

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 304 of 2023

BETWEEN : STATE

AND : VACOLO QIO

**Counsel : Ms S Shameem, Mr U Lal, Mr L Tuivuya & Mr P Navara
for State
Ms O Grace and Ms A Dean for Accused**

Voir Dire Ruling : 11 March 2025

Trial dates : 30 June, 2 & 3 July 2025

Closing Submissions : 5 August 2025

Judgment : 12 September 2025

JUDGMENT

[1] Vacolo Qio (the **accused**) is charged with the following offences:

Count One

Statement of Offence

MURDER: *Contrary to Section 237 of the Crimes Act 2009.*

Particulars of Offence

VACOLO QIO on the 14th day of September 2023 at Nausori in the Central Division, murdered CHAND KAUR.

Count Two

Statement of Offence

BURGLARY: *Contrary to Section 312 of the Crimes Act 2009.*

Particulars of Offence

VACOLO QIO on the 14th day of September 2023 at Nausori in the Central Division, entered the dwelling house of **CHAND KAUR**, as a trespasser, with intent to commit theft.

Count Three

Statement of Offence

THEFT: *Contrary to Section 291 of the Crimes Act 2009.*

Particulars of Offence

VACOLO QIO on the 14th day of September 2023 at Nausori in the Central Division, dishonestly appropriated (stole) a Black Alcatel Mobile Phone and charger, a Folio wristwatch, a Nokia button mobile phone, a purple e-transport bus card and a Purple ladies purse the property of **CHAND KAUR**, with intention of permanently depriving **CHAND KAUR** of the said properties.

- [2] The accused is alleged to have broken into the home of Chand Kaur (the **deceased**) on 14 September 2023, murdered the deceased and then fled with stolen property. The accused denies doing so.

Burden of proof and assessment of the evidence

- [3] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial. It never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.

- [4] The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.
- [5] The accused chose to remain silent. That is his right. No adverse inference will be drawn from this. As stated, the burden is on the prosecution to prove the charges.
- [6] I approach the evidence dispassionately, without sympathy or value-laden rules. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

Prosecution case

- [7] The prosecution called the following witnesses:
- PW1 Litia Janine Tunidau
 - PW2 Praneel Kumar – nephew of the deceased
 - PW3 Prem Kaur – sister of the deceased
 - PW4 Krishan Kumar – relative of the deceased
 - PW5 Pooja Devi – niece of the deceased
 - PW6 Pita Dralia – friend of PW2
 - PW7 Vishal Bimal Chandra – neighbour of the deceased
 - PW8 Ranjeeta Singh – daughter of the deceased

- PW9 Ronald Ravinesh Singh – neighbour of the deceased
- PW10 Sakiasi Koroi – Police Officer
- PW11 Mosese Bete - Police Officer
- PW12 Dr Praneel Kumar – Pathologist
- PW 13 DC Peni Moli - Police Officer
- PW14 Jimi Ratulevu - Police Officer

[8] A number of exhibits were produced by the prosecution. Photographic booklets were produced of the deceased's body - where the body was discovered¹ and during post mortem examination². There are also photographs of the interior and exterior of the deceased's house.³ PW10 prepared sketches of the interior of the deceased's house⁴ and the bedroom where her body was discovered⁵. The pathologist produced his post mortem report.⁶ While in the witness box, PW2 prepared a sketch map of the area surrounding the deceased's house.⁷ This sketch was used by several witnesses to identify their house or their location at the material time. These witnesses confirmed the accuracy of PW2's sketch map.

[9] PW2's sketch map contains the deceased's house and the surrounding houses, driveways, roads and fields – within about 100 meters of the deceased's house, toward the main road. To one side of the deceased's house was her sister's house, Prem Kaur (PW3). On the other side of the deceased's house is another house where the accused is said to have resided at the time of the material events. In front of the deceased's house is a driveway

¹ Prosecution Exhibit 5.

² Prosecution Exhibit 2.

³ Prosecution Exhibit 5.

⁴ Prosecution Exhibit 3.

⁵ Prosecution Exhibit 4.

⁶ Prosecution Exhibit 6.

⁷ Prosecution Exhibit 1.

which leads to the main road and on one side of the driveway is a line of three houses – being ‘Vishals House’ (PW7) and Ronal’s two houses (PW9). On the other side of the driveway is a vacant section of farm land. The sketch is a useful visual aid to help understand where some of the prosecution witnesses lived and were standing at the material time.

[10] The trial was heard over three days in June and July 2025. On the afternoon of the first day, the Court conducted a scene visit with counsel and the accused – the evidence of PW1 and PW2 had by this time been concluded. PW2’s sketch plan was available to the Court at the time of the visit.

[11] The evidence for the prosecution is as follows.

[12] The deceased was 76 years old at the time of her death. She lived in Koronivia, a small settlement near Nausori. Her house was two stories, although the bottom story was still under construction. The top story has three bedrooms, a living room and a kitchen. She lived alone in the top story. There appears to have been two entrances to the house; via stairs at the front of the house or stairs to the side of the house. The evidence from her relatives is that the deceased and family accessed the top level via the stairs to the side of the house.

[13] On 14 September 2023, the deceased’s sister (PW3) woke up in the early hours, about 2am, having heard a noise outside. She too lived alone. PW3 went back to sleep and got up at about 6:30am and investigated the source of the noise. She found a drum outside placed under the window and assumed that someone had tried to break into her home. PW3 phoned the deceased at about 6.45am to let her know. The deceased walked over to PW3’s house and they had a brief discussion. The deceased told PW3 not to touch anything and to call the police. The deceased also told PW3 come to her house to have a shower. The deceased then returned home. It appears that the deceased returned to her own home a little before 7am. PW3 went inside her own house to warm water to take over to the deceased’s house.

- [14] PW4 is 29 years old. He is the grandson of the deceased. He lives with his own family in Makoi, Suva. As a daily routine, PW4 and his young daughter speak to the deceased on the phone at about 6.55am, just before PW4 drops his daughter at school. As usual, the deceased called that morning at 6.55am and spoke with PW4. The deceased informed PW4 of the attempted break-in at PW3's house.
- [15] The deceased also called her daughter, PW8, about the same time to inform PW8 of the attempted break-in. PW8 is married with her own children. Her family live close-by in another part of Koronivia. PW8's evidence was that her mother called about 6am but that cannot be correct. The time was more likely just after 7am. They spoke for only a brief time.
- [16] PW3 stated that about 7.40am she went to the deceased's house with warm water to have a shower and knocked on the back door (ie the entrance on the side of the deceased's house). There was no response and the house was locked. The house was closed from all sides. PW3 went back to her house and phoned the deceased but the call was diverted. PW3, therefore, used the warm water to wash herself at her own home.
- [17] It is the prosecution's case that at or about this time, ie between 7am and the time PW3 went to the deceased's house, the deceased had been attacked in her house. The offender had unlawfully gained access into the house with the intention of stealing property. While doing so, the offender attacked the deceased, striking her to her face and possibly her body. The offender placed cloth into the deceased's mouth as well as around her face and head. The offender may also have placed pressure on the deceased's chest with his body or knees.
- [18] The pathologist, Dr Praneel Kumar (PW12) conducted the post mortem examination and gave evidence at trial. He stated in his report that the accused had multiple injuries. She had abrasions and contusions to her face as well as multiple abrasions and contusions to the chest plus two rib fractures. The deceased's tongue was pushed up against the hard

palate. She had contusions at the floor of her mouth and base of her tongue. Dr Kumar opined that the deceased's cause of death was asphyxia, secondary to smothering which he attributed to blunt force trauma. Dr Kumar elaborated on these details in his evidence in court. He stated that the cause of death was *'asphyxia and smothering and cerebellum and blunt force trauma. Asphyxia is basically preventing...the airway passage so that oxygen cannot go into the airway passages into the respiratory tract and as a result it died because of lack of oxygen...the presence of a foreign object that was pushed into the foreign cavity...It was stuck in the mouth and then pressed with the hand...there's a foreign object occluding most likely a fabric because it can be squashed and pushed down without causing lacerations'*. And, *'the smothering most likely could have been, she was on the floor...pressure was applied to that part of the chest, and likely she could have been assaulted prior to that, those injuries...'*⁸.

[19] The prosecution allege that after murdering the deceased, the offender fled the scene, down the front stairs of the deceased's house, with several stolen items taken from the deceased's home. Namely, a purple purse, a rose gold wristwatch, a black Nokia mobile button phone, an Alcatel mobile phone and a purple e-transport bus card. These items were missing from the deceased's house after her body was discovered.

[20] PW2 is the nephew of the deceased. He is 33 years old and works as an electrician. He has lived in Koronivia all his life. PW2 lives about 40-50 meters from the deceased's house. His house is also drawn on the sketch map – and identified as *'my home'*. He stated that each morning when he goes to work, after 7am, he would see the deceased who would wait for PW2 on the road to greet him and talk with him. On 14 September 2023, PW2 walked to the main road shortly after 7am but did not see the deceased. PW2 was somewhat vague about the time. At first, he stated it was 7.05 or 7.10am, later he said it was between 7.15am and 8am. PW2 stated that the grills to the deceased's house were closed and he felt something was wrong. PW2 made his way to the main road and waited at the junction to be picked up by the company vehicle. He could see the deceased's house from the junction. Pita Dralia (PW6) was standing with him. They

⁸ Transcript of Dr Kumar's evidence in court.

have been friends most of their life. PW6 was also waiting to go to work. PW6 identified the time somewhat generally as being between 7 and 8am.

[21] While waiting together, PW2 and PW6 saw a person come down the deceased's front steps. The deceased's house is about 60-70 meters from the junction where they were standing. There is an open field between the deceased's house and the junction. They had an unimpeded view of the deceased's house. At that time, the accused was living in the house next to the deceased's house. Both PW2 and PW6 were familiar with the accused. PW2 had known the accused for about 2 years but not well. PW6 was more familiar with the accused having known him for 8-9 years. PW6 stated that he socialised and interacted with the accused. Both PW2 and PW6 stated that they recognised the accused as the person coming down the steps of the deceased's house.

[22] PW2 stated that the accused had dreads at the back of his head. He was wearing a grey shirt and black three-quarter shorts. PW6 also stated that the accused had dreads. They both saw the accused walk down the stairs and then walk in the direction of his own house next door. Observing the accused leaving the deceased's house concerned both PW2 and PW6. PW6 stated that he did not expect anyone to go to the deceased's compound. He told PW2 to check on the deceased because the deceased was old and lived alone. PW2 went immediately to the deceased's house to check on the deceased.

[23] Pooja Devi (PW5) is the sister of PW2. She lived in the same house as PW2, a short distance from the deceased's house. At the time PW2 saw someone walk down the front steps of the deceased's house, PW5 was at home having breakfast with her mother. PW5's mother noticed someone jump out of the deceased house. Her mother immediately tried phoning the deceased but there was no response. PW5's mother told PW5 to go and check on the deceased. PW5 did so. She stated that the time was after 7.30am.

[24] PW5 made her way to the deceased's house. The evidence of PW5 and PW2 is somewhat different at this point – the differences are not material. PW2 states that after seeing the accused go down the stairs he immediately went to the deceased's house. He met his

sister at the front of the deceased's house. She too had seen someone coming down the stairs. PW5 told his sister to go inside and check on the deceased. She did so and when she went inside, she began screaming. PW2 then went inside and saw his sister on the couch crying.

[25] PW5 stated that when she went to check on the deceased her brother was standing at the main road waiting for his transport. She first checked the side entrance to the house but the door was closed. She then used the front door to enter the deceased's house. She discovered the deceased's body lying on the floor in the first bedroom. She went and sat down on the couch and was crying. One to two minutes after entering the house, while she was sitting on the couch, her brother entered the house.

[26] As stated the differences are not relevant and do not undermine the key parts of their description. Both made their way to the deceased's house about the same time to check on the deceased. PW5 went inside first to check on their aunt. PW5's screams or crying caused PW2 to enter the house to investigate.

[27] PW5 entered the house and found the deceased lying motionless on the floor of the bedroom. PW5 stated that the deceased's body (her legs) was half under the bed. PW5 saw blood stains and bruises on the deceased's face. A sari cloth was stuffed inside the deceased's mouth. PW5 did not touch or move the body. PW2 saw the same scene when he entered the bedroom. He stated that cloth were wrapped around the deceased's face and her body was covered in blood. He tried to check whether the deceased was breathing, calling her name several times but with no response. He too stated that he did not move the body.

[28] Photographs of the deceased's body were subsequently taken by the police.⁹ The photographs are consistent with the descriptions of PW2 and PW5. The deceased is seen lying on her back with her arms outstretched. A pink sari is wrapped around her face and head. A brown sari is stuffed inside her open mouth with a large part of the same sari

⁹ Prosecution Exhibit 2.

extending out of her mouth. There are blood stains on the front of her shirt and what appears to be brown marks (bruises) on both sides of her face.

[29] Upon discovering the grisly scene, PW2 immediately went to the balcony of the deceased's house and began yelling to the neighbours that the deceased had been murdered. The police were then alerted.

[30] Vishal Chandra (PW7) lives in one of the three houses in front of the deceased's house – identified as '*Vishal's House*' on PW2's sketch map. Next to his house, to the left on the sketch, is a driveway which runs from the main road to a river several hundred meters away from the main road. At about 7am on 14 September 2023, PW7 took his children to school and then dropped some vegetables at the Nausori market. He returned home at about 7:40am. He changed his clothes and then went to his porch. He saw the accused walking down the driveway past his house toward the main road. At that time, the accused lived in a house behind PW7's house. PW7 had known the accused since 2020. When PW7 saw the accused that morning, the accused was about 10 to 15 meters from him. PW7 then went to his chicken farm behind his house. Two to three minutes after doing so, he heard PW2 screaming from the deceased's house that the deceased had been murdered.

[31] A short time after the discovery of the deceased's body, the police arrived at the scene and commenced their investigation. The deceased's house was sealed off with yellow tape – the yellow tape can be seen in photographs 2, 3, 4 and 5 of Prosecution Exhibit 5. The forensics unit collected evidence. Later the same day they extracted CCTV footage from an outside camera located on a property immediately in front of the deceased's house. The property belongs to Ronald Singh (PW9) - his two houses are identified as '*Ronal House*' on PW2's sketch map. PW9's camera faces the back of his property. The front stairs of the deceased's house can be seen on the camera. The CCTV footage extracted by the police captured a person walking down the front steps of the deceased's house on the morning of 14 September 2023. The quality of the image of the person does not permit an identification of the person. The time recorded on the CCTV footage is

4.59am. PW9 stated that when the cameras were installed in 2022, the time was not properly set. He stated that the time recorded has always been at least 2 hours early. PW9 was unable to provide a precise difference between the time on the footage and the correct time. He was only able to give an estimate. He stated that the correct difference was not less than 2 hours but could not say how much more than 2 hours. As such, all that can be stated with confidence is that the person seen coming down the stairs did so after 6.59am. How much after is not clear.

[32] This is an appropriate time to refer to the evidence of Litia Tunidau (PW1).

[33] PW1 is a dental assistant. She is married and has children. In September 2023, she was living in Nakasi, Suva, with her family. Also staying in the house at that time was her brother, her cousin and her cousin's daughter. On the morning of 14 September 2023, PW1 was packing the house to shift. PW1 stated that between 6 to 7 a.m. she saw the accused outside her house. She stated that she knew the accused. She had met the accused in about 2021 on Facebook. They communicated on this forum and eventually met in person in 2023. The accused had come over to her house several times in the evening to drink yaqona. When the accused appeared outside her house on the morning of 14 September 2023, he was wearing black shorts and a grey t-shirt. He asked to come inside and have a shower. PW1 agreed. She stated that the accused had never previously done this. After his shower he asked PW1 for a shirt to wear and was given a shirt. PW1 offered to wash the accused's clothes but the accused insisted that he would take the clothes with him. The accused asked for a knife and proceeded to cut up his t-shirt. Unsurprisingly, PW1 found this behaviour to be unusual. She stated that the accused looked lost and worried. She asked him what had happened and he told her that he was scared. PW1 asked what he was scared of and the accused stated that he had done something. He told her that he had jumped over and punched a lady who was his neighbour. The lady was swearing at him, he slapped the lady and when the lady fell down, he punched her again. He told PW1 that he punched the lady because the lady was calling out his name.

- [34] PW1 stated that the accused had some items wrapped with the pants that he had been wearing. The accused told PW1 that he wanted to leave these items at PW1's house. She told the accused to place the items in a drawer in her room. He did so and told PW1 that he would return to pick up the items. PW1 told the Court that these items included a pencil case, a gold watch, a button phone, an Alcatel phone, and a purple e-ticketing bus card for the elderly.
- [35] The accused told PW1 that he wanted PW1 to tell his mother that he had slept at her house that night and had been drinking yaqona. The accused then phoned his mother and told her he was at Nakasi. The accused gave the phone to PW1 who confirmed to the accused's mother that the accused was in Nakasi. The accused then wanted PW1 to go with him to his mother's house to confirm this same story to his mother in person. They then both got into a taxi and travelled to the accused's house in Koronivia. When they arrived, PW1 saw the accused's mother raking outside. The accused told his mother that he had slept at PW1's house and had been helping her with packing. PW1 stated that she saw yellow tape around the house next door. She saw police and realised that something had happened. She stated that the accused looked scared. They then returned to PW1's house where upon the accused then left the house with PW1's brother.
- [36] PW1's brother later advised PW1 that the accused had been arrested by the police. The next day, 15 September 2023, the police took PW1 and her brother to the police station for questioning. They informed her that the accused was involved in a murder case. PW1 informed the police that the accused had been at her home and had left items at the house. The police returned with PW1 to the house. PW1 collected the items left by the accused in the drawer and provided it to the police. These items were recorded in a Search List produced in evidence by police officer Jimi Ratulevu (PW14).¹⁰ The search list was signed on 15 September 2023 by PW1 and PW14. The items recorded in the search list as having been provided by PW1 include an Alcatel mobile phone¹¹, a black

¹⁰ Prosecution Exhibit 18.

¹¹ Prosecution Exhibit 13.

Alcatel charger, a rose gold with silver watch¹², a Nokia button phone¹³, a purple e-transport bus card¹⁴ and a dark purple ladies purse¹⁵. PW1 identified these items in court.

[37] The items seized from PW1 were shown to the deceased's daughter, PW8, on 15 and 16 September 2023. PW8 confirmed to the police that the items were her mother's property as PW8 had purchased them for her mother. These items were produced in evidence by PW14. PW8 stated that purple bus card had her mother's signature on the back of the card.¹⁶ The Alcatel phone¹⁷ was then recharged so that the phone could be turned on. When it was charged, PW8 turned on the phone and was able to unlock the phone with a password that she stated she had programmed into the phone. The image on the phone was shown to the Court – the image was PW8's daughter.

[38] The last five prosecution witnesses were the pathologist and four police officers. The police officers produced the evidence collected from their investigation. The prosecution then closed its case.

Defence case

[39] The accused was informed that he had a case to answer. The three options were put to the accused including his right to remain silent. The accused chose to remain silent.

Analysis of the Evidence

¹² Prosecution Exhibit 15.

¹³ Prosecution Exhibit 14.

¹⁴ Prosecution Exhibit 17.

¹⁵ Prosecution Exhibit 16.

¹⁶ Prosecution Exhibit 17.

¹⁷ Prosecution Exhibit 13.

[40] The prosecution case is that between 7a.m. and 8.00 a.m. on 14 September 2023, the accused broke into the deceased's house and stole the deceased's personal property, being the items listed in count 3. In the process of doing so, the accused attacked and murdered the deceased.

Count 1 - Murder

[41] The prosecution must establish the following elements beyond reasonable doubt to establish that the accused is guilty of murder:

- i. The accused engaged in conduct;
- ii. With the intention of causing the death of Chand Kaur or was reckless as to causing her death; and
- iii. The conduct caused her death.

[42] The evidence available demonstrates that the deceased was attacked in her home. The offender struck the deceased to her face and chest. The fact that the deceased was found partially under her bed with cloth wrapped around her face and head as well as stuffed violently into her mouth demonstrates that the deceased was attacked. The multiple injuries to her head, face, inner mouth and chest remove any doubt. The post mortem examination reveals that the offender suffocated the deceased by blocking (smothering) her airways, with the use of cloth in her mouth and over her face along with pressure on her chest. I am, accordingly, satisfied that the offender engaged in conduct that caused the death of the deceased.

[43] The prosecution must also prove that the offender who caused the injuries to the deceased intended to kill the deceased or was reckless as to causing her death.

[44] In *State v Rai* [2022] FJHC 224 (22 July 2022), Temo J¹⁸ explained the requirements here as follows:

7. *The third element of murder concerned its fault element. There are two fault elements for murder...It would appear that the prosecution is running its case on both fault elements. That is permissible. They need only satisfy one fault element, to prove the charge of murder. They are alleging that when the accused assaulted Ms. Fieyan Chen, he intended to cause her death, or in the alternative, was reckless in causing her death.*
8. *On the first fault element, the prosecution must make the court sure that when the accused did “the wilful act”, he “intended to cause the death of the deceased”. You cannot cut open the accused’s head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But the court can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted her. If the court finds that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.*
9. *As for the second fault element of murder, the prosecution must make the court sure that when the accused did “the wilful act”, he “was reckless as to causing the death of the deceased”. A person is reckless with respect to a result, if he was aware of a substantial risk that the result will occur and*

¹⁸ Now Chief Justice.

*having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk was unjustifiable is one of fact for the court. Was the accused aware of a substantial risk that the victim would die if he assaulted her? If he was aware of the substantial risk that the deceased would die if he assaulted her, and he nevertheless took the risk, he was reckless. If otherwise, he was not reckless.*¹⁹

[45] There is no direct evidence as to what occurred in the deceased's house at the time of her death. Nevertheless, the injuries to the deceased and the condition in which she was found permit the Court to make some inferences. The deceased was the subject of a violent attack. She was elderly and unable to offer any real resistance to her attacker. The injuries to the chest and the use of cloth to block her mouth and airways demonstrate that the attacker was deliberately suffocating the deceased. The offender can have been under no illusion as to the consequences of their actions. If the offender was not intending to kill the deceased, the offender was most certainly reckless. The offender must have been aware that there was substantial risk that death would result.

[46] I am satisfied beyond reasonable doubt that the deceased was murdered. The only issue is whether the accused was the person that murdered the deceased.

[47] There is no direct evidence demonstrating that the accused committed the murder. The prosecution relies entirely on circumstantial evidence to support this allegation. As the Court of Appeal noted in *Chand v State* [2016] FJCA 61 (27 May 2016) at [7]:

The case is based on circumstantial evidence. Therefore it was required from the prosecution to establish that the cumulative effect of the items was only compatible with the guilt of the accused. Equally it had to be shown that when

¹⁹ My emphasis.

taken together that the one and only inference that could be drawn is incompatible with the innocence of the accused. However, even if one or two items are not strong enough, the balance items must be still capable of drawing the inference against the accused. Circumstantial evidence is like a strand of a rope and even if one strand is broken, the remainder may be sufficient to hold the weight. Even if one item seems to be innocuous, the totality may point towards the guilt. It is the responsibility of the prosecution to prove that no other person than the appellant could have committed the crime.

[48] It is necessary for the Court to carefully consider whether the circumstantial evidence produced by the prosecution establishes beyond reasonable doubt that the accused committed the murder. The circumstantial evidence is set out below.

[49] Firstly, the evidence of PW2 and PW5 is that they saw the accused walking down the front steps of the deceased's house between 7.30 to 8.00 a.m. on 14 September, 2023. If they are correct then the deceased was seen coming from the front entrance of the deceased's house shortly after she was murdered and only minutes before the body was discovered. It is important in this respect that PW5 stated that when she entered the deceased's house (only minutes after the person was seen coming down the stairs) the front door was open. I am satisfied that both PW2 and PW5 were honest witnesses. They had no reason to lie. The fact they saw someone walking down the stairs is consistent with PW5's evidence, and to a degree (subject to the timing), the CCTV footage from the camera on PW9's property.

[50] The only question concerns the reliability of their identification of the accused. Certainly, both were familiar with the accused, in particular PW6 who had known the accused for 8-9 years. They provided similar descriptions, namely that the person had dreads and was wearing black shorts and a grey t-shirt. Both were adamant in cross-examination that the

person was the accused and that the distance was not too great to properly identify the person.

[51] The distance from where PW2 and PW6 were standing to the front stairs of the deceased's house is about 60-70 meters. They had an unobstructed view from where they were standing to the stairs. They were well placed to observe the person coming down the stairs. Both identified that person as the accused lending more weight to their identification. However, it was a long distance. The person would have walked down the stairs in a matter of seconds only. While both believed the person to have been the accused, it is conceivable that one influenced the other in the moment as to the identity. It is possible that they are mistaken and have convinced themselves of the fact that the person was the accused. Both PW2 and PW6 were, however, steadfast in their belief that the person was the accused and both were sufficiently familiar with the accused to be able to have identified the accused. Nevertheless, I accept that given the distance it is possible they are mistaken.

[52] The second piece of circumstantial evidence is PW7's sighting of the accused between 7.40 and 8.00 a.m. walking next to his house. This was not unusual as the accused lived behind PW7's house. PW7 acknowledged that the accused normally walked down that particular driveway to come to the main road. The sighting is important, however, because of its timing. It shows that the accused was in the vicinity about the time of the deceased's murder and shortly before the deceased's body was found. The sighting is also consistent with the evidence of PW2 and PW6 who say they saw the accused walk in that direction after coming down the stairs - that may, of course, simply be a coincidence.

[53] I am satisfied that PW7 is a credible witness and that his sighting of the accused and the timing is reliable. PW7 was only 10-15 metres away from the accused and PW7 had known the accused for several years.

[54] Thirdly, the evidence from PW1. Her evidence is important in several respects, namely:

- i. The accused's odd behaviour, ie arriving on her doorstep and asking to have a shower – he could have had a shower at his own home (which he travelled to with PW1 shortly after the shower), cutting up his grey t-shirt, asking PW1 to lie to the accused's mother about the accused's whereabouts – effectively to provide a false alibi. The accused not only asked PW1 to confirm this over the phone but took PW1 to the accused's home by taxi for this sole purpose.
- ii. The statements from the accused that he was then scared because he had punched a lady who was his neighbour causing her to fall. The explanation for the punch being that the lady had called out the accused's name. This is consistent with the attack on the deceased, who was of course the deceased's neighbour and provides perhaps an explanation for why (if he is the offender) he suffocated the deceased – ie in order to stop her from exposing him.
- iii. The items that PW1 says the accused left at her house. This is the strongest circumstantial evidence against the accused because it connects the accused to the deceased's house and, in particular, the theft of the property stolen at the time of the murder. PW1 stated that the accused left several items in his possession in a drawer at her house; two mobile phones, a women's wrist watch, a purple bus card, and a purple pencil case purse. The next day, 15 September 2023, the police seized these items from PW1 and that same day the deceased's daughter confirmed that the items were her mother's property. I am satisfied beyond any doubt that the items were the property of the deceased. She had signed the back of the bus card. The mobile phone had an image of the deceased's

granddaughter on it. These items were in the accused's possession only a matter of an hour or two after her death.

[55] In terms of the veracity of PW1's evidence, it was put to PW1 that the accused did not come to her house that morning. It was put to PW1 that she was lying about that evidence and the fact that the accused left the items at her house. There was some suggestion in cross-examination that PW1 had not told her husband about the accused coming to her house on earlier occasions. PW1 denied this and stated that her husband was home when the accused came around to drink yaqona. In any event, I accept that PW1 was an honest witness. There no obvious reason for PW1 to fabricate her evidence. There was no doubt that the stolen items taken from the deceased's house were seized by the police from PW1. Although PW1 was in possession of the stolen property there is no realistic connection between PW1 or the others in her house and the murder of the deceased. PW1 does not live near the deceased. There is no evidence that PW1 or those in her home were at the deceased's property at or near the time of the murder. In other words, the possession of the stolen items in her house is her only connection to the deceased and PW1 has offered a compelling explanation for being in possession – being, that the accused brought the items to the house and left them in her drawer the morning of the murder.

[56] There is an apparent inconsistency with the time indicated by PW1. She appears to have stated that the accused was at her house between 6 and 7 am on 14 September 2023 – although the question put to her was '*What happened after 6 to 7?*' To which she mentioned that the accused was outside her house. If it was PW1's evidence that the accused was outside her house between 6-7am then I am satisfied PW1 is mistaken about the time. PW1 did not explain how she was aware of the time. PW7 saw the accused between 7.40am and 8am. The accused did not go to PW1's house before he walked past PW7's house. PW1 stated that she went with the accused to his house and when she arrived there was police yellow tape around the neighbour's house. This would have been after the accused was seen by PW7.

[57] The cumulative strength of each strand of circumstantial evidence demonstrates that the only person who could have murdered the deceased was the accused. He was in possession of the deceased's stolen property within one to two hours after her murder. The person that stole her property was almost certainly the same person that murdered the deceased. Given the deceased was murdered in her own home and discovered shortly after the murder there was no genuine opportunity for a second, unrelated, person to have stolen the deceased's property after her death. Add to this, PW2 and PW6's sighting of the accused walking down the deceased's front stairs shortly after the murder. Even if this evidence is removed, the fact of the accused's presence in the vicinity of the murder at the material time is confirmed independently by PW7. There is then the accused's odd behaviour at PW1's house including his attempt to create a false alibi and destruction of evidence by cutting up his grey t-shirt which he was seen wearing shortly after the murder. As will be clear from these findings, I am satisfied beyond reasonable doubt that the circumstantial evidence demonstrates that the person who murdered the deceased was the accused.

Counts 2 & 3 - burglary and theft

[58] The prosecution must prove each of the following elements of burglary beyond reasonable doubt:

- i. The accused entered into the house of Chand Kaur;
- ii. As a trespasser; and
- iii. With intent to commit theft

[59] With respect to the offence of theft:

- i. The accused dishonestly appropriated (stole);

- ii. Property (itemised in count 3) belonging to Chand Kaur; and
- iii. With intent to permanently deprive Chand Kaur of the said property

[60] The accused was in possession of the deceased's stolen property a short time after the deceased's body was found. There is a factual presumption arising out of possession of recently stolen property. The presumption was described as follows by the Supreme Court in *Rokodreu v State* [2022] FJSC 36 (25 August 2022):

[30] In common law jurisdictions there is a presumption that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession. In order to apply this presumption, the prosecution is required to establish several requirements.

- i. Stolen property*
- ii. Recent possession*
- iii. Exclusive and conscious possession*

When the above factors are established, the possessor has to give an account as to how he came to possess. In other words, he should give a reasonable or a plausible explanation.

i. Stolen Property:

[31] The property must be stolen property. It is therefore necessary to establish the identity of the property. In this case witnesses Arvind Chand Prakash and his wife Alini Prakash had identified the property which belonged to them such as

jewellery, mobile phones which are personal to them. They identified this property at the police station and in courts.

ii. Recent Possession:

[32] The property should be recently stolen property. In other words, recent possession has to be established. According to the evidence, the robbery has taken place on 18 March 2009 after 10.00 p.m. The accused joined witness Aisea Bani and others who were having drinks at about 3.00 a.m. in Kaleli, Lautoka and they were in their company having drinks when the police came and arrested the accused and others and recovered the blue bag which was in the possession of the accused containing stolen items. These items were recovered within twelve hours after the commission of the offence. The items such as jewellery which will not change hands many a times such as cash. Therefore, the prosecution has established the property was recently stolen property.

iii. Exclusive Possession

[33] The next element the prosecution is required to prove is that the stolen items were in the exclusive possession or control of the accused. Inspector Iakobo Vaisewa recovered the blue bag which was in the possession of the accused. That bag contained stolen items. The accused denied that he was in possession of the stolen property and alleged that police fabricated evidence. However, the assessors and the trial judge accepted the evidence of Inspector Iakobo Vaisewa as truthful. The accused did not give a reasonable account as to how he came to possess these items.

[34] The case of Wainiqolo v State [2006] FJCA 49; AAU0061.2005 [28 July 2006] is relevant to this case. It states:

"The principal ground relates to the so-called doctrine of recent possession which is that where property has been stolen and is found in the possession of the accused shortly after the theft, it is

open to the Court to convict the person in whose possession the property is found of theft or receiving. It is no more than a matter of common sense and a Court can expect assessors properly directed to look at all the surrounding circumstances shown on the evidence in reaching their decision. Clearly the type of circumstances which will be relevant are the length of time between the taking and the finding of the property with the accused, the nature of the property and the lack of any reasonable or credible explanation for the accused's possession of the property. What is recent in these terms is also to be measured against the surrounding evidence.”

[61] The accused was in possession of the deceased’s two mobile phones, her wrist watch, bus card and purple purse within 1-2 hours after her death. The items were in the accused’s exclusive possession as indicated by PW1. The accused has offered no explanation for why he was in possession of the stolen property.


[62] I am satisfied on this evidence that the prosecution have demonstrated beyond reasonable doubt that the accused stole the items and is guilty of count 3.

[63] However, with respect to the offence of burglary there is no evidence before the Court on how the accused gained entry into the accused’s house. The prosecution must establish that the accused entered the house as a trespasser. He may well have done so but there is no evidence of this. There is no evidence of forced entry into the house. The accused was the deceased’s neighbour and the deceased may have unwittingly permitted the accused entry before he attacked and murdered her. Therefore, the prosecution has failed to establish beyond reasonable doubt that the accused is guilty of burglary.

Conclusion

- [64] I remind myself that the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout and it never shifts to the accused. The accused chose to remain silent. That is his right. He is not required to prove his innocence.
- [65] I am sure that the accused murdered the deceased and stole her personal property. He was in possession of the deceased's stolen property a short time after her death and was seen to be the vicinity of the murder at the material time. The circumstantial evidence establishes beyond a reasonable doubt that the accused committed the two offences. However, I am not sure that he is guilty of burglary.
- [66] In view of the above, I find the accused not guilty of count 2 of burglary and he is acquitted. However, I find the accused guilty as charged of count 1 of murder contrary to section 237 of the Crimes Act, and guilty of count 3 of theft contrary to section 291 of the Crimes Act and he is, accordingly, convicted.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

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