

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 106 OF 2019

STATE

-v-

- 1. ERONI VAQEWA**
- 2. EMONI SAUKIWERE**

Counsel: Mr R. Mohammed with Ms R. Uce for Prosecution
Mr S. Nath with S. Toga for 1st Accused
Mr M. Anthony with R. Bancod for 2nd Accused

Dates of Hearing : 3 - 7 July 2023
Date of Judgment : 14 July 2023

JUDGMENT

1. The accused persons (accused) are charged with one count of Murder. They were arraigned on the following information filed by the Director of Public Prosecution:

COUNT 1

Statement of Offence

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

Particulars of Offence

**ERONI VAQEWA AND EMONI SAUKIWERE on the 1st day of June
2019 at Nadi in the Western Division, Murdered ISIKELI RABUKA
ALFRAD**

2. The accused persons pleaded not guilty to the charge. At the ensuing trial, the Prosecution presented the evidence of 8 witnesses. At the close of the case for the Prosecution, the court, being satisfied that there was a case for each accused to answer the accused were put to their defences. Both accused elected to remain silent.

3. Written submissions were filed by the Counsel which were supplemented by oral submissions. Having considered the evidence presented at the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

Burden of Proof and Standard of Proof

4. The accused are presumed innocent until they are proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove their innocence. The Prosecution must prove each accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, the accused must be found not guilty and acquitted. Each accused has a right to remain silent and no adverse inference shall be drawn by their election to remain silent.

5. Although the two accused are charged jointly in a single count, the case of each accused and evidence against each accused must be considered separately.

6. The case theory of the Prosecution is that on the evening of 1 June 2019, the accused and their wives were drinking alcohol with the deceased at a bus stop opposite Danny's shop in Korovutu. During the drinking session, the accused got angry with the deceased who had allegedly poured alcohol on 1st accused's music box as well as on the wives of both accused. The heat of anger escalated thus resulting in the deceased being brutally assaulted by the accused in his face and the chest area. The deceased managed to escape however he was later located by the accused on the opposite side of the road where he was assaulted again to the point where the deceased was motionless; then they picked him up by the accused's shoulders and banged his head on the edge of the concrete post.

The Elements of the Offence of Murder

7. To prove the offence of Murder, the Prosecution must prove beyond reasonable doubt that the accused were engaged in willful conduct with the intention of causing the death of the deceased, or they were reckless as to causing the death of the deceased and that the willful conduct of the accused caused the death of the deceased.

Circumstantial Evidence

8. The case of the Prosecution is substantially based on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. Firstly, the primary facts from which the inference of guilt is to be drawn must be proved. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts that are so proved. Equally, it must be shown that when taken together that the only reasonable inference that can be drawn is incompatible with the innocence of the accused. The drawing of the inference is not a matter of evidence: it is solely a function of this court based on its critical judgment of men and affairs, common sense, experience and reason.
9. In a circumstantial case, the factfinder must look to the combined effect of a number of independent items of evidence when considering the charge. While each separate piece of evidence must be assessed as part of the inquiry, the ultimate verdict on each charge will turn on an assessment of all items of evidence viewed in combination. The underlying principle is that the probative value of a number of items of evidence is greater in combination than the sum of the parts. The analogy that is often drawn is that of a rope. One strand of the rope may not support a particular weight, but the combined strands are sufficient to do so.
10. The charge requires the Prosecution to prove each accused's state of mind manifesting the murderous intention or recklessness as to causing the death of the deceased, at the time of the alleged willful conduct. This requires the drawing of inferences, based on all of the circumstantial evidence that is relevant to the issue of intention and recklessness. The drawing

of inferences inevitably involves the application of common sense and of the fact finder's knowledge of the world and of how it works on proven facts.

11. I shall now summarise the salient parts of evidence led in the trial which I consider important to resolve the issues in this case.

PW 1-Alena Bola

12. In 2019, Alena was residing at Lavusa with her husband Eroni Vaqewa (1st Accused). On 1 June 2019, she was at work at Nadi Downtown Hotel. During the lunch break, she called Vaqewa and asked him to bring down her clothes so that they could go and drink kava at Sonaisali. When she called Vaqewa, he was cooking and his best friend Isikeli, (the deceased) was also with him.
13. At around 6 p.m., she met Vaqewa at Vinod Patel- Nadi. Vaqewa had come with Isikeli. She invited Isikeli to join them at Sonaisali for the kava session. On their way to Sonaisali in a minivan, Eroni saw his brother Emoni (2nd Accused) and his wife Romera Leqe at the bus stop opposite Danny's shop in Korovuto. They got off to join Emoni and Romera. Sikeli, Eroni, Emoni and Romera then started a conversation consuming two cans of Joske (rum+cola). Sikeli went and bought another pack (4) of Joske and continued drinking at the bus stop.
14. In a drunk mood, Isikeli poured Joske on Eroni's music box. Eroni punched Sikeli once on his shoulder. After that, they continued drinking at the corner of the bus stop. The streetlights were on at that time. Isikeli again poured Joske this time on her and Romera twice. Romera started screaming. Emoni and Eroni then went and punched Isikeli. They were punching not in a really rough way because they were friends. The punches landed on Isikeli's shoulder. Isikeli slid down and ran down the road opposite beside the bus stop and ran down the shortcut while Romera, Eroni and Emoni were all sitting with her at the bus stop. From the bus stop, she saw Sikeli running from the other side of the road. After that, she heard a loud sound or bang. The loud bang came from the opposite side of the road where Sikeli was running into. By that time, Eroni and Emoni were still with her at the bus stop. Nothing else happened that night. After that Eroni told them to leave the bus stop. They stopped a van and came to town.

15. She admitted giving a statement to police on the 15 June 2019 which she signed. She was taken to Nadi Police Station from her workplace to obtain that statement. She gave that statement out of fear because the police were forcing her to give information and tell the truth. Under pressure, she did not tell the truth.
16. She read her previous statement and admitted that what she is telling in Court is completely different from what she had told the police in the latter part (last 6 lines) of her previous statement.
17. Having considered an application by the Prosecutor, the Court declared Alena Bola a hostile witness and allowed the Prosecution to cross-examine her. Alena under cross-examination denied having seen Eroni and Emoni running after Isikeli on the opposite side of the road. He denied seeing Isikeli lying on the ground beside Danny's shop. She admitted telling police, out of fear, that she saw Emoni and Eroni running after Isikeli and beating him up. She admitted telling police that she saw Emoni and Eroni holding Isikeli by his shoulder and forcefully pushing him backwards to the electric post and the back part of his head hit the post. She said she lied to the police out of fear and made that statement so that she could be relieved. She admitted telling the police that she screamed at the top of her voice saying, *ylei sa mate in iTaukei* language meaning, oh dear he's dead. She denied that what she told police was exactly what she saw that happened that night.
18. Under cross-examination by Mr Nath, Alena admitted that Isikeli was already a little bit drunk when they met him at the bus stop. Isikeli bought another pack (4) of Joske at the bus stop. She never saw Isikeli Rabuka hitting himself at any post. She just saw Isikeli running and she heard a loud bang. She did not see Eroni Vaqewa grabbing Isikeli and pushing him towards the post forcefully and hitting his head on the post.
19. Under cross-examination by Mr Anthony, Alena agreed that Isikeli did not receive any injuries as a result of punches from Eroni and Emoni. She spent two nights at Nadi Police Station and was treated like a suspect. The police officers kept telling her to make the statement. She wanted to tell the truth, but the police officers were harsh. She did not tell the police officers verbally that Isikeli hit his head by himself. Romera was also arrested with her and detained at the police station for two nights. She agreed that the police officers told her to give the version of what all she said in her statement.

PW 2- Tomasi Raituku

20. In 2019, Tomasi was employed at Danny's Food as a butcher. On 1 June 2019, he knocked off at 6.45 p.m. and went to his cousin, Richard Young's place to drink grog with Alipate. Richard Young's house is situated right opposite Danny's Shop, 40 metres away from the bus stop. When they were drinking kava, he could hear noises coming from the bus stop like some people talking and shouting. He could not make out what they were saying.
21. When he stood up, he could see two people chasing after each other on the road. He heard the one chasing after the other say 'Boy keep still'. After a while, he could hear someone saying, 'Oh, he died'. He heard both female and male voices. He sat down again while Alipate went to see that place. Alipate came back and informed that he turned a body on which he poured water. Alipate wanted them to go and see that place. They all went to the scene and stopped a police car to report the matter and also to transport the body. The injured man was unconscious but still alive. He saw blood coming from his head. This man was wearing a green T-shirt. They loaded him in the police car.
22. Under cross-examination by Mr Nath, Tomasi admitted that Richard's house is located in a sloppy area in comparison to the bus shelter. He did not see what actually happened to Isikeli Rabuka.
23. Under cross-examination by Mr Anthony, Tomasi said that he saw blood coming from the side of the injured person's head. He didn't hear any bang. He only heard the scream. The person chasing was about 40 metres behind the person being chased.
24. Under re-examination, Tomasi said that he saw the body just beside the electric post situated right beside Danny's Shop.

PW3 - Alipate Takaiwai

25. Alipate was residing in Korovuto since 2001. On 1 June 2019, in the evening, he was drinking grog at Richard's house with Richard and Tomasi. At about 8 or 9 p.m., they heard drunk people talking and arguing at the bus stop just opposite Danny's. From the bus stop to Richard's house, it is close to 30 metres. They could not see anything because the house is

down the slope at the bottom. When he ran up, he heard one of the girls say, *o sa mate*. They could hear people chasing each other on the other side of the road and heard something like a bang. He saw a person lying down at the electric post on the road that goes down at the corner of Danny's Supermarket (hereinafter referred to as the crime scene). He thought the guy got hit by a car. He saw blood on the mouth of this person and on the post. The injured person was heavily breathing like snoring and his eyes were open. When he was trying to recover by pouring water on this guy, Emoni, his cousin, and his wife Leqe came over.

26. He took Tomasi and lifted and put the injured person into the police car which was stopped while it was on highway patrol. There were no streetlights there but there was light coming from other places.
27. Under cross-examination by Mr Nath, Alipate said that the distance between the bus stop and the electric post was about 20 meters. The bus shelter is at a higher place than the place where the victim was lying. He saw a bit of blood on the forehead of the injured. He was sure there was light coming from Danny's shop. Under cross-examination by Mr Anthony, Alipate said that, when he was with the injured person, he saw Emoni and his wife walking from the bus shelter to check on the deceased.

PW 4 Dr James Kalougivaki

28. Dr James has been the Head of the Forensic Pathologist Department since 2014. He has conducted more than 2000 medical or forensic autopsies. He conducted the post-mortem examination on the body of Isikeli Rabuka Alfred at Lautoka Hospital on 6 June 2019. The body was identified by Asena Mira. The doctor tendered in evidence the post-mortem report he prepared (PE 1).
29. Upon the external examination, he observed the presence of bruised greases over the forehead and also towards the right side of the forehead. A switched wound was noted measuring 2cm. The right eye also showed the presence of bruising over the top of it and the lower lip had bruising also. The upper chest showed a bruising of about 3cm in length.
30. Upon the internal examination of the head, the doctor made the following observations. When the skin on top of the head was opened, he observed widespread haemorrhage under the skin

and under the covering of the skull, particularly over the top front and left side and front aspects. The skin of the face and the neck was also opened up and it showed, over the left, front and side of the neck, bleeding and bruising within the muscles and also over the cheeks and the left side of the face.

31. The salient features were noted over the 'dura' or the covering of the brain under the skull. The first covering showed the presence of bleeding particularly over the left side of the brain. In the brain itself, it showed the presence of bleeding and the brain was swollen. In addition to that, haemorrhage was noted under the second covering of the brain extending to the floor of the brain particularly over the small brain and into the spine.
32. He attributed the cause of death to the extensive damage to the brain and also the haemorrhage within the skull. Those included the bleeding of the first covering of the brain, bleeding of the second covering of the brain and also bleeding within the brain caused by a blunt force trauma.
33. The bleeding of the first covering of the brain was due to sudden deceleration. The injuries on the top of the head and the front are associated with sudden deceleration. In this case, there was bleeding under the second covering of the brain (subarachnoid haemorrhage) also. It is associated with sudden acceleration. Haemorrhage within the muscles on the side of the face and also on the left neck is associated with sudden acceleration. This type of haemorrhage is possible if the deceased was in a static position and suddenly his head moved in different directions, generally associated with someone hitting the person. The bleeding within the brain and the small brain is significant because it also brings about swelling of the brain. These are all fatal events that are caused due to both sudden acceleration and sudden deceleration.
34. The blunt force trauma should be associated with severe to even extreme force over the face and the neck. This level of force can be expected from blows to the face and to the top of the head. It is highly likely that the trauma came from the front.
35. In his opinion, it is highly unlikely that these injuries have been caused by someone just running to an object accidentally because of the external signs at multiple positions over the head, side of the face and also the neck which are reachable at different plains suggesting more than one blow. In addition to that, two different types of bleeding could have been caused by two different mechanisms - sudden deceleration for example potentially hitting a wall when

being thrown at a wall and sudden acceleration -for example, caused when the person is hit over the face whilst being in a static position.

36. Under cross-examination by Mr Nath, the doctor agreed that the injuries received on the frontal and left frontal temporal aspect can be caused by sudden deceleration and not by sudden acceleration. The doctor opined that there had been multiple blows, whether they were caused by sudden deceleration or sudden acceleration. Falling to the ground or being thrown at a wall are classified as sudden deceleration and are associated with one fatal aspect of the haemorrhage noted within the skull. There were no gross injuries noted at the back of the head.
37. Under cross-examination by Mr Anthony, the doctor agreed that the history was relayed (by the police officer) and was noted as being that the deceased probably ran into a post. Given the multiple aspects and plains, the head got hit from different plains or different angles and ruled out a single impact on a flat surface.
38. He agreed that the level of alcohol in blood could increase haemorrhage if the deceased was heavily drunk because the presence of toxins, which is alcohol, can make the lining or the walls of the blood vessels more fragile to bleed. In addition to that the drunk person is in less control and has less strain posture or mobility so highly prone to cause more force or less protection in the context of whatever the scenario is.
39. Under re-examination, the doctor agreed that the sudden acceleration could be associated with someone throwing a punch or blow or assault that is a cause or a source of that mechanism. He opined that it is less likely that a person running into a wall or a post and falling down could have received those multiple injuries.

PW 5 - Sergeant Josateki Seuseu

40. In 2019, Josateki was stationed at the Lautoka Police Station as a forensic science officer. On 3 June 2019, he received instructions from Inspector Jale to investigate the alleged crime scene at Korovuto. He proceeded to the scene with WPC Annie Maria and WPC Iisapeci. They reached the scene by 1650 Hrs. His role was to draw the sketch. WPC Annie was to be the

Crime Scene Examiner and WPC Ilisapeci the Photographer. He tendered in evidence the rough sketch plan (2A) and the fair sketch plan 2(B).

41. Referring to the sketch plans, Josateki described the place where the blood-like stains on the grass were found (Key No.1) which he believed to be where the deceased was found lying unconscious and the EFL post where other blood-like stains were found (Key No. 2). He also described the bus shelter where the deceased and the suspects were believed to have been drinking. He agreed that the by-road is sloping down towards the EFL post and that it was situated at a much lower level than the bus stop. The blood-like stains on the electric post were found 1.2 metres above the ground level.
42. Under Cross-examination by Mr Anthony Josateki agreed that there were no streetlights noted in the sketch plan and there weren't any streetlights on the by-road beside Danny's, Super Market. He did not agree that the lamp post is not clearly visible from the bus shelter. He agreed that the scene visit was not done at night.

PW 6 - Ana Maria Veredali

43. Maria was the Crime Scene Investigator who accompanied Sergeant Josateki to the crime scene on 3 June 2019. She swabbed the blood-like stains on the grass and the square concrete EFL post. The blood-like stains were found on the edge facing the roadside.
44. Under cross-examination, by Mr. Toga, Maria agreed that the bus stop was not right opposite the junction. Under cross-examination by Mr. Anthony, Maria said that the swabs were dispatched to the lab, on 10 June by PSO Eta. She has no knowledge of what happened to the samples after that.

PW 7- Corporal Ilisapeci

45. Ilisapeci was instructed to be the photographer of the scene. She also took photographs at the post-mortem. After taking the photographs, she prepared a photograph booklet which she tendered in her evidence (PE.3).

PW 8- Act. Sergeant Rajnesh Kumar

46. In 2019, Kumar was stationed at the Western Division Highway Patrol Unit. On 1 June 2019, he was rostered for night shift highway patrol duties from Lautoka to Sigatoka. At around 2300 hrs, when he reached Korovou near Danny's supermarket, he was stopped by an iTaukei man who told about an iTaukei man lying with injuries on his face just beside the road that goes down Danny's supermarket. He turned around the police vehicle so as to point the headlights to where the injured person was lying down. The injured person lay beside an FEA electric post on the grass with a blood-like substance and facial injuries on his face. With the help of other iTaukei males, he loaded the injured man in the back seat of the police vehicle and conveyed the injured to Nadi Hospital. The injured person was unconscious but was still breathing and smelling liquor.

Analysis and Evaluation

47. There is no dispute that the accused persons were drinking alcohol with the deceased at the bus stop right opposite Danny's Supermarket from around 7 p.m., on 1 June 2019. It was also not disputed that the 1st accused punched the deceased once on the deceased's shoulder and that both accused punched on his shoulders when they were drinking at the bus stop. The position of the Defence is that those punches had landed on the deceased's shoulders and that they were not that harsh so they had nothing to do with the injuries that led to the death of the deceased. The case theory of the Defence appears to be that the deceased received fatal injuries as a result of an accident.
48. Out of the eight witnesses called by the prosecution, Alena Bola, Tomasi and Alipate can be categorised as lay witnesses. Alena, the main eye witness for the Prosecution, is the wife or rather the de-facto partner of the 1st accused. Alipate is a cousin of the 2nd accused. Tomasi had been drinking kava with Alipate and was a friend of Alipate. All of them are somehow connected to the accused and in my observation, they all had a tendency to support the accused in their testimony. That observation made me believe that they did not tell in Court the whole truth of what they saw or heard that night. Therefore, I would adopt a cautionary approach in evaluating their evidence. The pathologist James on the other hand is an independent witness. His expertise was not disputed and the manifest objectivity and reasoning of his findings are

hardly capable of being challenged. Therefore, I accept the pathologist's opinion as being true and accurate.

49. As can be expected, Alena turned hostile to Prosecution as she proceeded in her testimony and was declared a hostile witness. She admitted that she lied to police in the latter part of her statement when she was pressurised by the police officers to tell the 'truth'. She read her previous statement and admitted that what she is telling in Court is completely different from what she had told the police in the latter part (from line 6 from bottom onwards) of her previous statement. I am mindful that what she has stated in her previous statement is not evidence and it can only be used to test the testimonial trustworthiness of her evidence. She attributed the admitted inconsistency to police pressure. However, she did not say that what she said in her evidence up to the point where she was declared a hostile witness is not the truth.
50. Alena, as the wife of the 1st accused and the sister-in-law of the 2nd accused has a real interest in this case and has a strong motive to refrain from telling anything that would prejudice her husband's defence. She contradicted her own statement on material particular as regards the alleged murder while maintaining her stance to a greater extent in other areas. Therefore, her evidence should be assessed cautiously before it is acted upon.
51. Despite the infirmities, I accept that Alena told substantially the truth in Court until she was declared a hostile witness. It is my considered view that she turned hostile to protect her husband and brother-in-law and therefore it is not prudent for me to accept that she told the whole truth in Court. I accept some parts of her evidence and reject the other parts. The rationale for accepting some parts is premised on two grounds; firstly, those parts are corroborated by other evidence led in the trial. Secondly, those parts go against her husband's interest- why should she tell lies detrimental to her husband and put him in trouble? I find the credibility of her evidence to be divisible.
52. I accept Alena's evidence that the two accused were drinking alcohol with the deceased at the bus stop which fact was admitted by the Defence. I accept her evidence that the deceased was drunk and that he poured alcohol on the 1st accused's music box first and then twice on her and Romena, the wife of the 2nd accused. I accept her evidence that the accused punched the deceased at the bus stop after the pouring incident. I accept her evidence that the deceased slid

down and ran down the road opposite the bus stop and ran down the shortcut beside Danny's Supermarket. I accept that she heard a loud bang from where the deceased was running into.

53. Tomasi said that he could hear loud noises -people talking and shouting at the bus stop. Alipate said that at about 8 or 9 p.m., he heard drunk people talking and arguing at the bus stop. They corroborated Alena's evidence to some extent as to the punching incident at the bus stop.
54. Where did the punches Alena saw actually land and how severe they were? Alena described the punches as being 'friendly' and being landed on the deceased's shoulders. She also said those punches did not result in any injuries. That part of her evidence I am inclined to reject. I am unable to accept that the accused persons had thrown 'friendly punches' on the shoulders of the deceased when they found their wives being poured with alcohol by the deceased in public.
55. There is clear evidence that the deceased crossed the highway and was running along the opposite side and then ran into a shortcut beside Danny's Supermarket where the deceased was later found lying. If they were friendly punches, why did the deceased keep running away from the accused? The pathologist did not find any signs on the deceased's shoulders suggesting that he (deceased) had received punches on his shoulders. None of the Defence Counsel sought any clarification from the pathologist as to whether he observed any signs on the deceased's shoulders suggestive of punches. My considered view is that Alena did not tell the truth to Court when she said that the accused threw 'friendly punches' and that those punches landed on the deceased's shoulders.
56. I accept Alena's evidence that the deceased was seen running on the opposite side of the highway and that he ran into the shortcut beside Danny's Supermarket. This piece of evidence was supported by Alipate and Tomasi. Alipate said that he could hear people chasing each other on the other side of the road and heard something like a bang. Tomasi also said that he could see two people chasing after each other on the road. He heard the one chasing after the other say 'Boy keep still'.
57. Alena under cross-examination by the Prosecution denied having said to police in her statement that she saw both the accused running after the deceased on the opposite side of the road. Her evidence is that when the deceased was running on the opposite side of the road,

both accused were still with her at the bus stop. If the deceased was not being chased or pursued by somebody, he had no reason to run and for the chaser to say -‘Boy keep still’. Both Alipate and Tomasi confirmed that they either saw or heard a pursuit. However, none of them said that the people involved in the pursuit were the accused and the deceased. Given the circumstances and the timing, it can reasonably be assumed that the people pursuing were the accused and the person being pursued was the deceased.

58. I do not accept Alena’s evidence that both accused remained with her at the bus stop when the deceased ran into the shortcut from where she heard a bang soon after. Mr Anthony argued that Alena’s evidence on this point is consistent with that of Alipate who said that he happened to be the first person to arrive at the scene where the deceased was lying and that whilst the deceased was being given first-aid, he saw the 2nd accused and his wife approaching him from the bus stop.
59. Apart from Alipate’s propensity to lie for him being the cousin of the 2nd accused, his (Alipate’s) evidence on this point could not be believed for four other reasons. Firstly, Alipate, according to the undisputed sketch plan and the evidence of the CSI officers as to the layout of the crime scene, was not in a position to observe the bus stop from where he was (EFL post) at that time.
60. Secondly, Alena’s evidence that both accused were still with her at the bus stop when she heard the bang and that the 1st accused told them to leave the bus stop whereupon they stopped a van and came to town is inconsistent with the evidence of Alipate who placed the 2nd accused and his wife at the crime scene (at EFL post).
61. Thirdly, if the accused were still at the bus stop with their wives, they should be expected to rush to where the bang come from which Alena saw the deceased was running into. Alipate had been drinking kava at that time approximately 30 metres away from the bus stop and, if the accused were still at the bus stop, they were positioned much closer to the crime scene (according to Alipate 10 meters) and must have reached the crime scene well before Alipate to enquire into what had happened to their friend. According to Alipate, he was the first person to attend the crime scene. He had rushed to the crime scene upon being alarmed by a loud bang, and the words uttered by the girls who said, *o sa mate (the person has died)*. Alena admitted telling the police that she screamed at the top of her voice with similar words, *ylei*

sa mate (meaning Oh dear he's dead), although she denied in Court having said that to the police. It suggests that the girls had already been at the place where the deceased was laid. It can reasonably be assumed that Alena did yell those words, which Alipate heard, upon seeing the deceased lying unconscious.

62. Fourthly, if the accused persons had been still at the bus stop, Alipate could have sought help from them without going back to Richard's house to seek help from Tomasi to lift and load the deceased into the police car.
63. I am convinced that Alipate did not tell the whole truth in Court and did so to protect his cousin, the 2nd accused. In view of that, I am unable to accept that Alipate could provide corroboration on Alena's evidence that the accused were still at the bus stop when the bang was heard. The only reasonable inference that I can draw from the evidence is that the deceased was pursued by the accused persons and when the bang was heard, the accused were never at the bus stop.
64. It was contended by the Defence that because there is no evidence that a DNA test was done on the swabs taken off the stains by Maria, the link between the samples uplifted from the crime scene and the deceased was not established. There is no dispute that the deceased was lying unconscious on the grass beside the EFL concrete post where the blood-like stains were found. Tomasi, Alipate and police driver Rajnesh had seen the deceased lying unconscious with bloody injuries on his face and forehead. Alipate also saw the blood stains on the EFL post. Alipate said that there was enough light coming from Danny's Supermarket. Driver Rajnesh had pointed the headlights towards where the deceased was lying. There is ample evidence that the blood-like stains were in fact blood and they were sourced from the deceased.
65. From the evidence of these three witnesses that I analysed, the following findings and inferences could be drawn: The deceased was drinking alcohol (Joske) with the accused at the bus stop right opposite Danny's Supermarket at night (between 7-10 pm) on 1 June 2019. The deceased poured alcohol on 1st accused's music box and the wives of the accused twice in public. Being angered by the deceased's act, the two accused threw several punches on the deceased causing him to run away from the bus stop. The deceased ran across the highway and ran into the shortcut beside Danny's Supermarket. He was being pursued by the accused.

A bang was overheard from where the deceased had run and the girls were heard to yell '*o sa mate (the person has died)*'. Soon after the bang, the deceased was found lying unconscious on the grass close to EFL concrete post with blood and facial injuries.

66. Prosecution case theory is that both accused brutally assaulted the deceased on his head and chest at the bus stop causing him to run to where he was later found lying and that the accused having pursued the deceased assaulted him again to the point where he became motionless; then the accused picked the deceased by his shoulders and banged his head on the edge of the concrete post. The Defence case theory on the other hand that could be gathered from their line of cross-examination is that the drunk deceased ran into the concrete post thereby hitting his head on the concrete post.
67. The Prosecution invites the court to draw the necessary inference that the injuries to the head of the deceased were caused by the two accused as they were the last seen with the deceased alive that night. However, as per the direct evidence led in the trial, the accused were last seen with the deceased at the bus stop which is a public place and the considerable distance between the bus stop and the crime scene where the deceased was found lying does not allow me to draw the necessary inference suggested by the Prosecution without other supporting evidence. The circumstance of being last seen with the deceased alive should not be the only basis of conviction [Dharam Deo Yadav v State of Uttar Pradesh 92007) 3 SCC 755]. The facts of the case cited by the learned Prosecutor [State v Isoof (2021) HAC 161 of 2019], decided substantially on the basis of the 'last person seen principle', are materially different from the present case.
68. In coming to a decisive conclusion, I find the evidence and the opinion of the pathologist extremely important if not crucial. According to him, the external injuries were noted on the right side of the forehead, over the top of the right eye, on the lower lip and on the upper chest of the deceased. In his opinion, it is highly unlikely that these injuries had been caused by just running to an object or by an accidental fall because of the external signs at multiple positions over the head, side of the face and also the neck which are reachable at different plains suggesting more than one blow.
69. This opinion is further supported by his internal examination. He observed widespread haemorrhage under the skin and under the covering of the skull, particularly over the top and

left front aspects, the front and side of the neck, the cheeks and the left side over the face. Extensive haemorrhage noted over the two coverings of the brain (dura) and the brain itself is consistent with two mechanisms operating at the same time ultimately leading to the death of the deceased. He attributed the cause of death to the extensive damage to the brain and also the haemorrhage within the skull that included the bleeding of the first covering of the brain and the bleeding of the second covering of the brain, potentially caused by a blunt force trauma.

70. In his opinion, the two different types of bleeding are associated with two different mechanisms - sudden deceleration for example potentially hitting a wall when being thrown to a wall and sudden acceleration potentially caused when the person is in a static position and suddenly his head moved in different directions for example as a result of being hit from different directions.
71. The bleeding of the first covering of the brain is associated with sudden deceleration which corresponds to the injuries on the top and the front of the head. However, that was not the only source of haemorrhage in this case. There was bleeding in the second covering of the brain (subarachnoid haemorrhage) which is associated with sudden acceleration that corresponds to the haemorrhage within the muscles on the side of the face, and also, on the left neck. In his opinion, this type of haemorrhage is possible only if the deceased was in a static position and suddenly his head moved in different directions, generally associated with someone hitting that person. This phenomenon is consistent with one aspect of Prosecution case theory namely punching on the face. In the doctor's opinion, blunt force trauma should be associated with severe to even extreme force over the face and the neck and this level of force could be expected from blows to the face and to the top of the head.
72. In view of the expert opinion, it is obvious that the damage caused to the brain of the deceased and the haemorrhage in the second covering of his brain is not consistent with an accidental fall or his running into the concrete post hitting his head which appears to be the Defence case theory in this case.
73. If they were not caused due to an accident, then how those injuries were caused? The only plausible inference I can draw on evidence is that the punching of the accused landed on the deceased's face and the forehead and not on the shoulders as Alena said and that the resultant

blunt force trauma caused the haemorrhage in the second covering of his brain which substantially contributed the death of the deceased.

74. However, this finding does not explain the other mechanism -sudden deceleration which caused the haemorrhage in the first covering of the brain. Were they caused as a result of an accidental fall on the ground or the deceased hitting himself on the concrete post as suggested by Defence? I shall answer this question in the following discussion which is focused on the fault element of Murder.
75. In view of my finding that the punching of the accused substantially contributed to the death of the deceased, the next vital question to be asked is whether each accused intended to cause the death of the deceased at the time of the assault or they were reckless as to causing the death of the deceased. If the accused either intended to cause the death of the deceased or were reckless in causing death they must be guilty of Murder. However, if they intended to cause serious harm or were reckless in causing serious harm, they cannot be guilty of Murder but of the lesser offence of Manslaughter.
76. Where a person is charged with an offence but the court is satisfied that the evidence adduced in trial supports a conviction only for a lesser or alternative offence, the law gives discretion to the court to record a conviction for a lesser offence notwithstanding that no charge has been laid for the lesser offence. [See: Sec.162(1) read with Sec.162(2) of the Criminal Procedure Act]
77. We do not know what ran in each accused's mind at the time of the punching. Therefore, I have to draw reasonable inferences from the facts proved at the trial to decide if they had a murderous intention at the time of the assault. There is no evidence that the accused had used any lethal weapon nor was there eyewitness account to the effect that any of them used certain words such as "I will kill you" manifesting their murderous intention. According to Alena, the deceased was the best friend of the 1st accused and it is also admitted that he was with the 1st accused having drinks and lunch at home when she called the 1st accused shortly before the incident. Alena invited the deceased to join them to have a grog at Sonaisali. Both accused were drinking alcohol shortly afterwards with the deceased at the bus stop. There is no evidence of apparent motive on the part of the accused to kill the deceased.

78. The learned Prosecutor in his opening address said that the accused persons did not even bother to check if the deceased was dead or alive when he was lying motionless. In his closing submission also, it was submitted that the accused did not do anything to revive the deceased or convey him to the hospital suggesting that they had a murderous intention.
79. According to Alipate, the 2nd accused had been present with him when first aid was being administered to the deceased. Alipate did not say that the 2nd accused helped him in his first-aid or in putting the injured person in the police vehicle. However, I have already rejected Alipate's evidence that the 2nd accused was present at the crime scene by that time. Even if the 2nd accused were there, there is nothing to suggest that the 2nd accused intervened to prevent first-aid to the deceased or him being transported to the hospital. Therefore, the evidence does not support the Prosecution's argument that the post-incident conduct of the accused is consistent with the accused's murderous intention.
80. There is no plausible evidence to support the Prosecution case theory that the accused persons picked the motionless deceased by his shoulders and hit his head on the concert post. According to the pathologist, there were no gross injuries noted at the back of the head of the deceased. Sergeant Sevusevu of the CSI team, who prepared the sketch plan said that the blood-like stains on the electric post were found 1.2 metres above the ground level. The deceased is a tall and well-built man as per the photographs taken at his autopsy and it is hardly possible for the accused to hit the deceased's face at the edge of the concert post at that height. The evidence of the pathologist does not support this aspect of Prosecution theory either. Even the learned State Counsel never suggested nor sought any clarification from the pathologist in support of this contention. Therefore, I reject the Prosecution theory on that aspect.
81. Pathologist however did not rule out the possibility of causing a haemorrhage in the first covering of the brain, which is associated with sudden deceleration, if the deceased had been thrown to a wall or him falling on the ground hitting his head on a hard surface. However, there is no evidence to support this hypothesis nor was it the position of the Prosecution that the deceased was thrown to the concert post. There was only grass and no concert or hard surface as per the photographs where the deceased was found lying. Therefore, the hypothesis that he fell on the ground hitting his head in such a way as to be capable of causing those injuries should be excluded.

82. The only plausible inference on evidence that is consistent with the pathologist's opinion as to sudden deceleration is that the drunk deceased who had already received severe punches on his face and forehead at the bus stop ran fast in order to escape the accused person and fell to the ground hitting his head at the bottom edge of the concert post where the blood stains were found.
83. This finding is reasonably open in the circumstances of this case. As per Alena's evidence and the admitted facts (No. 4), the deceased was already drunk when they met at the bus stop and he continued to drink four canisters of Joske in her presence. An inference as to his level of intoxication can be drawn from his childish conduct of pouring alcohol on the music box and then on the two ladies in public in the presence of their husbands. The pathologist agreed that the level of alcohol in blood could increase haemorrhage if the deceased was heavily drunk because of the presence of alcohol which makes the lining or the walls of the blood vessels more fragile to bleed. In addition to that the drunk person is in less control, less strain posture or mobility so is highly prone to cause more force or less protection in any context. As per Sergeant Sevusevu, the blood stains were found at the bottom part of the EFL post, 1.2 meters above the ground.
84. In the result, two mechanisms have contributed to the head injuries that ultimately led to the brain haemorrhage causing the death of the deceased- namely, severe punching in the face and forehead of the deceased by the accused and accidental fall hitting his head at the bottom edge of the concrete post.
85. In the absence of other indicators pointing to the murderous intention which I have alluded to above and in a context that two potential mechanisms have jointly contributed to the death of the deceased, I am not inclined to draw the inference that the accused had acted with murderous intention, merely on the basis of their act of punching. I am also not satisfied that they were aware of a substantial risk that their act will cause the death of the deceased. However, it is possible to infer that they intended to cause serious harm or were reckless in causing serious harm. Therefore, it is logical and reasonable on the evidence to find each accused guilty of the lesser offence of Manslaughter.

86. A person is guilty of reckless Manslaughter if he was aware of a substantial risk that serious harm will occur and having regard to the circumstances known to him, he was unjustified to take that risk. The first step is to decide if there was a risk and whether the risk was “substantial”. The risk is substantial if a reasonable person, under the circumstances as they were known to the accused, would have taken the risk to be substantial at the time it was taken. I am satisfied that the accused persons were aware of the substantial risk that serious harm to the deceased will occur by their conduct in the circumstances known to them. They punched the deceased, in his face when he was already drunk, and also made the battered deceased run fast at night.
87. Furthermore, it is open, on the evidence of this case to reduce the charge to Manslaughter as a matter of public policy. When the court finds sufficient evidence (credible narrative) to justify the defence of sudden provocation, although that defence was not advanced by the Defence and even when it would have undermined the defence taken up by the accused (in this case accident), it is open to the trial judge in the interest of justice to consider the defence available on evidence and convict the accused for Manslaughter.
88. In *R v Coutts* [2006] 1 WLR 2154 [HL], (which was cited in *Naicker v State* [2018] FJSC 24; CAV0019.2018 (1 November 2018), the appellant who was charged with murder by way of defence took up the position that the death was a tragic accident, which meant that any suggestion of provocation would have undermined that defence. The trial judge did not leave to the jury the alternative defence of manslaughter, and the appellant was convicted. The House of Lords allowed the appeal. Lord Bingham, with whom the other Law Lords agreed, set out the relevant principles in paragraph 23 of the opinion as follows:-

The public interest in the administration of justice is, in my opinion, best served if in any trial on indictment, the trial judge leaves to the jury, subject to any appropriate caution or warning, but irrespective of the wishes of trial counsel, any obvious alternative offence which there is evidence to support (Emphasis added)

89. In *Naicker v State* [2018] FJSC 24; CAV0019.2018 (1 November 2018) the Supreme Court (of course in relation to the defence of self-defence) observed:

It needs to be noted that the defence did not ask the judge to leave the issue of self-defence. That was not necessarily negligence on the part of trial counsel. Such a defence was completely inconsistent, of course, with Naicker’s defence at trial, which was that the death of Naicker had had nothing to do with him, and trial counsel may well have thought that tactically it would be better if the alternative of self-defence was not considered. But the

mere fact that the defence in a particular case does not want an alternative defence to be raised does not mean that it should not be: see Marsoof JA's compelling judgment in *Praveen Ram v The State* [2012] FJSC 12 in which the relevant authorities on the topic were reviewed. It all depends on whether such a defence arises on the evidence – or to be more precise, whether there is “a credible narrative of events suggesting the presence of” such a defence: see the decision of the Privy Council in *Lee Chun Chuen v R* [1963] AC 220.

90. Our law recognises the common law defence of sudden provocation in Section 242 of the Crimes Act (Killing with Provocation), the relevant parts read as follows:

242 (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 stand in any such relation as stated 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 furnish an excuse for committing an assault is not a 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.

91. The deceased poured alcohol on the music box of the 1st accused and then on the wives of the two accused in a public place in the presence of their husbands. Being angered by the deceased's act both accused punched the deceased which substantially contributed to the death. In the closing submission, even the Prosecution submitted that the heat of anger escalated by the acts of the deceased. The punching took place in the heat of passion caused by sudden provocation when the accused lost control of their action as defined in the Section. There is sufficient evidence in this case to justify the defence of Provocation. The Prosecution failed to rebut the credible narrative available in evidence in favour of the defence of sudden provocation beyond a reasonable doubt. In view of the reasons aforesaid too each accused should be guilty of Manslaughter.

Conclusion

92. Prosecution failed to prove beyond reasonable doubt that the accused persons at the time of the commission of their willful conduct either intended or were reckless in causing the death of the deceased. Therefore, I find each accused not guilty of Murder as charged. I acquit each accused on the count of Murder.
93. The Prosecution proved that each accused engaged in willful conduct which substantially contributed to the death of the deceased and at the time of the commission of the willful conduct they were reckless as to causing serious harm to the deceased. The evidence also justifies a conviction for Manslaughter on the basis that the Prosecution failed to rebut the credible narrative of sudden provocation beyond reasonable doubt.
94. I find each accused guilty of Manslaughter and convict them accordingly.



Aruna Aluthge
Judge



14 July 2023
At Lautoka

Solicitors:

- Office of the Director of Public Prosecution for State
- Nath Lawyers and Millbrook Hills Law Partners for Defence