

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 097 OF 2014S

**STATE**

**vs**

- 1. SAMUELA KACI**
- 2. APENISA TUBAKILAKEBA**

**Counsels** : Mr. M. Vosawale and Ms. S. Lodhia for State  
Ms. T. Leweni for Accused No. 1  
Mr. P. Tawake for Accused No. 2

**Hearing** : 5 to 8 April, 11 and 12 April, 2016

**Summing Up** : 14 April, 2016

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**SUMMING UP**

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**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 accuseds. There is no obligation on the accuseds to prove their 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 accuseds' guilt, before you can express an opinion that they are guilty. If you have any reasonable doubt about their guilt, so that you are not sure of their guilt, then you must express an opinion, that they are 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 accuseds 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. We will now discuss the information. 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 Accused No. 1 and Accused No. 2, on 23 February 2014, at Suva in the Central Division, murder Veresa Tubuanakoro?



## **E. THE OFFENCE AND ITS ELEMENTS**

9. The accuseds were charged with murdering Veresa Tubuanakoro, on 23 February 2014, at Suva in the Central Division, contrary to section 237 of the Crimes Decree 2009. For an accused to be found guilty of murder, the prosecution must prove beyond reasonable doubt, the following elements:
- (i) the accused did a wilful act; and
  - (ii) that wilful act caused the death of the deceased; and
  - (iii) at the time of the wilful 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 "wilful 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, and as such, A did "a wilful act". Likewise, if A punches B in the face, A did a "wilful act" on B's face, or if A kicks B in the head, A did a "wilful act" on B's head.
11. On the second element of murder, "the wilful act must cause the death of the deceased". This simply meant that the accused's wilful act, substantially contributed to the death of the deceased. The accused's wilful act must be a substantial contributor to the death of the deceased. In other words, the accused's wilful 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 (wilful act) was a substantial cause of B's death. Likewise, when A punched B in the face, whereupon B fell and hit his head on a concrete pavement, and then A kicks B's head, causing serious injuries to his head and brain, which later resulted in his death. A punching B in the face and kicking B's head (wilful act) set in motion a chain of events that led to B's death (A's wilful act causes B's death), and as such, was a substantial cause or contributor to B's death.
12. The third element of murder concerned its fault element. There are two fault elements of murder, as described in paragraphs 9(iii) (a) and 9(iii)(b). In this case, the prosecution is not relying on the fault element described in paragraph 9(iii)(a). Therefore, you will have to



disregard this fault element, for the purpose of this case. The prosecution is running its case on the fault element described in paragraph 9(iii)(b).

13. The prosecution will have to make you sure that at the time the accused did the wilful act, he was reckless as to causing the deceased's death. The question becomes: Were the accuseds reckless as to causing the deceased's death, when they punched and kicked him in the head, at the material time? In law, a person is reckless with respect to a result if:

- (i) he is aware of a substantiable risk that the result will occur, and
- (ii) having regard to the circumstances known to him, it is unjustifiable to take the risk.

The question whether taking a risk is unjustifiable is one of fact. The following questions had to be examined and answered: Was the accused aware of a substantial risk that the deceased would die if he punched and kicked him in the head? And having regard to the circumstances known to him, was it justifiable to take the risk by punching and kicking him on the head, at the material time? If you think he was not justified in taking the risk, then he was reckless as to causing the death of the deceased. If you think he was not reckless, then he is not guilty of murder.

14. If you are sure that all the elements of murder, as expressed in paragraph 9(i), 9(ii) and 9(iii)(b) hereof, are satisfied; then you must find the accused guilty as charged. If you find that the accused is not guilty of murder, then you are entitled to look at the lesser offence of "manslaughter", although he was not formally charged with the same. Manslaughter consisted of three elements:

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

The first and second elements of manslaughter are similar to the first and second element of murder. The difference is the fault element. For manslaughter, the accused must have intended serious harm, not death, alternatively, he was reckless as to causing serious harm, not death, to the deceased.

15. You will notice in the particulars of offence in the information that the prosecution began with the phrase, "...SAMUELA KACI and APENISA TUBAKILAKEBA..." The prosecution is alleging



that the accuseds committed the above offence as a group. In other words, to make them jointly liable for the above offence, the prosecution appears to be relying on and running its case, on the concept of "joint enterprise".

16. "Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence" (Section 46, Crimes Decree 2009). In the Oxford Advanced Learners Dictionary, Oxford University Press, 6th ed 2002, the word "probable" means "likely to happen, to exist or to be true", and "consequence" means "a result of something that has happened". In this case, there were two accuseds. Each participant must be shown to have in contemplation the probability of infliction of serious harm on the deceased in the execution of the planned unlawful purpose. You must examine the whole evidence, and consider each accused's case separately.
17. In considering each accused, you will have to ask yourself the following questions: Did each of them form a common intention to assault the deceased, while in the company of each other? If so, was his murder a probable consequence of the assault? Did each accused know that the violence they contemplated inflicting on the deceased would lead to serious bodily harm? If you think the particular accused contemplated murder, given the surrounding circumstances, then you must find him guilty as charged. If you think the particular accused contemplated manslaughter, given the surrounding circumstances, then you must find him not guilty of murder, but guilty of manslaughter. If neither of the above, then you must find him not guilty of murder or manslaughter.
18. Furthermore, in this case, there are two accuseds on trial. Each of the accused is entitled to be tried solely on the evidence that is admissible against him. This means that you must consider the position of each accused separately, and come to a separate considered decision on each of them. Just because they are jointly charged, does not mean that they must all be guilty or not guilty. Most evidence in this case are admissible against both accuseds. However, regarding Accused No. 1's police caution interview statements, which may contained his alleged confessions, the statements therein are only admissible against the maker of the



statement and on no other. In other words, in Accused No. 1's police caution interview statement, you must totally disregard what the accused said about his co-accuseds on the commission of the offences. You can only take into account what he said about himself, regarding his role in the commission of the crime.

**F. THE PROSECUTION'S CASE**

19. The prosecution's case were as follows. On 23 February 2014, Accused No. 1 was 20 years old, while Accused No. 2 was 24 years old. The deceased was approximately 45 years old. On 22 February 2014 (Saturday), Accused No. 1 and 2 were at a Tovata Rugby Union fundraising activity. Liquor was consumed at the fundraising. Thereafter, both accuseds went to Hanson liquor shop, bought some liquor and drank the same. They later went to Accused No. 2's house, had dinner, changed and went to Islanders Nightclub in a taxi.
20. At the Islanders Nightclub, the two accuseds continued drinking liquor. Approximately between 2 am and 3 am on 23 February 2014 (Sunday), Accused No. 1 was accused of stealing someone's camera. A bouncer (PW2) came to see Accused No. 1 to take him out of the Nightclub, and investigate the matter. The deceased followed PW2 and Accused No. 1 down the stairs and started pulling Accused No. 1's T-Shirt. It appeared the deceased was accusing Accused No. 1 of stealing the camera.
21. Outside the nightclub at its front door, the deceased punched Accused No. 1 on the face with a right hand. Accused No. 1 fell backwards on the concrete path, but used his hand to cushion his fall. He was bleeding in the eye and nose. The deceased stood over Accused No. 1 and questioned him on the whereabouts of the camera. According to the prosecution, Accused No. 2 approached the deceased from the back and punched the deceased head at the back with a right hand. The deceased fell forward on the concrete floor, and then immediately stood up, in a fighting stance.
22. The deceased faced Accused No. 2 and the two started exchanging punches. They went onto the road and onto the footpath in front of Singh's Curry House restaurant. Both were continuously exchanging punches with each other. According to the prosecution, Accused No. 1 then joined Accused No. 2 in punching the deceased. According to the prosecution, it was the two accuseds against the deceased. The deceased could not take the two accused's punches, and fled to the Tattslotto shop at the corner.



23. According to the prosecution, both accuseds pursued the deceased by grabbing his pants. They continued to punch him on the head and face. A strong punch landed on the deceased's mouth. He fell backwards and hit his head on the concrete pavement. According to the prosecution, the two accuseds continued to kick his ribs and head when he laid unconscious on the ground. They also stomped his head. The nightclub bouncers later came and stopped the two accuseds and chased them away. The deceased was conveyed in a taxi by a friend (PW1) to his home.
24. On 23 February, 2014 in the late morning, the deceased was taken to CWM Hospital by police. He was examined and treated by doctors. On 10 March 2014, 15 days after the incident, he passed away. The matter was reported to police. An investigation was carried out. On 17 March 2014, both accuseds appeared in the Suva Magistrate Court, charged with murdering Veresa Tubuanakoro. Because of the above, the prosecution is asking you, as assessors and judges of fact, to find the accuseds guilty as charged. That was the case for the prosecution.

**G. THE ACCUSED'S CASES**

25. On 6 April 2016, the first day of the trial proper, the information was put to the accuseds, in the presence of their counsels. Both accuseds pleaded not guilty to the charge. In other words, they denied the murder allegation against them. When a prima facie case was found against them, at the end of the prosecution's case, wherein they were put to their defence, Accused No. 1 choose to remain silent and called no witness, while Accused No. 2 choose to give sworn evidence and called a witness. That was their rights.
26. As for Accused No. 1, in choosing to remain silent and to call no witness, no negative inferences whatsoever must be made on his choice. This is because the burden to prove Accused No. 1's guilt beyond reasonable doubt stays with the prosecution from the start to the end of the trial. There is no burden on Accused No. 1 to prove his innocence, and as such, he was well within his right to remain silent and call no witness.
27. As for Accused No. 2 choosing to give sworn evidence and calling a witness, he was within his rights to do the above. He may introduce evidence into the case, to create a reasonable doubt in the prosecution's case, and if you accept the same and are thrown into a reasonable doubt, you are entitled to find the accuseds not guilty as charged, and acquit them accordingly. However, it is a matter entirely for you.



28. Nevertheless, the defence's case was simple. As for Accused No. 1, although he choose to remain silent and called no witness, his position on the case was outlined to the police when he was caution interviewed by Detective Corporal 3046 Livai Toribau (PW4), on 13, 14, 15 and 16 March 2014, at Totogo Police Station. When interviewed, he explained why he participated in the assault on the deceased, which lead to his death. In any event, we will further consider his police caution interview statements, when we analyse the evidence later.
29. As for Accused No. 2, he admitted he came down from the nightclub at the time, and saw a group of males assaulting Accused No. 1. He said, Accused No. 1 was wearing no T-Shirt, and was bleeding in the eye, nose and mouth. He went to them to stop the fight, but someone punched his left eye. He said, he got angry and started fighting them. They exchanged punches in the middle of the road. He said, one of them ran away. He ran after him, but one of the bouncers (DW2) held him up. He appeared to deny punching and kicking the deceased as he lay unconscious near the Tattslotto Shop at the corner. He said, a while later, he and Accused No. 1 left the scene and went to another nightclub. He appeared to deny the murder charge against him.
30. Because of the above, the defence is asking you, as assessors and judges of fact, to find both accuseds not guilty as charged. That was the case for the defence.

## H. ANALYSIS OF THE EVIDENCE

### (a) Introduction:

31. In analysing the evidence, please bear in mind the direction 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. In analysing the evidence, we will first discuss the "Agreed Facts", then we will consider the state's case against Accused No. 1, then the state's case against Accused No. 2, Doctor D. E. Salem's (PW5) evidence, Accused No. 2's (DW1) evidence, Rusiate Vakacegu's (DW2) evidence and the total evidence.

### (b) The "Agreed Facts":

32. The parties had submitted separate "Agreed Facts". Accused No. 1 and the prosecution submitted an "Agreed Facts" dated 19 February 2015. A copy is with you. It had nine paragraphs of Agreed Facts. Because the parties are not disputing this "Agreed Facts", you



may treat the same as established facts and that the prosecution had proven those facts beyond a reasonable doubt. The significance of this "Agreed Facts" was the fact that the parties agreed that Accused No. 1 was at the crime scene, at the material time, and that he was assaulted by the deceased and he was later assisted by another outside the nightclub.

33. On 6 April 2016, before the trial proper started, Accused No. 1 and the prosecution also agreed to tender Accused No. 1's 16 March 2014 medical report as part of the above Agreed Facts. A copy of the same is with you. Please, treat the above medical report as part of the above Agreed Facts. The significance of this report was that it tendered to confirm that Accused No. 1 was injured when he was allegedly assaulted by the deceased.

34. As for Accused No. 2, he and the prosecution also tendered an "Agreed Facts". A copy of the same is with you. There were three paragraphs of "Agreed Facts". You may treat the same as established facts and that the prosecution had proven those facts beyond a reasonable doubt. The significance of this "Agreed Facts" was that the parties agreed Accused No. 2 was at the crime scene, at the material time.

**(c) State's Case Against Accused No. 1:**

35. In connecting Accused No. 1 to the crime, the prosecution relied on two types of evidence. First, that of identification, and second, that of his alleged confession to the police. We will discuss these evidence in turn.

36. The most important identification witness for the prosecution was Peni Qaqalada (PW2). At the material time, PW2 was working as a bouncer at Islanders Nightclub. He was guarding the main nightclub front door. It was his job to check those who were going in and out of the nightclub at the time and to maintain security in that area. According to PW2, the commotion started when he went to get Accused No. 1 from upstairs in the nightclub. It was alleged that Accused No. 1 stole a camera. PW2 went to get Accused No. 1 out of the nightclub to investigate the matter. However, the deceased intervened and forcefully dragged Accused No. 1 out of the nightclub, and later punched him. PW2 saw this. PW2 said Accused No. 1 fell to the ground as a result of the deceased's punch.

37. PW2 said, he saw the deceased standing over Accused No. 1 and questioning him on the whereabouts of the camera. PW2 said, suddenly he saw Accused No. 2 and another come in to assist Accused No. 1. Accused No. 2, according to PW2, punched the deceased on the back



of the head, and the deceased fell forward onto the concrete footpath. According to PW2, the deceased suddenly stood up in a fighting position facing Accused No. 2. The deceased and Accused No. 2 started exchanging punches in the middle of the road, opposite Singh's Curry House restaurant and onto the footpath in front of the restaurant. PW2 said, Accused No. 1 then joined Accused No. 2 in punching the deceased. PW2 said, he saw both accuseds throwing left and right punches at the deceased, while the deceased returned fire with left and right punches also, while retreating simultaneously.

38. PW2 said, he observed it was a fistic fight by two persons against one. PW2 said, the deceased suddenly turned and fled from the two accused towards the Tattslotto shop at the corner. According to PW2, the two accuseds pursued the deceased by pulling his pants and punching the right side of his head. PW2 said, the deceased fled to the pedestrian crossing. PW2 said, the two pulled him back to the pavement in front of the Tattslotto shop and punched him in the mouth. PW2 said, the deceased fell backwards and hit his head heavily on the concrete pavement. PW2 said, he saw the two accuseds repeatedly kick the deceased on the right chest ribs and right side of his head and then stomped on the same. PW2 said the deceased was lying there unconscious at the time.

39. PW2 said, the deceased was later taken away by friends in a taxi. PW2 said the two accuseds returned to the nightclub, but he told them to go away to another nightclub. The above was a summary of what PW2 observed at the material time concerning the first and third element of murder, as described in paragraph 9(i) and 9(iii)(b) hereof.

40. Before discussing how to approach PW2's identification evidence, we need to discuss Accused No. 1's challenge to PW2's credibility as a witness. During the trial, Accused No. 1's counsel, through cross-examination and her closing submission, had asked you to treat PW2's evidence with caution. She appeared to say that PW2 was not a credible witness in that what he was saying in court was different from what he told the police on 14 and 15 March 2014. PW2's police statement was tendered as Defence Exhibit No. 1 (A) – hand written version; 1(B) – the typed version. Please read the same carefully.

41. As a matter of law, what a witness said in a witness box in the courtroom, is often treated as admissible evidence, and what he told the police in his earlier police statement is not admissible evidence, because it was an out of court statement. But the written statement is often used to test the consistency of his evidence in the courtroom with his earlier police



statement. If the two are not consistent, this may undermine the credibility of the witness, and consequently you may approach his sworn evidence with caution, and even reject the same. If the two are consistent with each other, it may enhance the credibility of the witness and thus may lead you to accept his evidence and version of events.

42. In this case, PW2 has ask you to accept his evidence and what he said in his police statement. I have carefully read PW2's police statements and the evidence he gave in the courtroom. When looking at PW2's police statements and his evidence in the courtroom in its total context, I found the two were generally consistent with each other. However, the ultimate decision to accept and/or reject PW2's evidence, given Accused No. 1's counsel's challenge, is a matter entirely for you.
43. In assessing the quality of PW2's identification evidence against Accused No. 1, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one identification of the accused which the defence may alleged to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness of the identification, because an honest and convincing witness may be mistaken. Second, you must carefully examine the circumstances in which the identification was made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way? Had the witness ever seen the accused before? How often? Was there any special reason for remembering the accuseds' faces? Was a police identification parade done? Third, are there any specific weakness in the identification made. The answers to the above questions will determine the quality of the identification evidence. If the quality is good, you may rely on the identification evidence. If its otherwise, you may reject it.
44. In this case, PW2 said he observed both accuseds for 10 minutes. It was obviously not a fleeting glance. As to the distance, you will have to look at Photo No. 2, 3, 4 and 5 of Prosecution Exhibit No. No. 1 (Booklet of Photos). In photo 3, you can see the Nightclub front door. PW2 was right in front of the door. PW2 saw the fight in the middle of road opposite the nightclub door. Then it went to Singh's Curry House footpath. Then it came down towards the Tattslotto shop at the corner, see Photo No. 4 and 5. The deceased was punched, kicked and stomped near the Tattslotto shop steps, see Photo No. 5. At all times, PW2 was standing at the nightclub door observing the incident for 10 minutes. In what light? DW2, another bouncer,



at the crime scene at the material time said, the whole crime scene was well lit from street lights on the traffic island near Tattsлото shop, and nearby shop lights and street lights from Sukuna Park. So, it would appear the crime scene was well lighted. Was the observation impeded in any way? PW2 appeared to say no. Has PW2 ever seen the accuseds before? PW2 said yes. Both accuseds were regular customers of Islanders Nightclub for the previous months. Was there a special reason for remembering the accuseds' faces? According to PW2, yes. A person was severely assaulted that night. Was a police identification parade held. Yes. PW2 said he identified both accuseds at the Totogo Police Station identification parade. Was there any special weaknesses in PW2's identification evidence? It appeared there was none. If you think PW2's identification evidence was of a high quality, you may use it to find Accused No. 1 guilty as charged. If otherwise, you will have to work on other evidence to decide whether or not Accused No. 1 is guilty as charged.

45. The second type of evidence the State was relying on to connect Accused No. 1 to the crime, was through his alleged confession in his police caution interview statements, tendered as Prosecution Exhibit No. 2 (hand written version). Detective Corporal 3046 Livai Toribau (PW4) caution interviewed Accused No. 1 in the English language, at Totogo Police Station, on 13, 14, 15 and 16 March 2014. A total of 111 questions were asked and 111 answers were given. According to PW4, the accused's right to counsel and other rights were given to him. He was given the standard rest and meal breaks. According to PW4, the police never assaulted, threatened or made false promises to Accused No. 1, while he was in their custody. During the interview, Accused No. 1 made some admission to the offence - see questions and answers 44, 53 to 57, 63, 67, 68, 69, 85, 106 and 107 of Prosecution Exhibit No. 2. Please, read these questions and answers carefully.
46. When considering the above evidence, I must direct you as follows, as a matter of law. 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 that 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 its otherwise, you may give it less weight and value. It is a matter entirely for you.

47. In this case, Accused No. 1 choose to remain silent. However, in question and answer 111 of Prosecution Exhibit No. 2, he admitted he made his statements as recorded in the interview notes. He said, in question and answer 110 of the interview notes, that he gave his statements voluntarily and he was not assaulted or threatened by police. It appeared he made no complaint to the police or the Suva Magistrate Court when he first appeared on 17 March 2014. If you accept the above confessions, you will have to find the accused guilty as charged. If otherwise, you will have to work on the other evidence, if any, to find out whether or not, Accused No. 1 is guilty as charged. It is a matter entirely for you.

**(d) State's Case Against Accused No. 2:**

48. The State's case against Accused No. 2 was based solely on PW2 identifying him at the crime scene at the material time, exchanging punches with the deceased from the nightclub door to the front of Tattslotto shop, wherein he and Accused No. 1 punched the deceased in the mouth and he fell on the concrete pavement, hitting his head heavily on the same. Please, refer to Photos 2, 3, 4 and 5 of Prosecution Exhibit No. 1. PW2 said, he saw the two accuseds kicked the deceased on the right ribs, the right side of his head and then stomped on his head, while he lay unconscious on the concrete pavement.
49. As to what PW2 observed before then, I repeat what I said in paragraphs 36, 37, 38 and 39 hereof.
50. In assessing the quality of PW2's identification evidence against Accused No. 2, I repeat the directions I gave you in paragraph 43 hereof. I also repeat the observations made in paragraph 44 for Accused No. 2. If you think PW2's identification evidence against Accused No. 2 was of a high quality, you may find Accused No. 2 guilty as charged. If its otherwise, you may find Accused No. 2 not guilty as charged. It is a matter entirely for you.

**(e) Doctor Daniella E. Salem's Evidence and the Post Mortem Report:**



51. Doctore Daniella E. Salem's (PW5) evidence was important for the second element of murder, as described in 9(ii) hereof. She did the post-mortem on the deceased on 12 March 2014. She prepared a post-mortem report on her examining the deceased, and the same was tendered as Prosecution Exhibit No. 3. In the report, she outlined her discoveries on the injuries the deceased suffered. She said, "the deceased died from blood clots accumulating in his brain and the swelling of the same. This was due to the head injuries he sustained. Substantial amount of force applied to the head due to a fall or a blow to the head, would cause those blood clots accumulating in his brain and the consequent swelling of the brain". She said, if properly treated in Fiji, chances of survival is 20%. She said, if the bur hole was not done on 23 February 2014, Veresa would have died in the afternoon. The bur hole it would appear, gave him another 15 days of life. It would appear that the accuseds' assault on the deceased in front of the Tattslotto shop at the material time caused the deceased's brain injuries.

**(f) Accused No. 2's (DW1) Evidence:**

52. In his sworn evidence, Accused No. 2 denied punching the deceased's mouth, wherein he fell heavily and hitting his head on the concrete pavement next to the Tattslotto shops, at the material time. He denied kicking the deceased's rib, head and stomping on the same thereafter.

**(g) Rusiate Vakacegu's (DW2) Evidence:**

53. DW2 was working with PW2 as bouncers at the Islanders Nightclub at the material time. DW2's evidence about the fighting between Accused No. 2 and the deceased from the middle of the road, until the deceased ran away was consistent with each other. DW2 said Accused No. 2 ran after the deceased when he fled. He said, he held onto Accused No. 2 not to pursue the deceased. He said, Accused No. 2 did not reach the deceased because he was holding onto to him for 10 to 20 minutes. Note that this was different from what PW2 said, in that both accuseds pursued the deceased to the Tattslotto shop corner, punched the deceased in the mouth and later kicked and stomped on his head when he was unconscious on the concrete pavement. Note when cross-examined by prosecution, DW2 admitted he was related to Accused No. 2. Whether or not you accept his version of events is a matter entirely for you.

**(h) Looking at the Total Evidence:**

54. You will have to carefully consider all the evidence together. You have watched and heard all the witnesses give evidence in the courtroom. You have observed their demeanour. Who do



you think was the credible witness? Who do you think was forthright as a witness? Who do you think was evasive? Who do you think, from your point of view, was telling the truth? If you think the prosecution's witnesses were credible and you accept their evidence, you must find the accuseds guilty as charged. If otherwise, you may find the accused not guilty as charged. It is a matter entirely for you.

**I. SUMMARY**

55. Remember, the burden to prove the accuseds' guilt beyond reasonable doubt lies on the prosecution throughout the trial, and it never shifts to the accuseds, at any stage of the trial. The accuseds are not required to prove their innocence, or prove anything at all. In fact, they are 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 accuseds' guilt, you must find them 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 accuseds' guilt, you must find them not guilty as charged.

56. Your possible opinions are as follows:

- |      |               |   |  |   |                      |
|------|---------------|---|--|---|----------------------|
| (i)  | Accused No. 1 | : | Murder   | : | Guilty or Not Guilty |
|      |               |   | If not guilty of<br>Murder, than<br>Manslaughter | : | Guilty or Not Guilty |
| (ii) | Accused No. 2 | : | Murder   | : | Guilty or Not Guilty |
|      |               |   | If not guilty of<br>Murder, than<br>Manslaughter | : | Guilty or Not Guilty |

57. 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, Suva.  
Solicitor for Accused No. 1 : T. Leweni, Barrister and Solicitor, Suva.  
Solicitor for Accused No. 2 : Legal Aid Commission, Suva.