

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO.: HAC 90 OF 2011

STATE

-v-

AVNIT SINGH

Counsels : Ms. L. Latu for the State
Ms. L. Raisua for the accused

Date of Trial : 8 September - 12 September 2014

Date of Summing Up : 15 September 2014

SUMMING UP

Madam Assessors and Gentleman Assessor:

1. We have now reached the final phase of this case. The law requires me – as the Judge who presided over this trial – to sum up the case to you on law and evidence. Each one of you will then be called upon to deliver your separate opinion, which will in turn be recorded. As you listened to the evidence in this case, you must also listen to my summing up of the case very carefully and attentively. This will enable you to form your individual opinion as to the facts in accordance with the law with regard to the innocence or guilt of the accused.
2. I will direct you on matters of law which you must accept and act upon.
3. On matters of facts however, which witness you consider reliable, which version of the facts to accept or reject, these are matters entirely for you to decide for yourselves. So if I express any opinion on the facts of the case, or if I appear to do so, it is entirely a matter for you whether to accept what I say, or form your own opinions.
4. In other words you are the Judges of fact. All matters of fact are for you to decide. 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.

5. The counsel for defence and the state counsel made submissions to you about the facts of this case. That is their duty as the Prosecution Counsel and the defence counsel. But it is a matter for you to decide which version of the facts to accept, or reject.
6. You will not be asked to give reasons for your opinions, and your opinions need not be unanimous although it is desirable if you could agree on them. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
7. On the matter of proof, I must direct you as a matter of law, that the accused is innocent until he is proved guilty. The burden of proving his guilt rests on the prosecution and never shifts.
8. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find accused guilty, you must be satisfied so that you are sure of his guilt. If you have any reasonable doubt as to his guilt, you must find him not guilty.
9. Your decisions must be solely and exclusively upon the evidence, which you have heard in this court and upon nothing else. You must disregard anything you might have heard or read about this case, outside of this courtroom. Your duty is to apply the law as I explain to you to the evidence you have heard in the course of this trial.
10. You must judge the case solely on the evidence that you heard in this Court room. There will be no more evidence and you are not to speculate on what evidence there might have been or should have been. You Judge the case solely on what you have heard and seen here.
11. Your duty is to find the facts based on the evidence and apply the law to those facts. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
12. As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding.
13. In accessing the evidence, you are at liberty to accept the whole of the witness's evidence or part of it and reject the other part or reject the whole. In deciding on the credibility of any witness, you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he/she evasive? How did he/she stand up to cross examination? You are to ask yourselves, was the witness honest and reliable.

14. In this case the prosecution and the defence have agreed on certain facts. The agreed facts are part of evidence. You should accept those agreed facts as accurate and truth. They are of course an important part of the case. The agreement of these facts has avoided the calling of number of witnesses and thereby saved a lot of court time.

15. The agreed facts of this case are:

1. **THAT** Avnit Singh aged 20 years born on the 27th April 1993, unemployed of Balemasima, Votualevu in Nadi is the Defendant in this matter.
2. **THAT** Bal Krishna, Farmer of Rakiraki is deceased in this case.
3. **THAT** Avnit Singh worked for the deceased.
4. **THAT** the post mortem examination was conducted on the deceased on the 09th of May 2011 by Dr. Ramaswamy Ponnu Goundar at Rakiraki Hospital Mortuary.

Agreed Statements to tender by Consent

1. Handwritten and typed statement of Ashok Kumar dated 7th May 2011.
2. Handwritten and typed statement of Kaliaamma Goundar dated 8th May 2011.

16. The charge against the accused is as follows:

COUNT 1
Statement of Offence

Murder: Contrary to Section 237 (a) (b) (c) of the Crimes Decree No. 44 of 2009.

Particulars of Offence

AVNIT SINGH on the 3rd day of May 2011 at **Tuvavatu** in the **WESTERN DIVISION** murdered **BAL KRISHNA**.

17. I will now deal with the elements of the offence. The offence of murder is defined under Section 237 of the Crimes Decree. "Murder", has three essential elements. For accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:

- (i) That accused did an unlawful act;
- (ii) That the unlawful act caused the death of the deceased;
- (iii) That the accused person intended to cause, or reckless as to causing, the death of other person by the conduct.

18. An "unlawful act", is simply an act not justified in law. For example, in attempting to rob someone I rushed towards him and delivered punches to his body and head. The act of

punching, without any legal justification, is an assault and is an unlawful act. It is an unlawful application of force to the person of another, and is therefore an unlawful act.

19. The “unlawful act” must “cause the death of the deceased”. This is the second element of murder. The law requires a link between the unlawful act and the death. Continuing from the above example, the right hand punch I landed on the person’s head was so hard he fell to the ground. As a result, he suffered internal bleeding in his brain, and subsequently died. My punch therefore “caused the deceased’s death”, because it was a substantial cause of the injuries to his brains. Without my punch, he wouldn’t have had a brain injury, and therefore would not die. My punch was a substantial and major cause of his death.
20. The third element of murder is the accused intended to cause, or reckless as to causing, the death of other person by the conduct.
21. The first element is called the physical element of the offence, while the second element indicates the casual link. The third is called the mental element. You have to always bear in mind that all three elements should be established by the prosecution at all times together for it to succeed in the charge of murder. It must be absolutely clear in your mind that the act or the conduct of the accused was accompanied by intended to cause, or reckless as to causing, the death of other person by the conduct, which is the necessary mental state or the faulty intention to complete the offence of murder.
22. You must also bear in mind that a person’s intentions are locked up in mind. They are not often spoken out. The intent, therefore, cannot be physically observed. However, this intent can be proved by what one tells others, or can be inferred from one’s conduct prior to, during and subsequent to the act or conduct in question.
23. If, on the other hand, the prosecution failed to prove beyond reasonable doubt, the mental element required, but have only proved beyond reasonable doubt that-
 - (i) an illegal act was done
 - (ii) it resulted in the death
 - (iii) that he intended to cause serious harm or is reckless as to a risk that the conduct will cause serious harm

then you are entitled to find the accused guilty of manslaughter. The elements of manslaughter are the first two elements for murder, that is, the accused did an unlawful act, which caused the deceased’s death with intention to cause serious harm or recklessness as to risk the conduct will cause serious harm.

24. I will now explain what manslaughter is. Manslaughter is a lesser offence that stands very close to the offence of murder. It is the killing of someone by an unlawful act or omission without necessary intention or recklessness. If you consider that the accused did not have the necessary intention of committing the death of the deceased or reckless in his action,

but he had only the knowledge that the death would be caused by his act or conduct, then you must find the accused guilty of not of murder but of manslaughter only. Whether the accused had knowledge only or whether he had the intention to cause the death of the deceased or cause serious harm to him is a matter entirely for you to decide on the basis of facts and circumstances of the case.

25. Apart from the elements of the offence, the identity of the person who alleged to have committed the offence is very important. There must be positive evidence beyond reasonable doubt on identification of the accused and connect him to the offence that he alleged to have been committed.
26. Evidence that the accused has been identified by a witness as doing something must, when disputed by the accused, be approached with special caution because experience has demonstrated, even honest witnesses have given identification which have been proved to be unreliable. I give you this warning not because I have formed any view of the evidence, but the law requires that in every case where identification evidence is involved, that the warning be given.
27. In assessing the identification evidence, you must take following matters into account:
- (i) Whether the witness has known the accused earlier?
 - (ii) For how long did the witness have the accused under observation and from what distance?
 - (iii) Did the witness have any special reason to remember?
 - (iv) In what light was the observation made?
 - (v) Whether there was any obstacle to obstruct the view?
28. Proof can be established only through evidence. Evidence can be from direct evidence that is the evidence of a person who saw it or by a victim who saw, heard and felt the offence being committed.
29. As a matter of law I must direct you on circumstantial evidence. In this case, the prosecution relies on certain circumstantial evidence. In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime being committed, but give evidence of other circumstances and the events that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.
30. I cite the following situation as an example for circumstantial evidence. In a silent night, you hear cries of a man from a neighboring house. You come out to see that a man named 'A' is running away from that house with an object in his hand. Out of curiosity you go inside the house to see what really had happened. You see your neighbor 'B' lying fallen on pool of blood with injuries. Here you don't see 'A' committing any act on 'B'. The two independent things you saw were the circumstances of a given situation. You can connect the two things that you saw, and draw certain inferences. An inference you may draw

would be that 'A' caused the injury on 'B'. In drawing that inference you must make sure that it is the only inference that could be drawn, and no other inferences could have been possibly drawn from said circumstances. That should be the inescapable inference that could be drawn against 'A' in the circumstances. Further in evidence one witness may prove one thing, and another witness may prove another thing. None of those things separately alone may be sufficient to establish guilt, but taken together may lead to the conclusion that the accused committed the crime.

31. You must consider all direct evidence—that what witnesses saw, heard or perceived by their senses, as well as circumstantial evidence.
32. Circumstances are not made by mere speculation or guesswork. They must be established beyond reasonable doubt and the proved circumstances must only be consistent with the accused having committed the crime. To find him guilty, you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the circumstances proved. It must be inference that satisfies you beyond reasonable doubt that the accused committed the crime and that inference should be irresistible and inescapable on the evidence. Before you can draw any reasonable inference, you must first be satisfied beyond reasonable doubt, that the evidence given by each witness relating to the circumstances giving rise to the issues of fact to be proved is credible and truthful.
33. Documentary evidence is also important in a case. Documentary evidence is the evidence presented in the form of a document. In this case, coronial autopsy report of the deceased is an example.
34. Expert evidence is also important to borne in mind. Usually, witnesses are not allowed to give opinions. They are allowed to give evidence on what they have seen, heard or felt by their physical senses only, as described earlier. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions express on a particular fact to aid court and you to decide the issue/s before court on the basis of their learning, skill and experience.
35. In assessing evidence of witnesses you need to consider a series of tests. They are for examples:

Test of means of opportunity: That is whether the witness had opportunity to see, hear or feel what he/she is talking of in his/her evidence. Or whether the witness is talking of something out of pace mechanically created just out of a case against the other party.

Probability and Improbability: That is whether what the witness was talking about in his or her evidence is probable in the circumstances of the case. Or, whether what the witness talked about in his/her evidence is improbable given the circumstances of the case.

Belatedness: That is whether there is delay in making a prompt complaint to someone or to an authority or to police on the first available opportunity about the incident that was alleged to have occurred. If there is a delay that may give room to make-up a story, which in turn could affect reliability of the story. If the complaint is prompt, that usually leaves no room for fabrication. If there is a delay, you should look whether there is a reasonable explanation to such delay.

Spontaneity: This is another important factor that you should consider. That is whether a witness has behaved in a natural or rational way in the circumstances that he/she is talking of, whether he/she has shown spontaneous response as a sensible human being and acted accordingly as demanded by the occasion.

Consistency: That is whether a witness telling a story on the same lines without variations and contradictions. You must see whether a witness is shown to have given a different version elsewhere. If so, what the witness has told court contradicts with his/her earlier version.

You must consider whether such contradiction is material and significant so as to affect the credibility or whether it is only in relation to some insignificant or peripheral matter. If it is shown to you that a witness has made a different statement or given a different version on some point, you must then consider whether such variation was due to loss of memory, faulty observation or due to some incapacitation of noticing such points given the mental status of the witness at a particular point of time or whether such variation has been created by the involvement of some another for example by a police officer in recording the statement where the witness is alleged to have given that version.

You must remember that merely because there is a difference, a variation or a Contradiction or an omission in the evidence on a particular point or points that would not make witness a liar. You must consider overall evidence of the witness, the demeanor, the way he/she faced the questions etc. in deciding on a witness's credibility.

You must also consider the issue of omission to mention something that was adverted to in evidence on a previous occasion on the same lines. You must consider whether such omission is material to affect credibility and weight of the evidence. If the omission is so grave, you may even consider that to be a contradiction so as to affect the credibility or weight of the evidence or both.

In dealing with consistency you must see whether there is consistency *per se* and *inter se* that is whether the story is consistent within a witness himself or herself and whether the story is consistent between or among witnesses. In deciding that, you must bear in mind that the evidence comes from human beings. They cannot have photographic or videographic memory. All inherent weaknesses that you and I suffer, insofar as our memory is concerned, the memory of a witness also can be subject to same inherent weaknesses.

Please remember that there is no rule in law that credibility is indivisible. Therefore, you are free to accept one part of a witness's evidence, if you are convinced beyond doubt and reject the rest as being unacceptable.

36. You need to consider all those matters in evaluating the evidence of witnesses. You shall, of course, not limit to those alone and you are free to consider any other factors that you may think fit and proper to assess the evidence of a witness. I have given only a few illustrations to help what to look for to evaluate evidence.
37. I will now deal with the summary of evidence in this case.
38. The first witness for the prosecution was Sunita Devi. On 3rd May 2011 she was with her defacto partner working at a farm. The owner 'Dada' used to touch her when serving food. She had complained about this to her partner. On this day 'Dada' had asked him to chop some wood. He had gone and brought the axe. She was asked to go and sleep in her room. She had heard a loud sound like someone hitting someone. She had asked 'honey what are you doing?' When she came out 'Dada's eyes were popping out. She had run out. She had seen the accused standing at the door with an axe. Accused had brought her back. She was asked to bring the bag. She did not want to go. Then she had gone and packed all the clothes. The accused had washed the axe and thrown it to the woods. Then they have left the house.
39. On the way they have met an i-taukei guy who asked about 'Dada'. Accused had said he is not at home. The accused told him 'Dada' had said no one to come if he is not at home. Then they have come to the road. The accused washed his feet and changed his shoes. They got into a Pajero and went to Rakiraki town. They have gone to Lautoka and then to accused's parent's house in Nadi. There accused had told his parents that he killed 'Dada.' Her dad had called and she had spoken for few minutes. Then she called back and informed him that accused killed 'Dada' and he warned her not to tell anyone. At that time accused had gone to buy cigarettes. Later police came and took them to Police. The incident was at 9.00a.m. The accused had told her if someone touches his wife or do anything to his wife he doesn't like that. There were blood stains on the axe. She identified and tendered the axe marked P1. She was frightened that the accused might kill her as well. There were no houses close by. She identified the accused in Court. Their relationship with the deceased was good that morning. The accused looked upset as thinking of something. They have come to Rakiraki as accused's mother was fighting with her
40. Under cross examination she stated that she was in relationship with the accused for 8 months and they came to the deceased's house as accused's mother never liked her and was fighting with her and chasing her out of the house. Her brother had arranged them to work for the deceased. They have gone there on 20.4.2011 and stayed there till 3.5.2011 which was a Tuesday. She had told accused about the deceased touching her. She admitted that she was arrested by the police and also charged for this offence. Then she was granted immunity by prosecution. She denied that deceased was not at home that

morning. She had not seen any blood stains on the wall. The deceased was eating Roti, dhal, fried fish and fish in gravy for breakfast. It was suggested that she did not tell police that deceased told the accused to chop wood and the accused went and brought an axe. She said that she told that to police. It was put to her that deceased was not eating food and there was no food in front of him. It was further put that the deceased was dyeing his hair. She denied all this. She had seen the police officers assaulting the accused for 2-3 minutes at Namaka police station. She had told them to stop it. The police vehicle which took them to Lautoka was not stopped at Sabeto. At Lautoka police station she had told the accused to tell the truth so that they will not beat him.

41. You watched her giving evidence in court. What was her demeanor like? How she react to being cross examined and re-examined? Was she evasive? How she conduct herself generally in Court? Given the above, my directions on law, your life experiences and common sense, you should be able to decide whether witness's evidence, or part of a witness's evidence is reliable, and therefore to accept and whether witness's evidence, or part of evidence, is unreliable, and therefore to reject, in your deliberation. If you accept the evidence of this witness beyond reasonable doubt there is direct evidence that the accused was armed with an axe, she heard a sound and saw the deceased fallen with popping eyes and accused was standing with an axe with blood stains. You have to decide whether that inference should be irresistible and inescapable on the evidence. Before you can draw any reasonable inference, you must first be satisfied beyond reasonable doubt, that the evidence given by this witness relating to the circumstances giving rise to the issues of fact to be proved is credible and truthful.
42. Further at that stage I should give you legal directions to understand who is an accomplice. If a witness is an accomplice it is my duty to warn you that you should look for independent corroboration of that evidence and it is not safe to convict a person on uncorroborated testimony of an accomplice. Further it must be evidence which implicates an accused person that is, which confirms in some material particular not only the evidence that the crime has been committed but also that the accused person committed it. Sunita Devi was arrested, charged and then given immunity by the prosecution. That does not make her an accomplice. Who is an accomplice? Persons who are participes criminis (one who has a share in crime: accessory) in respect of the actual crime charged, as principal or accessories before or after the fact (in felonies).
43. The evidence given by Sunita Devi at the trial clearly places her at the scene of the crime. Is that evidence make you to conclude that she is a principal or accessory after the fact. Is Sunita Devi's evidence tainted by an improper motive? There is no evidence that Sunita Devi took any part in commission of the crime or that she aided or abetted the crime. The mere presence at the scene does not make a person liable for the crime. However she had failed to report to any person till she called her dad. You have to consider whether that is possible due to the fact she was defacto partner of the accused at that time and living with the accused's family.

44. The next lay witness for the prosecution was Ranjeet Singh. On 3.5.2011 around 10.00 a.m. when he was coming out of drive way to go to town, a boy and a girl had stopped his van and wanted a lift to the town. This is the first time he had seen them. He was told that they were coming from Bal Krishna's house. They wanted get down before the town. But he had dropped them at the town. He identified the accused as the boy who got into his van that day. They had big Black bag with them.
45. This witness was not cross examined by the defence. That means that defence is not disputing his evidence. If you accept his evidence beyond reasonable doubt prosecution wants to draw the inference that on 3.5.2011 around 10.00 a.m. the accused with another girl went to Rakiraki in his van.
46. The third witness for the prosecution was Subramani Mudaliar. He is the father of the first witness. On 8.5.2011 he had called the daughter. After few minutes she cut the line saying I want to speak to you. Ten minutes later daughter had called back. She had told that at the place where they were staying in Rakiraki the accused had killed that man. Her husband had told her not to tell anyone. She sound very frightened. Then she had switched off the phone saying accused was around. He had called the brother of the deceased and informed him this. Then police had called him from Rakiraki and he had told police everything.
47. Under cross examination he admitted that he called the daughter to ask where they are as the man with whom they are staying was dead. He admitted that he loves his daughter.
48. Prosecution had called this witness to establish that Sunita Devi had told her father about this incident on the first available opportunity. If you accept this evidence beyond reasonable doubt you have to decide whether under the circumstances Sunita Devi made a recent complaint.
49. The fourth witness for the prosecution was Salvindra Reddy. He had gone to deceased house on 7.5.2011 to ask for transport to go for fishing. He had seen a body lying at the back door. Half was inside and other half outside. There were lots of flies. He had informed his dad. The dad had come and checked. Then dad had informed the police. Dad is Ashok Kumar.
50. He was not cross examined by the defence. His father's statement is part of the agreed facts. Prosecution wants you to draw the inference that the body of the deceased was found on 7.5.2011 from this evidence.
51. The next witness for the prosecution was Namrita Krishna Goundar. She is the daughter of the deceased. She had called the deceased on 2.5.2011. He had told her not to call him as phone will be off due to no charge as there is no power supply. There was a couple staying with the deceased at that time.

52. She too was not cross examined by the defence. Further her mother Kaliaamma Goundar's statement is part of agreed facts. Prosecution wants you to draw the inference that deceased last spoke to his family on 2.5.2011.
53. The doctor was called as the next witness for the prosecution. He gave evidence on the Autopsy report prepared by Doctor Ponnu Swamy Goundar which was marked and tendered as P2. There was a large defect in the skull over the left parietal bone. The edges were rough. Adjoining that there was a large defect involving left temporal bone and maxillary bone. These defects were caused by a blunt weapon. Most body parts were putrefied. The cause of death was fracture of skull from blunt weapon. Something heavy was used in fast manner to cause high energy trauma. Back of the axe could be the possible weapon.
54. Under cross examination he stated that according to report the estimated time of death according to witnesses is 7.5.2011 at 10.00 a.m. The autopsy was done on 9.5.2011. The fracture noted could have been caused by a single blow. Answering Court he stated that it will take 48 hours at least for Maggots to be seen flying like this and could be few days to a week in Fiji conditions.
55. The doctor is an independent witness. He is not the doctor who conducted the post mortem examination. Prosecution wants you to draw the inference that the cause of death was fracture in the skull caused by heavy blunt weapon and the weapon could be the back of an axe. It is up to you to decide whether you could draw that inference beyond reasonable doubt from this evidence.
56. DC Hakim Khan was called as the next witness for the prosecution. On instructions received from Sgt. Anoop he had caution interviewed the accused at the crime office Rakiraki police station. Sgt. Anoop was the witnessing officer and JP Mr. Hydar Begg was also present. It was conducted in English language in question and answer format. The accused was given his rights. He had taken notes. He tendered the caution interview marked P3 and read the same to Court. There was no force or assault on the accused. The accused did not make a complaint before or after the interview. The accused did not have any visible injuries. The accused was normal and cooperative. He identified the accused in Court. At the reconstruction Sgt. Anoop and Mr. Begg were present.
57. Under cross examination he admitted that the interview commenced at 11.45 a.m. and concluded at 8.10 p.m. He denied that Cpl. Binesh was present interfering with the answers. He denied that Cpl. Binesh gave the answers for questions 107-135. He stated that there is a recent directive to caution the accused whenever the interview was suspended and recommenced. However that is not practiced before. He admitted that the accused was not sent for medical examination as he did not make a complaint of assault. He had not done a full body check of the accused.

58. The next witness for the prosecution was Mr. Hydar Begg. He is a JP since 2004. Sgt. Anoop had called him to the Rakiraki police station to be an independent witness of an interview. He had gone to crime office of the Rakiraki police station. Hakim was interviewing officer. Anoop was also present as a witness. Hakim was taking notes. Accused was normal. There were no injuries on his face. Accused did not make any complaint. He was giving answers on his own freewill. He was sitting with confidence. He identified the accused in Court. He was present right throughout including the reconstruction.
59. Under cross examination he stated that reason for his presence was explained to the accused. He had not asked whether the accused was assaulted before. The accused was not forced to sign the interview. Whatever in the interview were questions put to him and answered by him.
60. The next witness for the prosecution was Sgt. Anoop Kumar. He is an officer with 24 years experience. He was the investigating officer of this case. On 7.5.2011 he had received information about a body found at Tuvavatu. He had led a team of officers there. There were people gathered in this house. There was a body facing upwards near the kitchen door. The skull was cracked. He had briefed the DCO-West. The brother of the deceased identified the body.
61. On 8.5.2011 DCO-West arrived with a forensic team. Photographs were taken by them. He had received information that the suspect is at Votualevu, Nadi. He informed DCO. On 9.5.2011 DCO had brought the suspects to the station. Both suspects were interviewed at the station. He was the witnessing officer for Avnit Singh, the accused in the dock. DC Hakim was the interviewing officer and Mr. Hydar Begg was called as this was a serious case and to witness the fairness of the interview. DC Hakim was asking questions and accused answered those. DC Hakim took notes. He identified his signature in P3. He was present throughout including the reconstruction. The accused was giving answers voluntarily. The accused was cooperative. The accused did not make any complaint about assault, threat or verbal assault. He identified the photographs as those taken at the scene. He identified the axe, P1 taken by him at the scene. His signature is on it.
62. Under cross examination he denied that answers to questions 97-100, 107-135, 161 & 162 were not given by the accused. He denied that the accused was forced to sign his caution interview. The accused was not sent for medical examination as he did not make a complaint of assault. The accused was explained about Mr. Begg's presence. He denied that Cpl. Binesh came to the interview room during the interview to intimidate the accused. He admitted that Sunita Devi was also caution interviewed and charged. The mobile phone of the deceased was not found from the crime scene. He had investigated the loss of the mobile phone but it could not be located. The van of the deceased was found parked in a house close to the road.
63. The above three witnesses gave evidence on the caution interview of the accused. It is up to you to decide whether the accused made a statement under caution voluntarily to DC

Hakim Khan. If you are sure that the caution interview statement was made freely and not as a result of threats, assault or inducements made to the accused by persons in authority then you could consider the facts in the statement as evidence. Then you will have to further decide whether facts in this caution interview statement are truthful. If you are sure that the facts in the caution interview are truthful then you can use those to consider whether the elements of the charge are proved by this statement.

64. The prosecution case was closed after some photographs of the scene were tendered with agreement of both parties. The booklet of photographs is before you. You have to consider whether these photographs are consistent with the prosecution version or raise any reasonable doubt in the prosecution case and consistent with the defence version.
65. After the prosecution case was closed you heard me explaining the accused his rights in defence.
66. The accused gave evidence. He stated that he had a defecto relationship with Sunita Devi for about a year from 2010. They have lived at his house for 8-9 months. In April 2011 they have gone to Sunita's brother's house at Wairuku. This visit was for one week. The day they were return to Nadi his money was stolen. He had no option but to look for a job. Sunita's brother had told that there is farm in which they can work. On the 2nd day money was lost, he met the owner of the farm Bal Krishana alias Dada.
67. When they met Dada he gave all conditions of work. First three months he will pay in form of wages. After planting vegetables and after everything starts running smoothly they will share the profit 50% each. He agreed to these conditions. They have gone to Dada's farm on 27th April. On the first night they had kava and then liquor. His wife cooked the dinner. They went for work in the farm from the following day. They have stayed there till 3.5.2011. Everything was fine with him and Dada. They left as Mother's day was on Sunday and they wanted to get old clothes for work in the farm.
68. On 3rd they woke up, had breakfast, collected everything and went. Dada had gone to the hillside to grazing the horse. They had breakfast after 7.00 a.m. On the way they have met an i-Taukei man. He had asked 'where is Dada?' He had told he is not at home and gone to buy spare parts. They went to town in Red Pajero. They went to his parent's place at Nadi. Dada was aware that they were leaving that morning. Two i-Taukei police officers came on 8th May 2011 saying Sunita's father had lodged a complaint against him that he had done something wrong and he was asked to come to the station. He was taken to Namaka crime room.
69. He was asked to sit on a chair. He was told that 'where he was living, he killed that man.' He said that cannot happen. Next day he had to return to same place. They said 'You are lying. You killed the man.' Then they started beating him. First they slapped him. There were 4-6 i-Taukei officers. Then he was hit on the shoulder. He was beaten with a belt on the stomach while being seated. His hands and legs were tied. A jacket was put around his

head and knife was put at his neck. This was from 4.00 p.m. to 6.00 p.m. Then he was taken to Lautoka in a van. On the way van was stopped at Sabeto. The officer who was sitting next to him poked his finger into his stomach.

70. At Lautoka, Sunita told him that police officers told him to say that he killed the man. If not they will beat him again. When he went to bure he told two officers there he killed the man. Then he was put into the cell. An Indian officer came and took all his clothes. He was hungry, without clothes and anything to sleep on that night. Following morning he was given clothes and breakfast. Then he was taken to Rakiraki police station.
71. He was caution interviewed there. Hakim, Anoop and Mr. Begg were there. He was only told that Mr. Begg will be with them. Not all the answers in the caution interview were given by him. Some answers were given by police officer Binesh as what Sunita told Binesh. He was not shown an axe during the interview. The answer to question how many times you strike Dada was given by Binesh. He did not do this. As far as he knows he was being trapped.
72. Under cross examination he stated that Dada gave money to him on 2nd night as his wage and fare. On 3rd they had breakfast collected the dishes and left those at a side and went. They were in a rush as they have to reach Nadi before dark. That is why they left the dishes. He was represented by a lawyer on 10.5.2011 when he was taken to Court. He had not told him that he was assaulted by police and he has injuries. Before he went to Court he knew some answers in caution interview were not true. He had not told that also to the lawyer. He and Sunita had taken all their clothes when they left on 3rd. They were going to come back. Those were new clothes and they wanted to put those at home and bring old clothes. He had not told police that when they left Dada went to grazing the horse. He denied having breakfast with Dada that morning and striking his head with an axe. There was no reason for Sunita to say something against him.
73. In re-examination he said that he did not tell his lawyer about injuries as he was not aware to whom to complain about police assault. It was Sunita's duty to wash the dishes.
74. You watched the accused giving evidence in court. What was his demeanor like? How he react to being cross examined and re-examined? Was he evasive? How he conduct himself generally in Court? The position taken up by the accused in giving evidence in the court is different from his caution interview statement and the position taken up by him at the time of cross examination of prosecution witnesses. In other wards his version is inconsistent.
75. The accused's took a defence of alibi. He says that he was not at the scene of crime when it was committed. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary, the prosecution must disprove the alibi. Even if you conclude that alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a defence.

76. Present Criminal Procedure Decree in Section 125 provides that:

‘On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

A notice under this Section shall be given-

- (a) Within 21 days of an order being made for transfer of the matter to the High Court (if such order is made); or
- (b) In writing to the prosecution, complainant and the court at least 21 days before the date set for trial of the matter, in any other case.

77. No notice was given of alibi in this case.

78. I must remind you that when an accused person has given evidence he assumes no onus of proof. That remains on the prosecution throughout. His evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

79. You will generally find that an accused gives an innocent explanation and one of the three situations then arises:

- (i) You may believe him and, if you believe him, then your opinion must be Not Guilty. He did not commit the offence.
- (ii) Alternatively without necessarily believing him you may say ‘well that might be true’. If that is so, it means there is reasonable doubt in your minds and so again your opinion must be Not Guilty.
- (iii) 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 then would 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 beyond reasonable doubt that he committed the offence then the proper opinion would be Guilty.

80. The father of the accused gave evidence for defence. He stated that on 8th May 3-4 police officers came as Sunita’s father had made a complaint. Accused was taken to Namaka police station. He had followed with his wife and Sunita. Accused was in crime office. They were there till 6.30 p.m. They were told that he will be taken to Lautoka. He was not able to speak to his son while in police custody.

81. Under cross examination he said that he loves his son and he will do anything he can to save the son. Only reason for him to be in Court is to save his son.

82. You have to decide whether this evidence is confirming the evidence of the accused and creating a reasonable doubt in the prosecution case.

83. I have summarized all the evidence before you. But, still I might have missed some. That is not because they are unimportant. You heard every item of evidence and you should be reminded yourselves of all that evidence and form your opinions on facts. What I did was only to draw your attention to the salient items of evidence and help you in reminding yourselves of the evidence.

84. Remember, the burden to prove accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial, and never shifts to the accused, at any stage of the trial. The accused is not required to prove his innocence, or prove anything at all. In fact, he is presumed innocent until proven guilty beyond reasonable doubt.

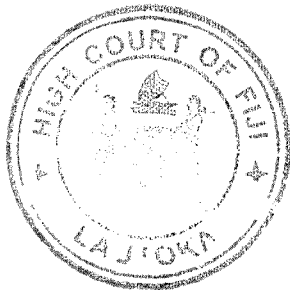
85. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of accused's guilt you must find him guilty for the charge. If you do not accept the prosecution's version of events, and you are not satisfied beyond reasonable doubt so that you are not sure of accused's guilt, you must find him not guilty as charged.

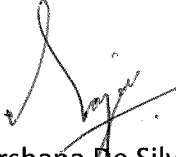
86. Your possible opinions are as follows:

The charge of Murder Accused	–	Guilty or Not Guilty
If not guilty		
For Manslaughter Accused	-	Guilty or Not Guilty

87. You may now retire to deliberate on the case, and once you have reached your decisions, you may inform our clerks, so that we could reconvene, to receive the same.

88. Any re-directions?




Sudharshana De Silva
JUDGE

At Lautoka
15th September 2014

Solicitors : Office of the Director of Public Prosecution for State
Office of the Legal Aid Commission for Accused