

**IN THE HIGH COURT OF FIJI**  
**AT LABASA**  
**CRIMINAL JURISDICTION**

**Criminal Case No: HAC 051 of 2012**

**BETWEEN:**

**STATE**

**AND:**

**TANOA COLAISAILAGI**

**Counsel:** Ms. S. Vodokisolomone & Ms. P. Low for State  
Mr. P. Lomaloma for Accused

**Date of Hearing:** 15 – 17 July 2013  
**Date of Summing Up:** 18 July 2013

**SUMMING UP**

[1] Ladies and Gentleman Assessors, it is now my duty to sum up this case to you. You will then be required to deliberate together and each of you must give a separate opinion whether the Accused is Guilty or Not Guilty of the charge. I will then pronounce the judgment of the Court and your opinions will carry great weight with me in deciding that judgment.

- [2] In coming to your opinions you must apply the law as I explain it to you. It is my duty to direct you on the law. Those directions on the law must be followed by you.
- [3] However, you decide the facts of the case. As I speak to you, you may feel that I have formed some view on a particular question of fact. If you disagree, then please feel completely free to disregard my version. It is for you to decide the credibility of the witnesses and what parts of their evidence you accept as true and what parts you reject. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and decide whether your opinion is guilty or not guilty.
- [4] You must come to that decision solely upon the evidence you have heard from the witnesses, which includes the exhibits that have been produced. If you have previously heard anything about this case or the people involved, through the media or some other source – you must ignore that completely.
- [5] The law requires that the Accused is to be judged solely upon the evidence sworn to in this Court. In considering that evidence you are expected to apply your common sense and everyday knowledge of human nature and people. You must please put aside any feelings of prejudice or sympathy which may occur to you one way or the other and arrive at your opinions calmly and dispassionately.
- [6] The charge against the Accused, is set out in the information that you each have a copy of. This charge is brought by the State and the onus of proving it rests on the State from beginning to end. There is no onus on the Accused at any stage to prove his innocence or to prove anything else. The law is that the State must prove the essential ingredients of the charge beyond reasonable

doubt before there can be a finding of guilty. This means that before you express an opinion that the Accused is guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt about the guilt of the Accused, then you must express an opinion of not guilty. It is only when you are satisfied so that you are sure of guilt, that you may express an opinion of guilt.

[7] In the present case the Accused elected to give evidence. You should weigh his evidence and evaluate it against the evidence of the other witnesses and facts that have been proved. You will generally find that an accused gives an innocent explanation and one of three situations then arises:

1. You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
2. Alternatively without necessarily believing him you may say 'well that might be true'. If that is so, it means there is a reasonable doubt in your minds and so again your opinion must be not guilty.
3. The third possibility is that you reject his evidence as being untrue. That does not mean that he is automatically guilty of the offence. The situation would then be the same as if he had not given any evidence at all. He would not have discredited the evidence of the prosecution witnesses in any way. If prosecution evidence proves that he committed the offence then the proper opinion would be guilty.

[8] The Accused is charged with manslaughter. The State alleges that on 1 August 2012 the Accused engaged in a conduct that caused the death of Pio Mainanukulua and at the time of such conduct was reckless as to causing serious harm to the deceased.

[9] There are three ingredients that must be proved for the offence of manslaughter:

1. That the accused engaged in a conduct.
2. That this conduct caused the death of the deceased.
3. That the accused was reckless as to a risk that the conduct will cause serious harm to the deceased.

[10] In this case the prosecution alleges that the accused engaged in a conduct, namely an assault that caused the death of the deceased. It is not disputed by the defence that the deceased died of head injury as a result of a fall on a concrete surface when the Accused punched him once in the face on 1 August 2012 at the Bounty nightclub. The defence's case is that the Accused was justified in punching the deceased once in his face in self-defence.

[11] If you think that the Accused was or may have been acting in lawful self-defence of himself, you must find him not guilty. Because the prosecution must prove the Accused's guilt, it is for the prosecution to prove that the Accused was not acting in lawful self-defence. It is not for the Accused to establish that he was and you must consider the matter of self-defence in the light of situation which the Accused honestly believed he faced. You must first ask whether the Accused honestly believed that it was necessary to use force to defend himself at all. You must consider all the circumstances leading to the assault and in particular the conduct of the deceased to determine

whether the Accused honestly believed that it was necessary to use force to defend himself.

[12] If you are sure that the Accused did not honestly believe that it was necessary to use force to defend himself, he cannot have been acting in lawful self-defence, and you need consider this matter no further. But what if you think that the Accused did honestly believe or may honestly have believed that it was necessary to use force to defend himself?

[13] You must then decide whether the type and amount of force the Accused used was reasonable. The Accused told us he threw one punch because he feared the deceased would punch him although the deceased was held back by another person. Obviously, a person who is under attack may react on the spur of the moment, and he cannot be expected to work out exactly how much force he needs to use to defend himself. On the other hand, if he goes over the top and uses force out of all proportion to the anticipated attack on him, or more force than is really necessary to defend himself, the force used would not be reasonable. So you must take into account both the nature of the attack on the Accused and what he then did.

[14] If you are sure that the force the Accused used was unreasonable, then the Accused cannot have been acting in lawful self-defence, but if you think that the force the Accused used was or may have been reasonable, you must find him not guilty. If you reject self-defence, you must then go on to consider the third element of manslaughter, namely that the Accused was reckless as to a risk that one punch will cause serious harm to the deceased. A person is reckless with respect of serious harm if he is aware of a substantial risk that serious harm will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. So the questions that you must ask are:

- (i) Was the Accused aware that one punch in the face of a drunken man of age and built of the deceased will result in a serious harm?
- (ii) If the Accused knew of these circumstances, was he justified in taking that substantial risk by punching the deceased once in his face?

[15] If you feel sure that the Accused was aware of the substantial risk of serious harm and that he was unjustified to take the risk, then you may find the Accused guilty. But if you are not sure that the Accused was aware of the substantial risk of serious harm and that he was unjustified to take the risk, then you must find him not guilty.

[16] That completes my explanation to you on the crime of manslaughter and the defence of self-defence.

[17] I will now remind you of the prosecution and defence cases. In doing this it would be tedious and impractical for me to go through the evidence of every witness in detail and repeat every submission made by counsel. I will summarize the salient features. If I do not mention a particular witness, or a particular piece of evidence or a particular submission of counsel that does not mean it is unimportant. You should consider and evaluate all the evidence and all the submissions in coming to your decision in this case.

[18] The first set of witnesses was the friends of the deceased who were with him on 1 August 2012. They gave evidence that the deceased consumed substantial quantity of liquor before ending up at Bounty nightclub. They further gave evidence of rowdy behaviour of the deceased before he got

punched. Viliame said the deceased was bit wild and was speaking in an angry tone. Poasa said that he intervened and pulled the deceased towards his table when he got rowdy towards the Accused and his friends, but the deceased pushed him away. Poasa let the deceased go. The deceased went and got into an argument with the Accused. Poasa said he told the Accused not to harm the deceased because he was his brother and he was very drunk. The Accused backed out.

[19] After a few minutes the deceased returned to the Accused and got into an argument with him. Josefa said he intervened twice to pull the deceased away from the Accused. On the second occasion as he was pushing the deceased away, he saw a punch land in the deceased's face. Josefa said that if he did not hold the deceased back he would have got back at the Accused. Viliame said that he intervened on the first occasion when the deceased got into an argument with the Accused but when the deceased pushed him away he let the deceased go.

[20] Sakisa was the security guard who carried the deceased outside the club after he fell on the floor as a result of the assault by the Accused. Emosi was the taxi driver who transported the deceased to his home. Lowane is the deceased's father who saw his son being dropped off at his home in the early hours of 2 August 2012. Sgt Rokua caution interviewed the Accused. The Accused admitted punching the deceased once because he was causing trouble. Dr Goundar carried out the post mortem examination of the deceased and concluded that the deceased died of extensive subdural haemorrhage due to or as a consequence of assault. The cause of death is an agreed fact in this case.

[21] That was the prosecution case.

[22] The Accused said that his first encounter with the deceased was when he came to their table and tried to take their beer. He managed to convince the deceased to back off by saying they came to enjoy their drink and not to fight. Shortly after, the deceased returned to the Accused and head butt him. The deceased's friends intervened and pulled him away. The Accused then went to visit the toilet where the deceased passed remarks to the effect that made the Accused think that the deceased could assault him. The Accused did not react to the remarks but returned to his table. The deceased followed the Accused to his table and started pushing him. The deceased threw a punch at the Accused, but it missed. Two of the Accused's friends intervened and pulled the deceased back. At this point, the Accused threw one punch which hit the deceased in his face causing him to fall backwards on the floor. The Accused said he was afraid of the deceased because the deceased was bigger than him in built and was very drunk.

[23] That was the defence case.

[24] In summary the prosecution case is that the deceased had done no harm to the Accused for him to honestly believe that it was necessary to punch the deceased in self-defence. The prosecution's case is that the deceased may have behaved in annoying manner towards the Accused but at no point he threatened to harm the Accused. The prosecution says at the point of time the Accused punched the deceased, the deceased posed no threat to the Accused because the Accused's friends had held back the deceased. The prosecution says that the Accused did not act in self-defence.

[25] The defence case is that on the night in question, the Accused was targeted by the deceased. The defence says that at all times, the deceased was the



aggressor and conducted in a threatening manner towards the Accused. On two other occasions, the Accused backed off when the deceased threatened him. On the third occasion, the deceased threw a punch but missed the Accused. Although the deceased was held back he continued to threaten the Accused and wanted to get back at the Accused. The Accused feared that he would be assaulted and so he threw one punch at the deceased. The defence says the Accused acted in self-defence.

[26] Which version of the facts you accept is a matter for you. If you feel sure that the Accused did not act in self-defence and that he was aware of the substantial risk of serious harm and that he was unjustified to take the risk, you may find the Accused guilty. If you are not sure that the Accused was or may have been acting in lawful self-defence of himself, or if you are not sure that the Accused was aware of the substantial risk of serious harm and that he was unjustified to take the risk, you must find him not guilty.

[27] Your possible opinions are guilty or not guilty of manslaughter.

[28] That concludes my summing up of the law and the evidence in this particular trial.

[29] We have now reached the stage where you must retire to your room to deliberate together and form your individual opinions on the charge against the Accused. You may have with you any of the exhibits that you would like to consider.

[30] When you have reached your separate decisions you will all come back into Court and you will each be asked to state your separate opinion.

[31] Would you please now retire to consider your opinions? When you have made your decisions would you please advise the Court officer and the Court will reconvene to receive your opinions?

[32] Thank you.

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**Daniel Goundar**  
**JUDGE**

At Labasa  
Thursday 18<sup>th</sup> July, 2013.

**Solicitors**

Officer of the Director of Public Prosecutions, Labasa for State  
P.R. Lomaloma & Esq , Mr Lomaloma, Labasa for Accused