information charging an accused person and drawn up in accordance with section 202 shall be filed by the Director of Public Prosecutions or by the Commissioner or Deputy Commissioner of the Fiji Independent Commission Against Corruption with the Chief Registrar of the High Court within 21 days of the order for transfer except that the High Court may grant leave to extend the 21 days. The power of the Director of Public Prosecutions to file information may be delegated by him to a public prosecutor in writing.

(2) In the information, the Director of Public Prosecutions or Commissioner of the Independent Commission Against Corruption may charge the accused person with any offence, either in addition to or in substitution for the offence in respect of which the accused person has been transferred to the High Court for trial.

96. In *Sakiusa Tuisolia v Fiji Independent Commission Against Corruption* [2010] HAM 122/09S Ruling 1 April 2010 at [40], Goundar J stated:

What charges are to be brought against an accused is within the discretion of the prosecution. The prosecution does not have to retain the original charges filed in the Magistrates' Court when filing Information in the High Court.

97. In similar vein in Seru v State [2015] FJCA 30; AAU0152.2014 (27 February 2015) at [10], Goundar JA opined:

The decision to charge or not to charge involves an exercise of prosecutorial discretion. The courts have no jurisdiction over prosecutorial discretion to charge or not to charge.

98. The charges filed in this case are within the discretion of the Prosecution, over which the Court has no jurisdiction.
99. On the uncontradicted evidence of Sgt. Moli, I find that the Prosecution has proved beyond reasonable doubt that the 1st Accused gave false information to a Police officer, knowing the same to be false. The false information caused Sgt. Moli to conduct an investigation in the area, cordon off the scene pointed out at Vunikaboa and left Police officers to man the place. She would not have done so had it not been for the false information given to her by the 1st Accused.
100. For all of the above reasons, the Judgment of the Court is as follows:
1. Count 1: Accused 1 not guilty. Acquitted of Unlawful Cultivation of an Illicit Drug.
 2. Count 2: Accused 1 and 2 guilty and convicted of Murder.
 3. Count 3: Accused 1 guilty and convicted of Giving False Information to a Police officer.




Sianu F. Bull
Acting Puisne Judge

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