IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0186 of 2016
[In the High Court at Lautoka Case No. HAC 146 of 2011L]

BETWEEN	**:**	**TARUN KUMAR RAWAT**
		Appellant
AND	**:**	**THE STATE**
		Respondent
Coram	**:**	**Prematilaka, RJA** **Gamalath, JA** **Nawana, JA**
Counsel	**:**	**Mr. A. J. Singh and Ms. P. D. Prasad for the Appellant**
	:	**Ms. E. Rice for the Respondent**
Date of Hearing	**:**	**10 November 2022**
Date of Judgment	**:**	**24 November 2022**

JUDGMENT

Prematilaka, RJA

[1] The appellant had been indicted in the High Court at Lautoka for the murder Tevita Tabua (TT) contrary to section 237 of the Crimes Act, 2009 committed on 21 July 2011 at Nadi in the Western Division.

[2] After trial at Suva High Court, the majority opinion of assessors had been that the appellant was guilty of murder. The dissenting assessor had found him guilty of manslaughter. The learned High Court judge had agreed with the majority of assessors and convicted the appellant for murder. He was sentenced on 02 December 2016 to life imprisonment with a minimum serving period of 17 years.

[3] The appellant had filed a timely notice of appeal against conviction and sentence. The single judge of this court had allowed leave to appeal against conviction only on the question whether the prosecution had proved beyond reasonable doubt that the appellant intended to cause death or was reckless as to causing death by his conduct in terms of section 237(c) of the Crimes Act 2009 and refused leave to appeal against sentence. The appellant had not renewed his sentence appeal before the full court. Neither had the appellant renewed any of the other grounds of appeal in respect of which leave was not granted.

[4] Therefore, legally speaking the appellant is not entitled to canvass other grounds on conviction unrelated to the above issue before the full court. However, the appellant's counsel informed court at the hearing that he had no desire to abandon those grounds of appeal against conviction but intended to urge all of them except the 12th ground of appeal before the full court. However, he submitted that the application for fresh evidence filed in person by the appellant after the leave ruling would not be pursued before the full court.

Case summary

[5] The trial judge in the judgment had summarised the case before him and justified his decision to agree with the majority of assessors of the guilt of the appellant for murder as follows:

> *"5. In his police caution interview statements (Prosecution Exhibit No. 2), the accused admitted that he was with the deceased, at the crime scene, at the material time on 21 July 2011. He admitted that he had a fight with the deceased, at the material time, as a result of the deceased questioning the "love bites" on his neck (see Questions and Answers 169 and 240). He admitted that he and the deceased were in a homosexual relationship since September 2010 (Questions and Answers 22 to 32). He also admitted, he was going out with a girlfriend at the same time (see Questions and Answers 33 to 35). He admitted that prior to the fight, he had oral sex with the deceased (see Question and Answer 60 to 70).*
>
> *6. The accused admitted that, during the fight, he threw several punches at the deceased and also attacked him with a stone (see Questions and Answers 74 to 78, 94 to 101, 115, 116, 119, 120, 178 to 184, 186, 196,*

198, 202, 205, 207, 213 and 214). He admitted that, as a result of the punches he threw at the deceased and the stone he struck him with, at the material time, the deceased fell to the ground unconscious and his pulse were not beating (see Question and Answer 77). As the sole judge of fact as to guilt, I accept that the accused made the above statements in his caution interview statements, and that they were true.

7. *The deceased's post-mortem report was tendered as Prosecution Exhibit No. 3. This document was admissible evidence by virtue of section 133 (1) of the Criminal Procedure Decree 2009, and Doctor James Kalounivaki (PW6), a substitute pathologist, was entitled to comment on it, by virtue of section 133 (5) of the above Decree. It was the injuries the deceased allegedly suffered, as itemized in the report, that spoke volumes about the accuseds' intention, at the material time. The report found 4 external injuries on the deceased. There were large bruises on left side of the chest to the neck. There were scratches on the back down to the buttocks. There was a deep larceration on the left top side of the head. The scalp showed large bruises on the top front region and at the back of the head. Doctor Kalounivaki had outlined the type of blunt force trauma that was required to cause the above injuries in paragraph 32 of the Summing Up and I accept what the doctor said.*

8. *In my view, when you put all the evidence together, especially what the accused had admitted in his caution interview and charge statements, and the effect of the deceased's post mortem report and the doctor's comments on the same, including the other evidences mentioned in paragraphs 45 and 46 of the Summing Up, as the sole judge of fact as to guilt, I find as a matter of fact that, the accused, on 21 July 2011, repeatedly punched and attacked the deceased with a stone to death, with an intention to kill him."*

[6] Thus, it appears that the prosecution case by and large consisted of the appellant's cautioned statement, medical evidence and other circumstantial evidence. The appellant provided the sole evidence for the defence case.

[7] The grounds of appeal urged at the hearing of the appeal are as follows:

'<u>Ground 1</u>

The Learned Trial Judge erred in convicting the Appellant for Murder when there was no credible evidence before the Court either direct or indirect proving an intention to kill, as the Prosecution alleged thereby causing a grave miscarriage of justice.

Ground 2

The Learned Trial Judge erroneously directed the Assessors on the Prosecution case theory as to a fight occurring between the deceased and the Appellant and at the end of the Summing up the Prosecution sort a re-direction that that was not their case as there case was that the Appellant killed in a fit of jealousy, the Learned Trial Judge referred to Question & Answer 240 of the Record of Interview and rejected the Prosecution case theory and refused to put the direction as a result he erred by changing the Prosecution case theory and he failed to direct the Assessors that the Accused had rejected the Prosecution case theory in Question 240 and therefore there was a reasonable doubt, the benefit of which was to be given to the Accused.

Ground 3

The Learned Trial Judge failed to give Re-directions sort by the Defence and merely said to the Assessors you have heard the Defence Counsel this was erroneous and he failed in his duty as it did not have the authority of the Judge and further it was questions of law and the judge had a duty to give those directions, he thereby caused the trial to miscarry, causing a grave injustice to the Appellant.

Ground 4

The Prosecution relied on intention as the only element of mens rea and the Learned Trial Judge failed to give the following directions:

a. *An Intentional Act is a willed Act, that is to say an Act of which the Accused was aware and meant to do.*
b. *It is necessary for the Judge to identify the precise intent required to make out the charge in every case.*
c. *The Assessors must determine beyond reasonable doubt that the Act done was intentional.*
d. *The Directions the Learned Trial judge gave was not sufficient having regard to Evidence of Accused that he had no intention to kill. (Refer to Charge Statement)*

As a result the trial miscarried resulting in a grave injustice.

Ground 5

The Learned Trial Judge misdirected the Assessors in paragraph 24 and 25 inclusive of his summing up by erroneously stating the Defence case, when the Defence case was that he had no intention to murder, he defended himself and threw a stone in the dark and importantly he tried to revive the deceased thus saying that there was no intention and he acted in self-defence which the Prosecution had to negate and in the alternative it was provocation as a result of his directions the trial miscarried resulting in a grave miscarriage of justice.

Ground 6

The Learned Trial Judge failed to direct the Assessors that the implication of the State not calling to material witness which they gave Notice of that is Police Officer Rohinesh Prasad (Material Witness No.33) and Rejieli Nolan (Material Witness No. 25) as there was evidence that a third person had shifted the body, he was wearing a boot with sand and that the head injuries were consistent with being hit by a boot repeatedly and that this third person did not allow police to investigate on the morning of 22nd July, 2011 by welding a knife as such the Learned Trial Judge failed to give direction in the following term "that failure to call witness cannot supply or make up a deficiency in the Prosecution case and in this context that the Accused bears no onus of proof or any obligation to call evidence, consistent with the presumption of innocence."

Ground 7

The Learned Trial Judge failed to explain that there were two theories available in the Record of Interview the Plaintiff's theory and Defence theory and that the Record of Interview in totality could not be read to mean that there was a confession to intention to kill but only a confession to assault at its highest or assault in self-defence and further Learned Trial Judge failed to warn the Assessors that it is dangerous to convict on the basis of confessional statement made while in custody which is disputed and its making not reliably collaborated.

Ground 8

The Learned Trial Judge refused to redirect the assessor or omitted to direct them that the cross-examination of the Pathologist confirmed that there was no sexual act performed on the deceased and further there was no injury in the back passage or sign of any digital penetration and further that head injury could be caused by boot kicks thus causing a reasonable doubt to the confession and Prosecution case theory.

Ground 9

The Learned Trial Judge refused to give a good character direction even though it was raised in cross-examination of the Officer in charge, opening and closing of Defence and evidence from the Accused, the Learned Trial Judge was required to direct the assessors that they should consider good character as a factor affecting the likelihood of the Accused committing the crime charged thus causing the trial to miscarry.

Ground 10

The Learned Trial Judge failed to assist the Assessors in regard to the sworn testimony of the Accused and failed to direct them to give the Accused such credit as they think fit for having taken the course of making a Defence by way

of giving Evidence on Oath and that his testimony was to be weighed as the case of any other witness.

Ground 11

The Learned Trial Judge erroneously restricted the closing submissions to 15 minutes in a Murder Trial when he knew that two Assessors were very young and inexperienced and that this was a fundamental error and it deprive the accused of a fair trial pursuant to the Constitution of Fiji Section 15(1).

Ground 13

The deceased died at in the early hours off 22nd July, 2011 and after the Accused had left the scene a third person had moved the body and he was welding a knife at a police officer when they tried to investigate and since the head injuries were inconsistent with a stone thrown there was a reasonable doubt on the guilt of the Accused an further the Prosecution failed to produce the stone which at PTC they said they possessed.

Ground 14

The Learned Trial Judge direction on circumstantial evidence was erroneous and confusing when he should have directed the Assessors as follows:-

a. *In cases in which a circumstantial evidence direction is required, guilt should not only be a rational inference, but should be the only rational inference that could be drawn from the circumstances.*
b. *Where an intermediate conclusion of fact is a necessary link in a chain of reasoning, that fact should be identified for the jury, which should be directed that it cannot view such an intermediate fact as basis for guilt unless satisfied of its existence beyond reasonable doubt.*
c. *A jury should be reminded that if there is any rational hypothesis consistently with innocence it is their duty to acquit.*

This cause the trial to miscarry.

Ground 15 (sentence)

The Learned Judge erred in imposing such a heavy minimum term and erred as a result of applying wrong principles and taking into account irrelevant factors and not giving the Appellant credit for his good subjective features and prospects of rehabilitation.'

[8] I shall consider the 01st, 04th and 05th grounds of appeal together as all of them deal with different facets of the fault element of murder, which as remarked in the leave ruling is the main issue in the case. Answer to this question will determine whether

the appellant's conviction for murder can be sustained or it should be reduced to manslaughter. The appellant's counsel has argued that the evidence could support a conviction for manslaughter or if intention cannot be sustained, the appellant should be acquitted altogether on the premise that the prosecution solely relied on intention. There appears to be some merits to the appellant's argument that the prosecution had run its case on the basis of intention rather than recklessness.

[9] On the morning of 02 February 2016 the prosecutor had informed court that considering the serious injuries caused to the deceased the appellant was reckless in causing the death of the deceased. However, in the very afternoon another prosecutor had stated that they were not relying on recklessness but on intention. However, as per the sentence order dated 02 December 2016 the amended information had stated that the appellant murdered TT. At the closing submissions the prosecutor had stuck to the same position that the appellant intended to cause death of the deceased. The trial judge had directed the assessors that they should consider whether the appellant had intended to cause death as the prosecution had run its case on that fault element. In his judgment, the trial judge had held that the appellant repeatedly punched and attacked the deceased with a stone with an intention to kill.

[10] The fault element for murder is either intention to cause the death or recklessness as to causing the death. Intention and recklessness are defined in section 19 and 21 of the Crimes Act, 2009 respectively.

[11] Section 19 is as follows:

> *'19. — (1) A person has intention with respect to conduct if he or she means to engage in that conduct.*
>
> *(2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.*
>
> *(3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.'*

[12] Section 21 reads thus:

> *'21. — (1) A person is reckless with respect to a circumstance if —*
>
> *(a) he or she is aware of a substantial risk that the circumstance exists or will exist; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(2) A person is reckless with respect to a result if —*
>
> *(a) he or she is aware of a substantial risk that the result will occur; and*
>
> *(b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.*
>
> *(3) The question whether taking a risk is unjustifiable is one of fact.*
>
> *(4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.'*

[13] Knowledge is defined in section 20 as follows:

> *'20. A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.'*

[14] In terms of section 21(4) when recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

[15] Therefore, in my view an appellate court while examining the totality of evidence is not debarred from considering whether the evidence on record would prove any fault element in an offence the appellant is charged with, for the fault element is to be inferred from the proven facts. Thus, although the prosecution had run its case on the fault element of intention, it does not necessarily mean that recklessness cannot be reckoned at all, for proof of intention, knowledge or recklessness will satisfy the fault

element of recklessness. Further, the Director of Public Prosecutions (DPP) had indicted the appellant for murder which includes both fault elements.

[16] Intention means a purpose or desire to bring about a contemplated result or foresight that certain consequences will follow from the conduct of the person. For instance, if a man throws a boy from a high tower or cuts off his head, it is obvious that he desired the victim's death. Similarly, if a man abandons his two-month-old child in a forest, and the child ultimately dies, it is apparent that he knew the consequences. In all such cases, the man is said to have intended the desired act (see ***Criminal Law: Cases and Materials Sixth Edition Reprint 2012 by KD Gaur*** *page 50*)

[17] Recklessness has been described in common law as the state of mind of a person who foresees the possible consequences of his conduct, but acts without any intention or desire to bring them about. A man is said to be reckless with respect to the consequences of his act, if he foresees the probability that it will occur, but does not desire it nor foresee it as certain. It may be that the doer is quite indifferent to the consequences, or that he does not care what happens. In all such cases, the doer is said to be reckless towards the consequences of the act in question. In other words, recklessness is 'an attitude of mental indifference to obvious risk'. Driving at a furious speed through a narrow and crowded street is a reckless act. The person foresees that someone in the crowd may get injured by his act, but is 'mentally indifferent' to such obvious risk. Likewise, if A throws a stone over a crowd, without caring whether it would injure someone, and the stone falls on the head of one of the persons in the crowd, A is responsible for causing injury recklessly (see ***Criminal Law: Cases and Materials Sixth Edition Reprint 2012 by KD Gaur*** *page 52*)

[18] Thus, recklessness involves subjective awareness of the *risk* of harm but a reasonable person would have regarded the risk to be unjustifiable. If a doctor performs a difficult operation and is aware that it may prove to be fatal but goes ahead because there are no other safer options, he cannot be said to be reckless as it is justifiable to take the risk.

[19] On the other hand knowledge requires awareness that harm is *likely*. If A throws a small stone in the direction of B's head and if A is aware that B is likely to suffer hurt, A has knowledge that hurt to B is likely. Another example is that if a person conceals a time bomb in a building, he can be said to know that it is likely to kill the occupants of the building even though the bomb may be discovered and defused before it can do any harm.

[20] While common law on intention, recklessness and knowledge seem to align with sections 19(3), 21(2) and 20 of the Crimes Act, the statutory definitions in the Crimes Act, 2009 are broader and more descriptive than the common law meanings given to fault elements.

[21] The trial judge had directed the assessors that the prosecution had run its case on the basis that the appellant had the intention to cause the death of the deceased. However, if he was reckless as to causing the deceased's death still he would be guilty of murder.

[22] Therefore, the question for determination on the facts of this case is, if the appellant had the intention with respect to the deceased's death *i.e.* if he meant to bring about the death of the deceased by his acts or omissions or if he was aware that it will occur in the ordinary course of events as a result of his acts or omissions.

[23] If not, this court will also examine to see if the appellant was reckless with respect to the death of the deceased *i.e.* if the appellant was aware of a substantial risk that the death of the deceased will occur as a result of his acts or omissions and having regard to the circumstances known to him, it was unjustifiable to take the risk.

[24] According to the appellant's cautioned statement he and the deceased (TT) were sex partners since September 2010 in which TT used to give him 'blow jobs' meaning 'sucking his cock' and money. The appellant was also having a girlfriend by the time of the incident leading to the deceased's death. The appellant and TT had met in Nadi Town on the evening of 21 July 2011 and decided to meet later at Maqalevu Junction because TT wanted to give him a blow job. Accordingly, they met around 7.15 pm at

Nads Handicraft compound and TT on his knees started sucking the deceased's penis and the appellant who was standing was sticking his finger in the anus of TT at his request. Both men were at the back of a container and by this time TT was without his cloths and the appellant's pants and underwear too were out of his right leg and wrapped around the ankle of his left leg.

[25] According to the appellant while TT was in the act of sucking his penis which was very satisfying, he was imagining and pictured in his mind how TT was or must be satisfying other men and felt jealous of TT doing the same to others. Then, he got angry and punched TT's head, face and front of the chest with his right fist six to seven times. Then, the appellant had picked up a stone and threw it at TT's head at full strength. TT was about 1 ½ meters away and he fell to the ground. TT was motionless and the appellant checked but did not feel his pulse. He was shocked and dragged TT's body on its back about 05 meters away from where TT fell towards the entrance of the compound. Then, he decided to wash his face and dragged TT towards the creek nearby. TT was bleeding from his face and the appellant had thought that he was dead as he could not feel his pulse. Having washed TT's face, the appellant thought of putting TT somewhere and go home and dragged him again towards the back of the container but realized that the grass was short and people could see the body. Then he decided to drag TT's body towards the mangrove swamp and finally pulled TT and left him at the creek. Then, the appellant had removed $170, ATM card, employment card, FNPF card - all from TT's wallet and the SIM card from TT's phone and thrown his mobile phone into water and wallet and TT's trouser off Nadi Bridge. Thereafter, he had gone to the town with Raijieli by bus and bought grog, rum, red wine and barbeque. Then they had gone to Jale Solo' house and started drinking which went on till the following morning. During the reconstruction of the crime scene the appellant had shown these places to the police that had observed blood stains on the ground on the side of the container and near the creek. The investigator had photographed these places and produced them as exhibits at the trial.

[26] After the post-mortem examination was performed, the appellant's caution interview had continued and he had provided additional information as to what transpired during the intimate sexual activity between him and TT. He had deviated from the original story in several aspects since Q.169.

[27] According to the appellant, after getting off from the bus to meet him as agreed, TT had seen love bites around his neck through flood lights fixed to the trees at Nads Handicraft compound and questioned him as to who made them and why he was going with girls. The appellant had told TT that they were from his girlfriend made a day before. Then a heated argument had ensued over love bites and TT had indulged in name-calling the appellant by using swearwords 'sonalevu' (big anus) and 'ceistamamu' (father fucker). TT had pushed the appellant and he had got angry and in turn punched him. TT also had delivered a punch on the appellant's right chin. After the appellant had delivered 2-3 more punches on his face, TT had started to run away shouting and the appellant had picked-up a stone and threw it hard at him. The stone had hit TT's head about a meter away and he had immediately dropped to the ground. Then the appellant had approached TT, shaken him calling his name and found him breathing heavily. The appellant had admitted that TT had at one stage shouted for help saying 'Tarun enough'.

[28] The appellant had nevertheless admitted once again that the argument between him and TT developed behind the container where the latter was giving him a 'blow job' and he pulled TT away from that place after he went motionless and his body was lying on the ground.

[29] In his charge statement, the appellant had stated that he wanted to hurt TT and had no intention to do what he did.

[30] According to the post-mortem report the excessive loss of blood due to laceration of the scalp had directly led to the death of the deceased.

[31] Dr. James Kalounivaki who had given evidence on the post-mortem report made by Dr. R P S Gounder upon his post-mortem examination had said as follows:

> *"…...the injuries noted to the scalp would be caused by blunt force trauma to the head. An average to high energy blunt force trauma would cause those bruising on the scalp. This include a kick, a punch or a multiple thereof. The 4th injury in the external examination shows a deep cut, or tear or laceration and this is associated with a harder blunt force object. These are inclusive of all bruising noted. The blunt force trauma could include a stone. A cut to the scalp could cause excessive bleeding, and if not attended to, could become fatal. This is because the scalp is a blood vessel rich part of the body.*
>
> *Chest and lungs: There is fracture of the central bone of the chest in front, which holds the other ribs together in front. There is noted fractures in the 7th, 8th and 9th ribs on the right chest. A blunt force chest trauma could cause the above eg. heavy punch or a kick or multiple thereof. A medium to high energy punch would be a heavy punch.*
>
> *If a person suffers the larceration of the scalp or skin of the head, it is high likely, if not attended within 10 to 12 hours, a person can die, from the bleeding. The injuries to the chest, the breathing and the gas exchange in a person, can be severly affected. Looking at all the injuries, a person can die, if the same are not attended to..."*

[32] Under cross-examination Dr. James Kalounivaki had clarified that the laceration on the scalp under injury No.4 and its corresponding internal contusion leading to bleeding is the major cause of the death and a combination of scalp injuries and the rib injuries led to the deceased's death, who would have died within 01-03 hours if no medical attention was given. The laceration on the scalp which is rich with blood vessels could have been caused by something harder than kicks or punches for example a stone or safety boots. The chest injuries could be caused by kicks. According to Dr. James, if the deceased had been taken immediately or within ½ hour of the assault to hospital and his injuries attended to, it was highly likely that he could have survived with a 60% - 90 % chance.

[33] It is very clear that the contusions found on TT had been caused by several punches delivered by the appellant and the laceration on the scalp was due to the hit with the stone. Multiple bruises on the back of the body had been the result of it being dragged for a considerable distance along the ground. These injuries correspond to what the

appellant had said in his caution interview as inflicted upon TT by him. Similarly, it is clear that instead of abandoning TT if the appellant had taken steps to take him to hospital, there was a very high likelihood of him surviving. Thus, the appellant's assault on TT with his fist and a stone coupled with his leaving TT at the creek near the mangrove swamp had resulted in TT's otherwise preventable death. It appears that TT had been simply left to die. The appellant's subsequent conduct seriously calls into question his overtly concern for TT. He seemed to have been more interested in hiding TT's body and taken his belongings including money and the mobile phone with the SIM card. He appears to have been callously oblivious to TT's plight, for his immediate destination thereafter was Nadi town to buy drinks and enjoy them in the company of his friends till next morning.

[34] The appellant had run his defense on the basis that he entertained no intention to cause the death of the deceased and even made an application for no case to answer at the end of the prosecution case on that basis. This position was further affirmed at the opening address of the defense counsel before the appellant took the stand. The defense counsel had also referred to self-defense and provocation as part of the defense case.

[35] The appellant in his evidence had basically given evidence in line with his cautioned interview up to the point of the sexual encounter with TT on the day in question. According to him, having met TT, as previously agreed, at Nad's Handicraft at 7.15pm he refused to indulge in sex with him who then became angry. After TT saw the love bites on his neck, a heated argument erupted and TT started swearing, yelling and pushing him. He threw punches and his mobile phone at the appellant. According to the appellant, he defended himself and punched back 2-3 times. Then TT ran into the dark and fearing that he would return the appellant threw a stone in his direction but did not see it hitting anyone. He then heard someone falling to the ground. TT was in the dark but he had run towards TT calling his name and trying to shake him. Shocked and terrified, as he was and not knowing what to do, he had pulled TT to a nearby creek, put water on his face and tried to revive him. At this stage of the appellant's evidence the court had observed that he was giving evidence from some prepared notes which were then removed.

[36] After that he had picked up TT's phone which was later recovered by the police from him and went home which was about 400-500 meters from Nad's Handicraft. He denied having moved the body. He also denied that he had any intention to kill TT and said that he hit him because TT hit him first. He had also denied having been jealous of TT. He admitted that his own medical report had not noted any injuries on him. He had even floated the idea that TT fell on the pavement made of concrete but the photographs or investigator's evidence had not shown any such pavement away from the container.

[37] In the closing submissions the prosecution had still argued that the appellant had the intention to cause the death of TT out of jealousy. The defense had argued that he had no intention to kill but acted in self-defense and was also provoked by TT. In an obvious attempt to negate intention, it had been submitted that the appellant tried to revive TT by taking him to the creek.

[38] It is clear that the appellant in evidence had jettisoned his original version of attacking TT out of sexual jealousy but pursued his second version of heated argument and exchange of swearwords and physical blows following TT's finding of love bites on the appellant's neck area given in the cautioned interview in order to advance self-defense and even provocation. In order to distance himself from having caused the most serious injury namely the laceration of the scalp, the appellant had denied having hit TT with a stone but admitted having only thrown it in his direction in the dark. However, he surprisingly managed to find TT immediately thereafter and reached him. The appellant had perhaps forgotten that at the beginning of his evidence he had admitted that there were lights fixed to coconut trees. He even introduced a concrete pavement for the first time in order to create a doubt as to how TT came about his scalp injury. The presence of such a pavement was not suggested to the investigator. He was giving evidence from a prepared script as found out by court. However, he had not explained as to why he simply abandoned TT when assistance was most needed because at one point of time he found TT to be breathing heavily. He had also not explained why he decided to steal the possessions of TT and thrown some of his clothes and wallet to the river if he was so concerned about TT's well-being and also why he failed to get help from someone as quickly as possible when his house was not

very far away from the scene. Not surprisingly, when arrested on the following day the investigators do not seem to have seen any injuries or love bites on the appellant; nor had the doctor who examined the appellant later observed any injuries or love bites. The defense counsel would have questioned the investigators and elicited those findings from Dr. Anareta Mudunasoka had there been any.

[39] In all the circumstances, it is difficult, if not impossible, to successfully argue that the appellant did not entertain the intention to cause the death of TT. In my view, even otherwise the evidence clearly suggests that the appellant had been absolutely reckless in causing the death of the deceased. His subsequent appalling conduct excludes any other proposition. Having examined the totality of evidence, I am unable to conclude that appellant was unaware that there was a substantial risk that the death of the deceased will occur as a result of his acts and I am fully convinced that having regard to the circumstances known to the appellant, it was totally unjustifiable for him to have taken that risk. I have no hesitation to reach this view on the totality of evidence. Accordingly, I think the finding that the appellant was guilty of murder by the majority of assessors and the learned trial judge is justified on the fault element of recklessness if not intention.

Provocation

[40] The appellant did not specifically take up provocation as a partial defence in his evidence. His defense at the trial was that he was acting in self-defence which is a complete defense but in the cautioned interview he had adverted to facts creating a basis for consideration of provocation. Therefore, justice requires that consideration be given to a possible defense disclosed by the evidence even if, for reasons good or bad, the accused chooses not to advance it (vide **Ram v State** (2012) FJSC 12; CAV0001.2011 (9 May 2012). Though, there is a general duty on court to consider a defense, even if it was not expressly relied upon by the accused at trial, the scope of that duty in relation to provocation is that the defense cannot require the issue to be left to the jury/assessors unless a credible narrative of events has been produced suggesting the presence of these elements [see **Lee Chun Chuen v R** (1963) AC 220].

[41] Section 242(1) of the Crime Act, 2009 states that 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. The term 'provocation' means *inter alia* any wrongful act or insult of such a nature as to be likely when done to an 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 with having committed upon the person by whom the act or insult is done or offered [vide section 242(2)].

[42] The judicial approach to be taken in respect of provocation is laid down as follows [see **Masicola v State** [2021] FJCA 176; AAU073.2015 (29 April 2021)]:

> *"1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.*
>
> *2. There should be a credible narrative (i) on the evidence of provocation words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship (ii) of a resulting loss of self-control by the accused (iii) of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.*
>
> *3. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However accumulative provocation is in principle relevant and admissible.*
>
> *4. There must be an evidential link between the provocation offered and the assault inflicted."*

[43] Effect of provocation on a reasonable man is the determining factor to justify a verdict of manslaughter so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led an ordinary person to act as he did. In applying the test it is particularly important to consider whether a sufficient interval has lapsed since the provocation to allow a reasonable man time to cool and take into account the instrument with which the homicide was effected, for to retort in the heat of passion induced by provocation by a simple blow is a very different thing from

making use of a deadly instrument like a concealed dagger [vide **Mancini v Director of Public Prosecutions** (1941) 3 All ER 272 (HL)]. The provocation must not only have caused the accused to lose his self-control, but also be such as might cause a reasonable man (*i.e.* ordinary man of that age and sex) to react to it as the accused did [vide **Director of Public Prosecutions v Camplin** (1978) 2 All ER 168 (HL)].

[44] In **Codrokadroka v State** [2008] FJCA 122; AAU0034.2006 (25 March 2008) it was held:

> *'[40] The English courts have held that in the context of provocation, the "reasonable man" means "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today" (per Lord Diplock in DPP v. Camplin [1978] AC 705, 771). Lord Simon in the same case (at page 726) said that a reasonable man is "a man of ordinary self-control." These definitions were approved by the majority in **Att-Gen for Jersey v. Holley** [2005] 2 AC 580 (Privy Council). The majority decision was that the jury should take the accused exactly as they find him. This included an especially violent temperament, but having considered the gravity of the provocation offered, the standard of self-control by which he/she will be judged is that of a person of the accused's age and gender exercising the ordinary powers of self-control to be expected of an ordinary person of that age and gender. The majority also held that specific characteristics of the accused, such as for instance, homosexuality, or alcoholism, or disability are relevant but **only if they are related to the provocation offered**. Thus, where a person has a (relevant) disability and the provocative words are directed to him being a "cripple", or where the accused is homosexual and he is taunted for his homosexuality, then those personal characteristics are relevant and the question for the assessors will be whether an ordinary person who is homosexual would find the words provocative and would thereby lose self-control to assault the deceased in the way he did. It follows that ethnicity and cultural background are relevant only if the words spoken or deeds done are aimed at the culture or ethnicity of the accused. Racial taunts are therefore capable of being provocative if the taunts would have provoked an ordinary person of the accused's race, gender and age.'*

[45] Section 242 of the Crimes Act 2009 also adopts the standard of an ordinary person in relation to provocation. However, no abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values etc.; in short, the cultural, social and

emotional background of the society to which an accused belongs. It is neither possible nor desirable to lay down any standard with precision, it is for the court to decide in each case depending upon the facts and circumstances (vide **Jan Muhammad v Emperor** AIR 1929 Lah 861 by Lahore High Court).

[46] The trial judge had addressed the assessors on provocation at paragraphs 14, 15, 24 and 40 to 42 of the summing-up and placed the issue of provocation fairly and squarely before the assessors. It is clear that both the majority of assessors and the trial judge had not accepted that the appellant was acting under provocation.

[47] On a consideration of totality of evidence, I do not see how the defense of provocation could be upheld in the light of the above legal principles and the factual scenario in the case. Even if the appellant was provoked by TT by his use of swearing words upon seeing love bites around his neck, there was no justifiable reason for the appellant to attack with a stone causing the most serious injury on TT who was fleeing from the scene. The appellant does not appear to have lost self-control by TT's taunt. Provocation should have led to sudden and actual loss of self-control so as to make him for the moment not master of his mind (see **R v Duffy** [1949] 1 All ER 932). In any event the attack on TT was not proportionate to the provocative words or deeds. Merely getting angry is not the same as provocation in law.

Self-Defense

[48] Section 42(2) of the Crimes Act, 2009 states:

> *"A person carries out conduct in self-defense **if and only if** he or she believes the conduct is necessary:*
>
> *(a) to defend himself or herself or another person; or*
> *(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*
> *(c) to protect property from unlawful appropriation, destruction, damage or interference; or*
> *(d) to prevent criminal trespass to any land or premises; or*
> *(e) to remove from any land or premises a person who is committing criminal trespass —*

and ***the conduct is a reasonable response in the circumstances as he or she perceives them.****" (emphasis added)*

[49] The Court of Appeal in **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014 quoted from **Vasuitoga v State** [2013] FJSC 1; CAV001 of 2013 (29 January 2016) and held:

> *'[28] It is settled that when an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds. As the Privy Council said in* ***Palmer v The Queen*** [1971] AC 814*, 831-832:*
>
> > *"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable ground that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."*
>
> *[29] In* ***State v Li Jun*** *unreported CAV0017/2007S; 13 October 2008 Sackville JA referred to the English and Australian authorities on self-defence and said at [46]:*
>
> > *"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable."*
>
> *[30] We also refer to what Lord Lowry CJ said in* ***R v Browne*** *[1973] NI 96 which is cited in the unreported decision of the English Court of Appeal of* ***Balogun*** *[1999] EWCA Crim. 2120. Lord Lowry said at p 106:*
>
> > *"To justify killing or inflicting serious injury in self-defence the accused must honestly believe on reasonable grounds that he is in immediate danger of death or serious injury and that to kill or inflict serious injury provides the only reasonable means of protection."*

[50] In **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015) Calanchini P said of section 42(2) of the Crimes Act, 2009 as follows:

> *"[30] The defence of self-defence is now, as a result of the words "if and only if", available as a statutory defence. The defence will exonerate an accused person in the event that the prosecution fails to establish beyond reasonable doubt that the conduct of the accused was not a reasonable response to the circumstances as they were perceived by the accused. This is the only basis upon which the use of force in self-defence will negate criminal responsibility for an offence.*
>
> *[31] The common law defence of self-defence was discussed in the judgment of Sackville J in **The State –v- Li Jun** (unreported CAV 17 of 2007; 13 October 2008). Although the judgment of Sackville J was a dissenting judgment, the judgment of the majority does not appear to take issue with the principles to be applied by a trial judge when directing the assessors and himself on self-defence. Sackville J having formed the view that although it may be possible that there are some differences between the common law of self-defence in England and Australia concluded that they were not material to the appeal before the Supreme Court in that case. The Supreme Court was concerned with a petition for leave to appeal against conviction for murder of four family members where the defences of self-defence (at common law) and provocation were in issue. Sackville J referred to the decision of the High Court of Australia in **Zecevic –v- DPP** [1987] HCA 26; (1987) 162 CLR 645 at 661 and concluded that there was no inconsistency with the statements made by the Privy Council in **Palmer v The Queen** [1995] 1 AC 482. Sackville J then made the following observations as to the nature of the test for self-defence at common law in paragraph 46:*
>
> > *"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused based on the circumstances as he or she perceives them to be, which has to be reasonable. The test is not what a reasonable person in the accused's position would have believed. _ _ _. It follows that where self-defence is an issue, account must be taken of the personal characteristics of the accused which might affect his appreciation of the gravity of the threat which he faced and as to the reasonableness of his or her response to the threat."*
>
> *[32] There is in my judgment no inconsistency between the common law principles of self-defence and section 42 of the Decree.*
>
> *[33] In my judgment the summing up did not adequately explain the subjective element of the test under section 42 of the Decree. The actions of the Appellant will be considered necessary for the purposes of self-defence if the conduct was a reasonable response in the*

> *circumstances as they were perceived by the Appellant. In my judgment the summing up does not direct the minds of the assessors or the Judge himself to the importance of the Appellant's perception of the threat that he faced on the afternoon of 10 September 2011. There is in the summing up an emphasis on the objective nature of the test. For example, the assessors were told that in considering whether the accused acted reasonably you must ask yourself what a reasonable man in the accused's shoes would have done to defend himself. It was not made sufficiently clear that the issue of whether the conduct was necessary must he considered in the context of reasonableness which in term had to be determined by reference to the Appellant's perception of the threat that he faced. The Appellant's defence had at all times been that as an immediate response to the stone hitting him he had swung the cane knife in the direction of the deceased."*

[51] In my view, in the case of self-defence, the primary question similar to that of provocation is 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 and Fiji Supreme Court decision in **Naicker v State** [2018] FJSC 24; AAV0019.2018 (1 November 2018)]. If and when the factual matrix giving rise to 'self-defence' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in self-defence to do what he did. If the accused had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection. The fact that an appellant has taken up 'self-defence' in his evidence does not necessarily make it a credible story and the assessors and the trial judge should always act upon it.

[52] In this case the trial judge had addressed the assessor on self-defense at paragraphs 18 and briefly at 42. The appellant had primarily taken up this position in his evidence and not in his cautioned statement. According to his evidence, he threw a stone in TT's direction as he thought that he might attack him from the dark. However, what

he had said under caution is that he attacked TT who was on the run, in retaliation as he thought that TT might complain to someone. Thus, there is little credibility to his version of self-defense. In my view, the conduct of the appellant was at all not a reasonable response to the circumstances as they were perceived by him both by subjective and objective standards.

[53] Therefore, I hold that 01st, 04th and 05th grounds of appeal would not succeed.

02nd ground of appeal

[54] The appellants' complain flows from the rejection of the redirection sought by the prosecution that its case was not that there was a fight between the appellant and TT but that the appellant killed TT in a fit of jealousy.

[55] Apparently, when the trial judge pointed out the appellant's answer to Q240 where he had retracted his story of attacking TT out of sexual jealousy but insisted on 'love bites' theory leading to swearing words being uttered by TT on the appellant and pushing him making the appellant angry, the prosecution had withdrawn the intended re-direction.

[56] Although, the appellant had initially come out with the theory of 'sexual jealousy' as the reason for him to attack TT in his cautioned interview, he had varied it later without unequivocally withdrawing it, to advance 'love bites' theory before retracting the former at the very end at Q240. In his evidence, he had not spoken to his initial version of 'sexual jealousy' that triggered the attack on TT. He had plainly advanced his belated version of 'love bites' in evidence.

[57] Therefore, the trial judge cannot be faulted for not placing before the assessors the theory of 'sexual jealousy' although they had the cautioned statement before them for consideration. In any event, I do not see how this failure on the part of the judge had prejudiced the appellant as he ran his defense on 'love bites' theory which is what the trial judge directed the assessors on.

[58] I see no merits in this ground of appeal.

03rd ground of appeal

[59] The appellate complains that the trial judge had not redirected the assessors as requested by his counsel. The trial judge had said that there are no authorities to warrant a redirection on the failure to call Raijieli Volau and Senior Constable Rohinesh Prasad by the prosecution. The defense could have called any one or both of them if they were so vital to its case. No such application had been made or recorded.

[60] On the date of the death whether it is 21 July 2011 or 22 July 2011, the Post Mortem Examination Report had given the estimated time of death as 8.00 hours on 22 July 2011. This matter had not been a seriously contested fact at the trial. Evidence makes it clear that the encounter between the appellant and TT had occurred around 7.15 pm on 21 July and the TT's body was found on the following morning. In any event, what material impact it would have had to the defense by not knowing the exact time of the death is not clear from cross-examination of Dr. James by the defense. Dr. James had testified that Dr. Gounder had not determined the exact time of death due to the condition of the body. What was given in the PME report as the estimated time of death was according to police witnesses.

[61] There was nothing much to redirect the assessors on lack of examination of TT's private part as the appellant had said that he did not suck his penis; only TT sucked his penis. The appellant's counsel had not been very specific as to what redirection he wished to have on TT's private part.

[62] The trial judge had certainly addressed the assessors on sworn evidence of the appellant. Like all other witnesses he also gave evidence under oath. That did not deserve a special mention to the assessors who were anyway aware of it.

[63] The trial counsel for the appellant had read some legal literature to court as part of the request for redirections and the trial judge had directed the assessors to consider them in their deliberations without repeating them himself.

[64] I do not think this ground of appeal has any merits capable of altering the verdict of the majority of assessors and the trial judge.

06th and 13th grounds of appeal

[65] The appellant argues that the trial judge should have given a direction to the assessors that *'failure to call witness cannot supply or make up a deficiency in the prosecution case and in this context that the accused bears no onus of proof or any obligation to call evidence consistent with the presumption of innocence'.*

[66] This submission is based on the premise that a third person wearing boots with sand had shifted TT's body and head injuries were consistent with being hit by a boot repeatedly on the morning of 22 July 2011. This third person had been seen wielding a knife and did not allow the police to investigate.

[67] It appears that the prosecution had called D/Cpl. 2019 Anil Kumar who was the investigating officer and the defense counsel had cross-examined him with regard to Jale Sole who was very drunk and holding a knife near the crime scene on the morning of the following day. At that stage, the trial judge had held a discussion in the absence of the assessors with both the prosecutor and the defense counsel on causation and both counsel had understood the same. The Defense counsel had not posed any further questions on this issue thereafter.

[68] The defense counsel also had not led any evidence from the appellant relating to this aspect. However, his cautioned interview sheds some light. According to him, he had informed Jale Sole twice of what happened to TT or what he did to TT while drinking with several others including Raijeeli at Jale Sole's house on 21 July 2011. After they almost finished drinking around 5.30am on the following morning, Jale Sole had wanted the appellant to show him the place where TT was lying. Both had then gone there and the appellant had shown the place from a distance and Jale Sole had proceeded towards that place. The appellant had gone back to Jale's house and Jale had returned after 07-10 minutes and told him *'don't' worry about anything'*. These words made him realize that Jale had done something to the body. They had

continued to drink till about 6.30-7.00 am. By that time the workers had arrived to cut mangroves and Raijieli had brought the news of the dead body. The appellant along with Raijieli had proceeded to the place and he saw the body at a place different to where he had placed it on the previous night. Jale Sole was seen running up and down brandishing a cane knife and threatening them not to go there as it was his private property. The appellant had not said in the interview that Jale Sole was wearing boots. The defense had not even put this suggestion to the investigator when he gave evidence. The appellant in just one sentence said in his evidence that he saw Jale Sole wearing boots. This appears to be an afterthought to clear the way for an argument that the man wearing boots may have inflicted the injuries on TT.

[69] The gist of the appellant's argument arising from this ground of appeal is that TT would have been killed by the third person namely Jale Sole. However, the unchallenged medical opinion of Dr. James rebuts this hypothesis. According to the doctor, if a person suffers a laceration of the scalp or skin of the head, it is highly likely, if not attended within 10 to 12 hours he can die from bleeding and most crucially he said that looking at all the injuries TT would have died within 01-03 hours if not attended to. Therefore, it is clear that by the time, Jale Sole approached TT, he most likely was long dead and gone. Even if Jale Sole had moved TT from where the appellant had placed him in the night, Jale would have meddled only with his dead body. Jale's movement of the body had not contributed to the death of TT.

[70] The appellant also complain that the prosecution had failed to produce the stone at the trial. It is not in evidence that the investigators had found the stone used by the appellant and taken it as a production. The defense counsel had not even questioned D/Cpl. 2019 Anil Kumar on this. The defense counsel had asked the prosecution to produce the stone only during the examination -in-chief of the appellant. The defense should have been aware from the disclosures that a stone was not among the items listed to be produced at the trial.

[71] Thus, I see no merit in these two grounds of appeal.

07th ground of appeal

[72] The appellant submits that the trial judge had failed to explain to the assessors that there were two theories in the record of interview; prosecution theory and defense theory and the whole interview taken together cannot mean an intention to kill but only a confession to assault at its highest or self-defense. Further, the trial judge had failed to warn the assessors that it was dangerous to convict on a confession made while in custody.

[73] It is true that the prosecution ran its case on the theory of 'sexual jealousy' being the motive for the murder of TT by the appellant. Having come out with this position at the commencement of the interview, the appellant changed its course midway through the statement to advance not so much self-defense but provocation. However, in his evidence the appellant advanced self-defense to explain why he attacked TT. Since at the very end of the cautioned interview, the appellant had specifically dropped the 'sexual jealousy' as the reason for his assault on TT, the trial judge did not canvass that with the assessors. He, however, discussed provocation and self-defense. The fault element of murder had to be ascertained by the assessors and the trial judge, not only from the appellant's interview, but from medical evidence and other circumstantial evidence. This is exactly what the trial judge had said at paragraph 33 of the summing-up. What the appellant said about lack of intention to kill on his part is not decisive in that respect. I have already ventilated these matters earlier in the judgment and do not intend to repeat them.

[74] I know of no principal of law adopted in Fiji which states that the trial judge should warn the assessors that it is dangerous to act upon a confession made while the maker is in custody. In almost all cases cautioned interviews are recorded while the accused are in police custody. That is why caution is administered before recording it. It had been done in this case as well. The principles governing admissibility of a confession is set out in **Ganga Ram & Shiu Charan v Reginam** Criminal Appeal Ni. 46 of 1983 and the directions on how to act on a confession are summarized in **Tuilagi v State** [2017] FJCA 116; AAU0090.2013 (14 September 2017). The trial judge's

directions at paragraph 34 are substantially in line with the guidance on confessions required in law.

[75] Therefore, I see no merits in this ground of appeal.

08th ground of appeal

[76] The appellant complains that the trial judge had refused, failed or omitted to direct the assessors that the pathologist confirmed that no sexual act had been performed on the deceased and there was no injury to his back passage or signs of any digital penetration.

[77] What the appellant's counsel had sought a redirection on, was that there was no examination of TT's private area. Post-Mortem Examination Report had not indicated any specific finding as to the reproductive or generative organs but indicated them as 'unremarkable'. Therefore, Dr. Gounder may or may not have examined TT's anus and had he found anything remarkable he could be expected to have recorded his finding in his report. The defence counsel had not questioned Dr. James Kalounivaki further on any findings on TT's anus. Therefore, there was nothing for the trial judge to redirect the assessors on lack of examination of TT's private part as the appellant had said that he did not suck TT's penis; only TT sucked his penis. As for anal penetration what the appellant had said in his cautioned interview was that he put his fingers in TT's anus which had not been probed further by the defense or specifically denied by the appellant in his evidence. Thus, it had not been canvassed as a contentious issue by either party at the trial and remained an unremarkable piece of evidence as far as the maters in issue were concerned.

[78] Thus, this ground of appeal will not succeed.

09th ground of appeal

[79] The appellant complains that the trial judge refused to redirect the assessors on his good character evidence. I do not find any evidence given by the appellate at the trial on his good character. The defense counsel had, of course, questioned D/Cpl. 2019 Anil Kumar on this and the witness had stated that he was not aware whether the appellant had any previous convictions. He had also not carried out investigations into TT's sexual history because he was investigating into a homicide and not sexual history of TT. When asked whether TT was a sexual predator, Anil Kumar's answer was that to him TT was a decent gentlemen who was working for a prominent hotel in Nadi. Thus, Anil Kumar's evidence was non-conclusive of any god character of the appellant.

[80] Therefore, I do not think there was a proper basis for the trial judge to direct the assessors specifically on the appellant's good character.

10th ground of appeal

[81] Similarly, the appellant's complaint that the trial judge had not given adequate credit to the appellant for having taken the stand is superfluous. The trial judge had correctly said at paragraph 23 of the summing-up that when called upon to make his defense, the appellant had exercised his right to give evidence and analyzed his evidence in detail including the lessor offence of manslaughters based on fault element, provocation as a partial defense and self-defense as a complete defense.

[82] There is no requirement in law in Fiji that the trial judge should give a warning to the assessors against discounting an accused's evidence because he is the accused. The trial judge had directed at paragraph 46 to consider all the evidence together. He had treated evidence led by both parties on an equal footing.

11th ground of appeal

[83] The appellant submits that the trial judge had violated his right to a fair trial guaranteed under section 15(1) of the Constitution by restricting closing submissions to 15 minutes. Apparently, the prosecution too had been allocated the same time period for its submissions.

[84] There is no statutory requirement regulating the time slots to parties for their closing submissions. It would depend on the requirements of each and every case and the trial judge is in charge of controlling the proceedings. It appears from what had been recorded that the prosecution and defense had addressed the assessors on all contentious issues in their respective closing submission.

14th ground of appeal

[85] The appellant's grievance is that the trial judge had not adequately addressed the assessors on circumstantial evidence. The trial judge's directions to the assessors on circumstantial evidence are at paragraph 37 of the summing-up.

[86] Circumstantial evidence usually is that which suggests a fact by implication or inference. The circumstantial evidence in this case mainly comprised of medical evidence and the evidence of investigator along with photographs at the crime scene. Direct evidence usually is that which speaks for itself: eyewitness accounts, a confession etc. Therefore, the cautioned interview and the charge statement of the appellant is direct evidence similar to eye-witness account.

[87] In **Naicker v State** [2018] FJSC 24; CAV0019.2018 (1 November 2018) Keith J said *inter alia* referring to Pollock CB in *Exall* [1866] EngR 22; (1866) 4 F & F 922 at p 929:

> *"3. It is sometimes said that circumstantial evidence is less compelling than direct evidence. What better evidence can there be than that someone saw the defendant commit the crime he is accused of? But eye witnesses can sometimes be mistaken, and they have also been known to lie. That is why it*

is also said that circumstantial evidence can be just as compelling, if not more so. If I go to bed at night and the ground outside is dry, and I wake up in the morning to find that it is wet – true, I have not actually seen it rain, but the inference that it rained during the night is irresistible. As long ago as 1866, 8 years before Fiji became a Crown Colony, a distinguished judge likened circumstantial evidence to a rope comprised of several chords. He said that "[o]ne strand of the chord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.".. One of the issues in this case is whether the circumstantial evidence was sufficient to justify the conviction of the petitioner for murder."

[88] However, the case against the appellant was not built solely on circumstantial evidence. It was primarily based on direct evidence of his own cautioned interview and charge statement. The role of the circumstantial evidence was to strengthen the prosecution case.

[89] On a reading of the appeal record, I am of the view that by and large medical evidence and the investigator's evidence including those of reconstructions of the crime scene coupled with crime scene photographs corroborate the appellant's version of events spoken to by him in his cautioned interview.

[90] In **McGreevy v. Director of Public Prosecutions** (1973) 1 W.L.R 276; (1973) 1 A.E.R 503; Cr. L. Rev. 232 the House of Lords held that there is no rule or additional duty that where the prosecution depends on circumstantial evidence, the jury must be separately told not to convict unless the evidence is inconsistent with all possible explanations except the accused's guilt. The Law Lords also held that the duty of the judge is to make clear to the jury in terms which are adequate to cover the particular features of the case that they must not convict unless they are satisfied beyond reasonable doubt of the guilt of the accused. In **Lulu v. State** Criminal Appeal No. CAV 0035 of 2016: 21 July 2017 [2017] FJSC 19, His Lordship the Chief Justice said *"We accept that the position in McCreevy is the correct approach to directions on circumstantial evidence in Fiji.'*

[91] Therefore, I do not see any inadequacy in the trial judge's directions on circumstantial evidence in his summing-up particularly considering that the case against the appellant was not to a very great extent dependent of circumstantial evidence.

[92] In terms of section 23(1) of the Court of Appeal Act, the Court shall allow the appeal if the Court thinks that the verdict should be set aside if it is unreasonable or it cannot be supported having regard to the evidence or on the ground of a wrong decision of any question of law or on any ground there was a miscarriage of justice subject to the proviso enabling the Court to dismiss the appeal notwithstanding that a point raised in the appeal might be decided in favour of the appellant if the Court considers that no substantial miscarriage of justice has occurred. In any other case the appeal must be dismissed.

Assessors'' majority opinion

[93] The Court of Appeal in **Sahib v State** [1992] FJCA 24; AAU0018u.87s (27 November 1992) while considering section 23 (1) of the Court of Appeal, referred to the considerable advantage of the trial court of having seen and heard the witnesses and stated that it was in a better position to assess credibility and weight and the appellate court should not lightly interfere but based its decision on the reading of the whole record. If the Court of Appeal is satisfied that on the whole of the facts and with a correct direction the only reasonable and proper verdict would be one of guilty there is no substantial miscarriage of justice [vide **Aziz v State** [2015] FJCA 91; AAU112.2011 (13 July 2015)].

[94] The question for an appellate court is whether upon the whole of the evidence it was open to the assessors or jury to be satisfied of guilt beyond reasonable doubt, which is to say whether the jury must as distinct from might, have entertained a reasonable doubt about the appellant's guilt. *"Must have had a doubt"* is another way of saying that it was *"not reasonably open"* to the jury to be satisfied beyond reasonable doubt of the commission of the offence [see **Pell v The Queen** (supra), **Libke v R** (2007) 230 CLR 559, **M v The Queen** (1994) 181 CLR 487, 494]

[95] Upon a reading of the appeal record, I cannot come to a conclusion that upon the whole of the evidence it was not reasonably open for the assessors to have found the appellant guilty of murder or that they *'must have had a reasonable doubt'* of his guilt of murder.

Trial judge's verdict

[96] Having directed himself according to the summing-up, the trial judge had also agreed with the assessors that the appellant was guilty of murder. The House of Lords in **Watt v Thomas** [1947] AC 484 held that when a question of fact has been tried by a judge without a jury (in Fiji too the judge has always been the sole judge of fact and law and the assessors – now not in existence - only expressed an opinion) and it is not suggested that he has misdirected himself in law, an appellate court in reviewing the record of the evidence should attach the greatest weight to his opinion, because he saw and heard the witnesses, and should not disturb his judgment unless it is plainly unsound.

[97] It was held in **Kaiyum v State** [2014] FJCA 35; AAU0071 of 2012 (14 March 2014) that when a verdict is challenged on the basis that it is unreasonable, the test is whether the trial judge could have reasonably convicted on the evidence before him.

[98] On the totality of evidence, I cannot say that the trial judge's finding that the appellant was guilty of murder is unreasonable and plainly unsound. He could have reasonably convicted the appellant for murder. Even if one leaves out intention to cause the death of TT, it cannot be doubted upon the totality of evidence that the appellant was aware that there was a substantial risk that the death of the deceased will occur as a result of his acts and having regard to the circumstances known to him, it was unjustifiable for him to have taken that risk.

Gamalath, JA

[99] I have read in draft the judgment of Prematilaka, RJA and I am in agreement with his reasons and conclusions.

Nawana, JA

[100] I agree with the reasons and conclusions reached by Prematilaka, RJA.

Order of the Court:

1. Appeal against conviction is dismissed.

.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

COURT OF APPEAL FIJI

.....
Hon. Mr. Justice S. Gamalath
JUSTICE OF APPEAL

.....
Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL