

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

LAUTOKA CRIMINAL CASE NO. HAC 146 OF 2011L

STATE

vs

TARUN KUMAR RAWAT

Counsels : Mr. Y. Prasad, Mr. S. Nath and Mr. A. Dutt for State
Mr. A. Singh for Accused
Hearings : 14 to 18 November, 2016
Summing Up : 21 November, 2016

SUMMING UP

A. ROLE OF JUDGE AND ASSESSORS

1. Madam and Gentlemen Assessors, it is my duty to sum up to you. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of fact however, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. So if I express my opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of fact.
2. State and Defence Counsels have made submissions to you, about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsels, in this case. Their submissions were designed to assist you, as the judges of fact. However, you are not bound by what they said. It is you who are the representatives of the community at this

trial, and it is you who must decide what happened in this case, and which version of the evidence is reliable.

3. You will not be asked to give reasons for your opinions, but merely your opinions themselves and they need not be unanimous. Your opinions are not binding on me, but I will give them the greatest weight, when I deliver my judgment.

B. THE BURDEN AND STANDARD OF PROOF

4. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he is proved guilty.
5. The standard of proof in a criminal trial, is one of proof beyond reasonable doubt. This means that you must be satisfied, so that you are sure of the accused's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt so that you are not sure about his guilt, then you must express an opinion, that he is not guilty.
6. Your decision must be based exclusively upon the evidence which you have heard in this court, and upon nothing else. You must disregard anything you might have heard about this case outside of this courtroom. You must decide the facts without prejudice or sympathy, to either the accused or the victim. Your duty is to find the facts based on the evidence, and to apply the law to those facts, without fear, favour or ill will.

C. THE INFORMATION

7. You have a copy of the information with you, and I will now read the same to you:
"... [read from the information]..."

D. THE MAIN ISSUE

8. In this case, as assessors and judges of fact, each of you will have to answer the following question:
 - (i) Did the accused, on 21 July 2011, at Nadi in the Western Division, murder Tevita Tabua?

E. THE OFFENCE AND ITS ELEMENTS

9. The accused was charged with "murder", contrary to section 237 of the Crimes Decree 2009. It was alleged that on 21 July 2011, at Nadi in the Western Division, he murdered Tevita Tabua. For the accused to be found guilty of "murder", the prosecution must prove beyond reasonable doubt, the following elements:
- (i) that the accused did a willful act; and
 - (ii) that willful act caused the death of the deceased; and
 - (iii) at the time of the willful act, the accused either;
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.
10. On the first element of murder, a "willful act" is a voluntary act by the accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder. For example, A wants to shoot B with a gun. A picks up a gun, and shoots B in the heart, A did a "willful act". Likewise, if A assaults B. When A assaults B, A did a "willful act" to B.
11. On the second element of murder, "the willful act must cause the death of the deceased". This simply meant that the accused's willful act, substantially contributed to the death of the deceased. The accused's willful act must be a substantial contributor to the death of the deceased. In other words, the accused's willful act was a substantial cause of the deceased's death. Continuing from the above examples when A shot B in the heart, with a gun, B later died as a result of the injuries to his heart. A's shooting B in the heart (willful act) was a substantial cause of B's death. Likewise, when A assaults B, it caused serious injuries to his body, leading to B's death. A's assaulting B, set in motion a chain of events that led to B's death, and as such, was a substantial cause to B's death.
12. The third element of murder concerned its fault element. There are two fault elements for murder, as described in paragraphs 9(iii) (a) and 9(iii) (b). In this case, the prosecution is running its case on the fault element in paragraph 9 (iii) (a), that is, the accused intended to cause the deceased's death. We will therefore concentrate on this fault element, rather than the other. The prosecution must make you sure that when the accused did "the willful act", he "intended to cause the death of the deceased". You cannot cut open the accused's head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But

you can examine his conduct at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted her. If you find that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.

13. If you are sure that all the elements of murder, as expressed above, are satisfied by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged. If you find that some of the elements of murder, as described above, are not satisfied beyond a reasonable doubt by the prosecution, then you must find the accused not guilty as charged.
14. At this stage, we must consider the lesser offence of "manslaughter". This was because the accused had called in aid the defence of "provocation" and had also argued that the accused at the material time, did not intend to kill, but only to seriously harm the deceased. In law, a person may be found guilty of a lesser offence, although he was not formally charged with the same. Whatever decision you reach on the murder charge, you will have to consider the lesser offence of manslaughter.
15. If you find the accused guilty of murdering the deceased, you will have to look at and consider the lesser offence of manslaughter, because the defence had argued in their closing submission, that the accused is not guilty of murder, but guilty of manslaughter, by reason of provocation. Section 242 (1) and (2) of the Crimes Decree 2009 reads as follows:

"...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...and before there is time for the passion to cool, he is guilty of manslaughter only. Provocation means any wrongful act or insult of such a nature as to be likely when done to any ordinary person, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered..."

So, if you find on the evidence that the accused was provoked into killing the deceased, in the sense given above, and you are sure of it, then you will have to find the accused guilty of manslaughter only.

16. If you find the accused not guilty of murder, you will still have to look at and consider the lesser offence of manslaughter, because the defence had also argued in their closing submission, that the accused was not guilty of murder, but guilty of manslaughter, on the ground that, at the material time, he did not intend to kill, but only intend to cause serious harm to the deceased. For the accused to be found guilty of "manslaughter", the prosecution must prove beyond reasonable doubt, the following elements:

- (i) that the accused did a willful act; and
- (ii) that willful act caused the death of the deceased; and
- (iii) at the time of the willful act, the accused either;
 - (a) Intends the willful act to cause the deceased serious harm; or
 - (b) Is reckless as to causing serious harm to the deceased.

17. Note that the first two elements of manslaughter are similar to the first two elements of murder. The only difference between the two offences are their fault elements. In murder, the accused must intend to cause the deceased's death, or was reckless in causing the same. In manslaughter, the accused must intend to cause serious harm, not death to the deceased. Continuing from the examples we discussed above, when A shoots B with the gun, he intended to cause B serious harm, not death. Alternatively, A was not reckless as to causing his death, but only serious harm. Likewise, when A allegedly assaulted B on the body, he did not intend to kill him, but only to cause him serious harm. Alternatively, A was not reckless in causing B's death, but only to cause B serious harm. If you find that the evidence satisfy the above elements of manslaughter, and you are sure of the same, then you are entitled to find the accused guilty of the alternative lesser offence of manslaughter.

18. Finally, if you find the accused guilty of either the murder or manslaughter of the deceased, you will have to consider the defence of self-defence, as it was raised by the accused in his closing submission. The defence appeared to be saying that the accused was not guilty of the murder or the manslaughter of the deceased, at the material time, because he was defending himself. Section 42 (1) and (2) of the Crimes Decree 2009 reads as follows:

"...A person is not criminally responsible for an offence if he carries out the conduct constituting the offence in self-defence. A person carries out conduct in self-defence if and only if he believes the conduct is necessary: (a) to defend himself or another person..."

If you find on the facts that the accused was acting in self-defence, when he assaulted the deceased, and you are sure of the same, he is not guilty of murder or manslaughter. If it's otherwise, then he is guilty of either murder, or alternatively, manslaughter.

F. THE PROSECUTION'S CASE

19. The prosecution's case were as follows. On 21 July 2011, the accused (DW1) was 23 years 9 months old. He resided with his parents at Nadi and reached Foundation level education at the University of the South Pacific. He was at the time, a self-employed boat captain. The deceased was 51 years old and was the House Keeping Manager at a hotel in Denarau Island and he resided at Nawaka Nadi. The two, according to the prosecution, had a homosexual relationship that appeared to have started in September 2010. According to the prosecution, the two had oral sex on numerous occasions and the deceased often gave the accused \$30 to \$50 every now and then.

20. On or about May to June 2011, the accused found a girlfriend and started going out with her. The accused did not tell the deceased about this relationship. On 21 July 2011, after 6 pm, the accused met the deceased at Nadi HM Supermarket. According to the prosecution, the two planned to meet again at the Maqalevu Road Junction near the Nads Handicraft compound. At about 7.15 pm on the same night, the two met at the Nads Handicraft compound. According to the prosecution, the deceased then performed oral sex on the accused for a while. According to the prosecution, from the lights that lit up the area, the deceased saw multiple "love bites" on the accused's neck. A commotion then started.

21. The deceased then questioned the accused about the "love bites". It appeared that he wanted to know who gave the "love bites" to the accused. According to the prosecution, the accused told the deceased "the love bites" were from his girlfriend. The two then swore at each other. According to the prosecution, the accused threw several punches at the deceased's head and face. The deceased also punched back at the accused. After a while, the accused threw a stone at the deceased's head when he fled and he fell down unconscious. According to the prosecution, the accused tried to revive him, but to no avail. On 25 July 2011, a post-mortem examination was done on the deceased. It appeared from the post-mortem report that the deceased died from excessive bleeding from his scalp and rib injuries.

22. It was the State's case that the accused's punches and assaults on the deceased with a stone on 21 July 2011 caused him serious head and rib injuries that led to his death, and at the time of the assaults, the accused intended to cause the deceased's death. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accused guilty as charged. That was the case for the prosecution.

G. THE ACCUSED'S CASE

23. On 15 November 2016, the first day of the trial proper, the information was put to the accused, in the presence of his counsel. He pleaded not guilty to the charge. In other words, he denied the murder allegation against him. When a prima facie case was found against him, at the end of the prosecution's case, wherein he was called upon to make his defence, he choose to give sworn evidence and called no witness. That was his right.
24. The accused's case was simple. In their opening submission, the defence said, they are not disputing the first and second element of murder. In paragraphs 9(i) and 9(ii) hereof, we discussed the first and second element of murder. In paragraphs 10 and 11 hereof, we further discussed the first and second element of murder. The thrust of the defence case was that the accused, at the material time, did not intend to kill the deceased, and thus was not guilty of murder. They appear to say that the accused was provoked into assaulting the deceased because he provoked him by repeatedly swearing at him, accused him of cheating on him when he saw the love bites on him, and repeatedly punching him. Therefore, they said, he was not guilty of murder, but of manslaughter.
25. The defence also appeared to be saying as an alternative, that the accused merely intended to cause the deceased serious harm when he assaulted him, not death, and thus was only liable for manslaughter, not murder. Furthermore, the accused argued that he was acting in self-defence when he assaulted the deceased, because the deceased started the commotion by punching him. Because of the above, the defence is asking you, as assessors and judges of fact, to find the accused not guilty as charged. That was the case for the defence.

H. ANALYSIS OF THE EVIDENCE

(a) Introduction:

26. In analysing the evidence, please bear in mind the directions I gave you in paragraphs 4, 5 and 6 hereof on the burden and standard of proof. In the acceptance and/or rejection of the

evidence presented at the trial and your role as assessors, please bear in mind the directions I gave you in paragraphs 1, 2 and 3 hereof. In analyzing the evidence, we will first discuss the "Agreed Facts" and its significance. Then we will discuss the State's case against the Accused with reference to the three elements of murder as described in paragraphs 9(i), 9(ii) and 9(iii)(a) hereof. Then we will discuss the defence's case, and the need to look at all the evidence.

(b) The Agreed Facts:

27. The "Agreed Facts" submitted by the parties, in this proceeding, consisted of two types:
- (i) The "Agreed Facts", dated 27 October 2016, which contained 4 paragraphs of Agreed Facts;
 - (ii) The "Booklet of Photos", submitted by consent of the parties at the start of the trial proper, that is, photo no. 1, 2, 4, 10 and 12.

The "Booklet of Photos" gives you an idea of what the alleged crime scene looks like. On this note, you may also take on board Defence Exhibit No. 2, which is photo no. 20, showing the container, at the alleged crime scene. This photo was taken by the police, and it was not seriously contested by the prosecution. Please, consider the above matters carefully, and you may take it as established facts, and that the prosecution had proven them beyond a reasonable doubt, because the parties were not disputing them. It is a matter entirely for you.

(c) The State's Case Against the Accused:

28. The State produced no eye witness to show the accused assaulting the deceased to death on 21 July 2011, with an intention to kill. This was obviously a difficulty for the prosecution. To overcome this difficulty, the State relied on the accused's alleged confessions in his police caution interview and charge statements. We will analyse these evidence, and consider the proper way to approach the same later. The caution interview statements were tendered as Prosecution Exhibit No. 2 and the charge statements were tendered as Prosecution Exhibit No. 4. Please, carefully read and understand the above exhibits.
29. In addition to the above, the State submitted Tevita Tabua's post-mortem report as Prosecution Exhibit No. 3. In their closing submission, the defence submitted to you to disregard the report as hearsay evidence. This is not correct. You are entitled to consider the report as admissible evidence by virtue of section 133 (1) of the Criminal Procedure Decree 2009, and consider Doctor James Kalounivaki's (PW6) comment on the same by virtue of section 133(5) of the

above Decree. The significance of the report lies in the extent of the injuries allegedly suffered by the deceased. You will note from the accused's caution interview and charge statements that, at the material time, when the accused and the deceased allegedly fought each other, only two persons were present at the crime scene, the accused and the deceased. The accused had spoken about the event through his interview and charge statements. Tevita Tabua cannot speak about the same because he is dead. However, Tevita Tabua speaks to us through his alleged injuries, as contained in his post-mortem report. Because of this, the State is also relying on circumstantial evidence, in support of its case. We will discuss this later.

30. In their opening submission, the defence said, they were not disputing the first and second element of murder as described in paragraph 9(i) and 9(ii) hereof. They said, their main defence in this case, was that the accused did not intent to kill the deceased when he assaulted him at the material time. The prosecution, in proving element no. 1 of murder said, the accused repeatedly punched and attacked the deceased with a stone [Please, refer to questions and answers 74 to 78 and 169 of Prosecution Exhibit No. 2]. In his sworn evidence, the accused admitted he punched the deceased several times and attacked him with a stone. Although the accused said different reasons for the above assaults, he was consistent in saying that he repeatedly punched and attacked Tevita Tabua with a stone, at the material time. On the nature of the accused's alleged assaults on the deceased, at the material time, the parties' positions were consistent with each other.

31. As to the second element of murder, that is, the accused's alleged assaults on the deceased caused his death, the parties also appeared not to seriously dispute this issue. In paragraph 3 of the "Agreed Facts", the parties agreed that "a post mortem was conducted on the deceased on the 25th July 2011 by Doctor Ramasswamy Ponnu Swamy Goundar". The deceased's post mortem report was submitted in evidence as Prosecution Exhibit No. 3. Please, carefully read and understand this report, because of its importance. As we have said before Tevita Tabua cannot speak to you to explain his side of the story because he is dead. He can only talk to you through his injuries as contained in his post mortem report. You had heard Doctor James Kalounivaki (PW6) explained to you the deceased's external and internal injuries. On external examinations, he explained to you the four marks of violence on the deceased's bodies. The fourth injury was the most serious. It was deep laceration to the left top side of the head. He described the internal injuries to the scalp in the report.

32. In his evidence, PW6 said, "...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 laceration 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 severely affected. Looking at all the injuries, a person can die, if the same are not attended to..." In accessing the parties' position on PW6's evidence, they do not seem to seriously contest his evidence and his conclusions.

33. The main issue in this case was whether or not the accused intended to cause the deceased's death when he repeatedly punched him and attacked him with a stone? In question and answer 236 of Prosecution Exhibit No. 2, the accused said, he did not intend to kill the deceased when he repeatedly punched him and attacked him with a stone. In his sworn evidence, he said he did not intend to kill the deceased at the time. If anything, he only intended to cause him serious harm. What is important is that you will have to consider the accused's intention at the time of the incident. The only way you can decide on the point is examining what he said when he was caution interviewed by police and when formally charged by police. Please, refer to questions and answers 22 to 32, 68 to 78, 80 to 88, 90 to 101, 105 to 107, 115 to 127, 129 to 144, 168 to 184, 186 to 187, 196 to 200, 202 to 213, 236 and 240 of Prosecution Exhibit No. 2. Please, see question and answer 11 of Prosecution Exhibit No. 4. You will also have to consider the nature of the injuries that the deceased suffered, as itemized in his post-mortem report. You have heard the evidence of Doctor James Kalounivaki (PW6), and the same are still fresh in your minds. The State's case on intention to cause death was founded basically on a combination of alleged confessions and circumstantial evidence.

34. On his alleged confessions in his caution interview and charge statements as stated in paragraph 33 above, I must direct you as follows. A confession, if accepted by the trier of fact

– in this case, you as assessors and judges of fact – is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the accused did in fact make the statements contained in his police caution statements? If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? In answering the above questions, the prosecution must make you sure that the confessions were made and they were true. You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find he gave his statements voluntarily and the police did not assault, threaten or made false promises to him, while in their custody, then you might give more weight and value to those statements. If it's otherwise, you may give it less weight and value. It is a matter entirely for you.

35. As previously discussed, the defence is not disputing element no. 1 and 2 of murder as described in paragraph 9(i) and 9(ii) hereof. So, you will have to accept the accused's alleged confessions in his caution interview and charge statements on those elements, that is, the accused assaulted the deceased with punches and a stone, which caused serious injuries as shown in the post-mortem report, leading to this death. However, in terms of intention to cause death, you will have to consider my directions on paragraph 9(iii)(a) and 12 hereof. As I have said before, you cannot cut open a person's head, to find out what his intentions were, at the time he allegedly assaulted the deceased to death. But you can examine his conduct, at the time, that is, what he said and did, and the surrounding circumstances, to infer whether or not he intended to kill the deceased, when he allegedly assaulted him. If you find that he intended to kill the deceased, at the material time, that would be sufficient to support the third element of murder, that is, an intention to kill.
36. Finally, the effect of the deceased's post-mortem report, and the power of circumstantial evidence. You have heard the accused's version of events as contained in his caution interview and charge statements. You have heard his version of events while giving evidence. He does not deny having a fight with the deceased at the material time, where he repeatedly punched him and attacked him with a stone. The result of those punches and stone attack were contained in the deceased's post mortem report, Prosecution Exhibit No. 3. The mark of violence on the deceased was itemized in his external and internal examination. Severe bruise and lacerations were found on his head and body, including severe fractures to the lower

sternum (bone holding the ribs in front) and the 7th, 8th and 9th ribs. Doctor Kalounivaki said the deceased died from severe loss of blood from his scalp injuries and difficulty breathing as a result of the rib injuries.

37. The prosecution, given the above evidence, was relying on circumstantial evidence, to connect the accused to the murder. That simply means that the prosecution is relying upon evidence of various circumstances relating to the crime and the defendant which they say when taken together will lead to the sure conclusion that it was the defendant who committed the crime. It is not necessary for the evidence to provide an answer to all the questions raised in a case. You may think it would be an unusual case indeed in which a jury can say "We now know everything there is to know about this case". But the evidence must lead you to the sure conclusion that the charge which the defendant faces is proved against him.
- Circumstantial evidence can be powerful evidence, but it is important that you examine it with care, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt. Furthermore, before convicting on circumstantial evidence you should consider whether it reveals any other circumstances which are or may be of sufficient reliability and strength to weaken or destroy the prosecution case.
- Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them, and neither the prosecution, the defence nor you should do that.

38. Because of the above evidence, the State is inviting you to find the accused guilty as charged. It is a matter entirely for you.

(d) The Defence's Case:

39. In his sworn evidence, the accused admitted he had a fight with the deceased, at the material time, because he had an argument with him. The deceased was in a homosexual relationship with the accused since September 2010. They had previously had numerous sexual encounters. According to the accused, the argument started when the deceased noticed "love bites" on his neck. The "love bites" were from his girlfriend of 2 months. Swears were exchanged. The accused said, the deceased punched him around. He threw his mobile phone at him. Punches were exchanged. The accused said the deceased fled, and he threw a stone at his head. He heard the deceased fall to the ground. In his evidence, the accused said, he

had no intention to kill the deceased. If you accept his evidence, then you will have to find him not guilty of murder. If otherwise, you will have to still consider the prosecution's case to decide whether or not he was guilty as charged.

40. If you are sure that the accused unlawfully killed the deceased, intending to kill him, the accused is guilty of murder unless you conclude that this was or may have been a case of provocation. Provocation is not a complete defence, leading to a verdict of "not guilty". It is a partial defence, reducing what would otherwise be murder to the lesser offence of manslaughter. Because the prosecution must prove the accused's guilt, it is for the prosecution to make you sure that this was not a case of provocation, and not for the accused to establish that it was - Provocation has a special legal meaning, you must consider it in the following way. Firstly, you must ask yourself whether the accused was provoked in the legal sense at all. A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been said or done by the deceased, rather than just by his own bad temper.
41. Here the accused and the deceased were in a homosexual relationship since September 2010. They had previously had numerous sexual encounters. The deceased helps the accused financially by giving him \$30 to \$50 every now and then. They agree to have sex at the material time. The deceased, according to the accused wanted sex with him. He refused. He saw "love bites" on the accused. They argued. It became violent. Swear words were exchanged. They punched each other. The deceased fled. The accused threw a stone at him, struck his head and fell on the ground unconscious. If you are sure that the accused was not provoked in that sense, the defence of provocation does not arise, and the accused is guilty of murder.
42. But if you conclude that the accused was or might have been provoked, in the sense which I had explained, you must then go on to weigh up how serious the provocation was for this accused. Is there anything about this accused which may have made what was said or done affect him more than it might have affected other people? Finally, having regard to the actual provocation and to your view of how serious that provocation was for this accused, you must ask yourselves whether a person having the power of self-control to be expected of an ordinary, sober person of the accused's age and sex, would have been provoked to lose his self-control and do as this accused did. If you are sure that such person would not have done

so, the prosecution will have disproved provocation, and the accused is guilty of murder. If, however, you conclude that such a person would or might have reacted and done as the accused did, your verdict would be "not guilty of murder but guilty of manslaughter". It is a matter entirely for you.

43. In his evidence, the accused said he did not intend to kill the deceased when he was exchanging punches with him and when he threw the stone at him. It would appear that he was saying that he did not intend to kill the deceased, at the material time, but only intended to cause him serious harm, when he exchanged punches with him and threw a stone at him. If you accept the accused's position on this issue, then you will have to find him not guilty of murder, but guilty of the deceased's manslaughter. It is a matter entirely for you.

44. Lastly, even if you find the accused guilty of either murder or manslaughter, the accused argued that while assaulting the deceased with his fists and a stone, he was merely doing so in self-defence. If you think that the accused was or may have been acting in lawful self-defence, he is entitled to be found 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, not for the accused to establish that he was; and you must consider the matter of self-defence in the light of the situation which the accused honestly believed he faced. You must first ask whether the accused honestly believe that it was necessary to use force to defend himself at all. This would not be the case if the accused was the aggressor, acted in revenge, knew that he did not need to resort to violence.

If you are sure that he 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? You must then decide whether the type and amount of force the accused used was reasonable. 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.

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 reasonable, he is entitled to be acquitted.

(e) Looking at And Considering All the Evidence:

45. In this case, eight witnesses gave evidence for the prosecution, that is, Laitia Rayasi (PW1), Detective Corporal 3821 Silio Finau (PW2), Suresh Chand (PW3), Doctor Anareta Mudunasoko (PW4), Detective Corporal 2019 Anil Kumar (PW5), Doctor James Kalounivaki (PW6), Amol Prasad (PW7) and Detective Corporal 2505 Wayne Tanu (PW8). The accused (DW1) was the sole defence witness. Four exhibits were tendered by the prosecution, that is, the accused's medical report, dated 26 July 2011 (Prosecution Exhibit No. 1); the Accused's Police Caution Interview Statements (Prosecution Exhibit No. 2); Tevita Tabua's Post-Mortem Report, dated 25 July 2011 (Prosecution Exhibit No. 3) and the Accused's police charge statement, dated 26 July 2011 (Prosecution Exhibit No. 4). Then, there were the "Agreed Facts", dated 27 October 2016, and the Booklet of Photos.
46. You must carefully consider all the evidence together. You must analyze and compare them together. You have heard all the witnesses' evidence in the courtroom. You had observed their demeanour in the courtroom. Who do you think was the credible witness? Who do you think was forthright as a witness? Who was evasive as a witness? Who do you think, from your point of view, was telling the truth? If you accept the prosecution's witnesses' evidence as credible, and you accept their version of events, then you must find the accused guilty as charged. If it's otherwise, then you must find the accused not guilty as charged. It is a matter entirely for you.

I. SUMMARY

47. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it 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. If you accept the prosecution's version of events, and you are satisfied beyond reasonable doubt so that you are sure of the accused's guilt, you must find him guilty as charged. 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 the accused's guilt, you must find him not guilty as charged.

48. Your possible opinions are as follows:

- (i) Murder : Guilty or Not Guilty
- (ii) If not guilty of murder,
Alternative of Manslaughter : Guilty or Not Guilty

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



Salesi Temo
JUDGE

Solicitor for State : **Office of the Director of Public Prosecution, Lautoka**
Solicitor for Accused : **A. J. Singh Lawyers, Nadi**