

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO.: HAC 144 OF 2012**

**STATE**

**-v-**

**MOHAMMED FARUN YAKUB**

**Counsel: Mr. S.Nath for State  
Mr. F. Koya and Mr. M. Raratabu for Accused**

**Date of Trial: 09<sup>th</sup> August – 12<sup>th</sup> August, 2016**

**Date of Summing Up: 16<sup>th</sup> of August, 2016**

**SUMMING UP**

1. Madam Assessors and the Gentlemen Assessor, It is now my duty to sum up the case to you. In doing so, I will direct you on matters of law which you must accept.
2. On matters of fact 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 you accept what I say, or form your own opinions.
3. I am not bound by your opinions, but I will give them the greatest weight when I come to deliver my judgment.
4. You do not have to agree with each other, but it would be better if you did agree.
5. On the matter of proof, I must direct you as a matter of law, that the Accused person is innocent until he is proved guilty. The burden of proving his guilt rests on the Prosecution and never shifts.

6. The standard of proof is that of proof beyond reasonable doubt. This means that before you can find the 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.
7. Both counsels in this case have made strong submissions on how you should find the facts of this case. It is a matter for you whether you accept what they say on the facts. On the law however, you must only accept the law as I direct you.
8. I must remind you again to disregard anything you might have heard about this case outside this courtroom. Concentrate on the evidence you have heard in the course of this trial. Approach the evidence with detachment and objectivity. Do not get carried away by emotion.
9. Accused is charged under the Penal Code. The Information alleges that on the 8<sup>th</sup> day of December, 2009, the Accused unlawfully killed the deceased Suresh Chandra by an act or an omission to exercise his duty of care over an inanimate object, Coral Son Bus Registration Number CQ 432 when he switched on the said bus causing it to move forward and bump the deceased.
10. Section 198 of the Penal Code provides that any person who by an unlawful act or omission causes the death of another person, is guilty of the felony named manslaughter.
11. An unlawful omission is an omission amounting to culpable negligence to discharge a duty tending to the preservation of life or health, whether such omission is or is not accompanied by an intention to cause death or bodily harm.
12. Section 213 provides: "It is the duty of every person who has in his charge or under his control anything, whether living or inanimate, and whether moving or stationary, of such a nature that, in the absence of care or precaution in its use or management, the life, safety or health of any person may be endangered, to use reasonable care and take reasonable precaution to avoid such danger; and he shall be deemed to have caused any consequences which adversely affect the life or health of any person by reason of any omission to perform that duty."
13. In this case the Prosecution alleges that the unlawful act was one of gross negligence in the starting of a motor vehicle which was in Accused's charge or under his control and he failed to exercise reasonable care and take reasonable precaution to avoid the danger.
14. The elements of the offence which the Prosecution must prove beyond reasonable doubt are:
  - I. The Accused;
  - II. Had a duty of care towards the deceased;
  - III. Was in breach of that duty;
  - IV. That breach was grossly negligent; and

V. That breach was the significant or operating cause of death of Suresh Chandra.

15. In this case the Accused disputes all the aforementioned elements. He denies that he switched on the vehicle CQ 432 which was involved in the incident. Accused also denies that he was under a duty of care towards the deceased and that he had breached that duty and that he had been grossly negligent. Accused also denies that his act caused the death of the deceased Suresh Chandra.
16. Prosecution says that it was the Accused who switched on the said bus causing it to move forward. Accused on the other hand maintains that bus had started itself. First of all, you must be sure that Accused started the bus.
17. Four eye witnesses testified in this case. None of them has said that they saw Accused starting the bus. The Prosecution relies on circumstantial evidence to prove that the Accused person was responsible for starting the bus and that there is no other reasonable explanation other than that.
18. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the Accused, and there is no other reasonable explanation for the circumstances which is consistent with the Accused's' innocence, then you may convict the Accused of the offence charged.
19. Let me give you an example which a previous judge had used to explain the nature and effect of circumstantial evidence. If you one day find that your wallet is missing and the only person who could have entered your house is your neighbor, and you find your credit cards hidden in his desk in his home, then you are entitled to accept that it was your neighbor who stole your wallet. This is because the circumstances lead you to the only reasonable inference. However, if other people have access to your house and the credit card is not found in his house, then there are other possible explanations which are also consistent with his innocence.
20. That is the law on circumstantial evidence.
21. If you find that it was the Accused who started the bus, then you may conclude that the bus was under his charge or control and therefore he owed a duty of care towards the deceased who had been working in front of the bus.
22. In assessing whether or not the Accused was in breach of his duty of care, you must ask yourself what a reasonable man would have done in his shoes, faced with the situation he found himself in. And, even if you find that the Accused was in breach of his duty and should have exercised greater care, you need to go on to ask whether his conduct was so grossly negligent, whether it was such an unacceptable departure from the proper and reasonable standard of care, that it deserves the sanction of the criminal law.
23. On the issue of causation, the law states that a person is deemed to have caused the death of another person even if his act was not the sole or the immediate cause of death, if he inflicts injury as a result of which that person undergoes surgical or

medical treatment which causes death. In such a case, it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill. Therefore, if a person is assaulted on a street, and is taken to a hospital where he later dies as a result of surgery conducted on him to save his life from the effect of the assault, the person who assaulted him is deemed to have caused his death, as long as the doctors in the hospital treated him in good faith and with common knowledge and skill.

24. These are my directions on the law. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

#### **Case for the Prosecution**

##### **Mr. Vijay Singh**

25. Mr. Singh is a joiner by profession. On the 8<sup>th</sup> of December, 2009 he was working for Coral Sun in a garage at the Nadi International airport.
26. Around 10.00 a.m., he was working on top of a work bench and drilling the concrete wall with two other staff, Papu and Kalaveti. Working bench was located in front of the bus. Kalaveti was with him on the bench while Papu was on the ground closer to the bus.
27. He could hardly hear any sound because the drilling machine was making noise. Whilst drilling, he heard some people shouting. Then he turned back and saw the bus bumping two people. When the accident occurred, he saw the Accused Yakub standing at the steps of the bus.
28. He had no idea what happened and what happened to the people who were crushed although the accident occurred in front of him. He only saw somebody coming and reversing the bus.
29. Under cross-examination, witness admitted that he did not see Accused starting the bus and moving it forward or sitting on the driver's seat. He was only sure that two people got injured because the bus pressed on them. Bus was 1 ½ meters away from the working bench.

##### **Dr. Lusiana Vagarau Boseiwaqa**

30. Doctor Boseiwaqa had conducted the post mortem examination of the deceased Suresh Chandra 17<sup>th</sup> December, 2009 at the Lautoka Hospital.
31. Doctor found 2 surgical puncture wounds at 5<sup>th</sup> and 6<sup>th</sup> intercostal space on the left and 5<sup>th</sup> and 6<sup>th</sup> intercostal state on the right with surrounding of tissue infection.
32. This surgical puncture wounds were just part of treatment that was given to a patient having compressed lungs to let out air or let out infection or let out blood.

33. Patient had a chest infection secondary to a blunt chest trauma. No rib fractures or external injuries were seen. Patient had internal injuries and with that internal injuries he had developed an infection. In her opinion, cause of death was chest infection due to blunt chest trauma which was a result of a motor vehicle accident.
34. Under Cross Examination Doctor admitted that she didn't look at patient's medical history. Estimated time of death was the 12<sup>th</sup> of December, 2009. Examination was conducted 5 days after the passing away of the deceased on 17<sup>th</sup> December, 2009.

**Kitione Bolekilepanoni**

35. In 2009, Mr. Bolekilepanoni was a leaner at Coral Sun. On the 08<sup>th</sup> of December, 2009, this incident occurred during his lunch break around 10.00 am to 11.00 am.
36. He could hear people shouting. He knew something had happened. He Could hear the engine of the bus running and saw Suresh lying on the surface in front of the bus. Suresh was crying in pain. Bus was Parked on the flat ramp on the ground.
37. He carried Suresh and took him to Namaka Health Centre.

**Shanil Kumar (Papu)**

38. Shanil Kumar is a joiner working under Vijay Singh. On the 08<sup>th</sup> of December, 2009 he was working for Coral Sun in a garage located at the Airport. He was standing on the ground at the working bench. Kalaveti Narayan and Vijay Singh were working on top of the bench. He was passing things on to them. The bus was parked behind him. He was facing the opposite side. Suddenly the bus came forward. One of his legs was pressed by the bus. He was injured in the accident. He had no idea how the bus moved forward.
39. He had no idea what happened to the other person. When his leg got pressed he turned around. He saw the Accused Mohammed at the door step of the bus. Mohammed went and stopped the bus. No one else was inside the bus.
40. Under cross-examination, witness said that he was not sure if the engine was 'on' when the bus collided with him.
41. When he got injured he saw Mohammed going from the step to stop the bus. When he was shown and explained the content of the statement he had given to police on the 08<sup>th</sup> day of December 2009, he admitted having said to police that bus had started itself.

**Jimione Biunaiwai Korovou**

42. Korovou had been a vehicle Examiner for the Land Transport Authority of Fiji for 15 years. He inspects vehicles for certificate for road worthiness; attend to accident cases, do evaluation of vehicles and other technical matters.

43. In the process, he inspects the chassis number and vehicle number and if there are any dents of the impact of any accidents, checks where the main switch and the starter switch are located.
44. The main switch activates itself whereas the starter switch is operated by the driver at the driver's seat. The main switch is at the back of the vehicle on top of the engine.
45. On the 8<sup>th</sup> day of December 2009, on a request by a police officer, he examined a bus bearing the registration No. CQ 432 which was parked in the garage at the TTF. He made a Vehicle Accident Report and handed it over to police officer Emori Qilu.
46. He noted down the chassis number but not the engine number. He obtained other particulars like the engine number, make, the model etc. from the data base at the office referring to the chassis number and wrote them down.
47. There was a slight dent on the front number plate caused by the impact of the accident. He checked the break system, the suspension system, the wheels, the steering system, the transmission and the lighting system. No defects contributed to the accident were found.
48. He carried out the Static Test and Dynamic Test. Static test was to check the status when the vehicle doesn't move forward or in a reverse motion. Dynamic test was to check the status of bus when it is moving forward while the break is applied.
49. He examined where the main switch and the starter switch were located. The main switch was located at the rear of the vehicle. When the main switch is switched on, current flows from the battery to the starter switch which is on the left hand side of the driver's seat.
50. He found out the gear was on 2<sup>nd</sup> gear position. Both parking and service break systems were in good condition and were effective. Suspension system was intact. All the wheels of the bus were in good condition. Steering, lighting, transmission systems were intact and operating. There's no key.
51. The starter switch is operated by the driver. Once the starter switch is switched on, it will heat the starter and operate the engine to run. When the starter switch which is on the dashboard is pressed by the driver, the engine starts to rotate.
52. Bus was parked with the parking or hand breaks turned off. There's no vehicle that can start itself. A bus can move forward only if somebody switches on the main switch and the starter switch and operates the gear.
53. The bus was parked over the pit ramp. Pit ramp surface was '0 gradient'.
54. Under Cross-examination, officer said that he had examined about 5 buses during past 13 years. He had the authority under Section 9 of the Land Transport Act to examine a vehicle.
55. He found a Nissan engine in a Mercedes bus. A new meter had been installed. It read 172 km. He confirmed that a Nissan engine had been installed and the engine

modified. He did not inspect the engine physically to determine the brand of the engine. Data system read FE6 Nissan engine. He did not come across whether owner had applied for modification.

56. According to the information abstracted from the data base, the bus was insured with a third party insurance policy, expiry date of which was 23<sup>rd</sup> of August 2009. In this investigation, he did not get the history from the check list for this particular vehicle.
57. The driver needs to turn the ignition key or the starter switch then only the bus will turn on. Whoever wishes to be in charge of driving needs to go at the back first or get someone else to start it off first. On the 08<sup>th</sup> day of December, 2009 the main switch was switched off.
58. Ramp is on a level zero gradient. He found no defects which may have contributed to the accident. He said that changing of the engine is not a defect.
59. He had a Diploma in Automotive.

#### **Shiu Sanjay Mani**

60. Mr Mani is a Serviceman /Mechanic. He does oiling, oil filter changing and attends to some mechanical faults. He takes the vehicle to the ramp before doing his work.
61. On the 08.12.2009, in the morning, his supervisor informed him to service a 22 seater Coaster bus. He brought the vehicle outside and serviced. Around 10.30 a.m., he wanted to park the Coaster on the ram to spill the oil. The bus bearing registration number CQ 432 had been parked on the ramp.
62. He saw Farun standing on the step of the bus. He came to Farun and asked him to reverse the bus if he had completed his work so that he could take the Coaster on the ramp. Suresh, the deceased, was working on the bus, standing in front, about one meter away from of the bus, CQ 432. Two other carpenters were also working there as well.
63. Having informed Farun, he was going backwards to his Coaster. Then he heard people yelling. The bus started and bumped. Only Farun was inside the bus on the steps. He was 2 to 3 meters away from the bus when he saw the incident. As soon as he heard people yelling, he came in front. He saw Suresh crushed in front and Farun was trying to reverse the bus.
64. When Farun reversed the bus, he and other carpenter went and helped Suresh to come out. He did didn't see how the bus got started.

#### **Emori Qilu**

65. On the 08<sup>th</sup> of December, 2009 Emori was stationed at Namaka Police Station.
66. He received instructions on that particular day to take over a fatal accident case in the Coral Sun Office at the Nadi International Airport. He visited the scene and carried out the investigation. He also drew a Fair Sketch Plan of the crime scene. The bus was

parked outside the garage in the yard. He inspected the bus. The ignition switch of the bus was on the left hand side of the driver's seat. Stairway was on the left hand side of the bus.

67. The Traffic Officer gave Information about point 'A' where the deceased had been working. Bus had been standing on a ramp, it was a level place.
68. Under Cross-examination, witness admitted that the sketch plan was prepared after taking information from the Rough Sketch Plan drawn by the Traffic Officer PC Ajay.
69. His Fair Sketch Plan was based on the information given by the Traffic Officer and on his own observation at the scene. At the time of his visit the bus wasn't on the ramp. It was parked in the yard, outside the bay.

**Cpl. Ajay Chand Verma**

70. He was advised to attend to a report of accident at Coral Sun Yard at the Nadi Airport.
71. He drew an Imaginary Sketch Plan of the accident scene and handed it over to the Investigating Officer DC Emori Qilu. Imaginary Sketch Plan is drawn where the vehicle has been removed and the driver is not at the scene. The bus had been removed from the point of impact. When he visited the scene, the deceased had already been taken to the hospital.
72. Under cross examination, witness said that when he attended the scene he drew actually what he saw at the scene.
73. Caution interview of the Accused was tendered in evidence without any objection from the defence. The Accused was interviewed under caution on the 20<sup>th</sup> of July 2010. The Accused agrees to the contents of the interview and you may give to it any weight you think fit. He has refrained from giving answers to some of the questions put to him by the interweaver. That is his right. He has exercised his right to silent. You must not draw the inference that he remained silent because he was guilty.
74. Apart from this evidence, you have access to the sketch plan and post mortem report. You may consider these documents in coming to your decision. Doctor is an expert witness. You are not bound to accept her opinion. If you think her evidence is logical and acceptable you can rely on her evidence.

That is the case for the Prosecution.

75. At the end of the Prosecution case you heard me give several options to the Accused. He could have remained silent, he could have made unsworn statements or given sworn evidence. He was given these options because he does not have to prove his innocence and prove anything at all. Burden remains on the Prosecution at all times to prove the guilt of the Accused.



76. Accused chose to give sworn evidence and to subject himself to cross-examination and called a witness on his behalf. You must give his evidence careful consideration. The fact that an Accused gives evidence in his defence does not relieve the burden of the Prosecution to prove the case beyond reasonable doubt. Burden never shifts to the Accused.

### **Case for the Defence**

#### **Accused Mohammed Farun Yakub**

77. In the year 2009, he was working for Coral Sun, Fiji. On the 08<sup>th</sup> of December 2009 he started work at 8.00 am.
78. His Supervisor informed him to change the rear spring pin of one bus bearing registration number CQ 432 which was parked at the ramp. Suresh was also working inside the bus. The bus had been parked there for at least around one year 8 to 9 months.
79. Suresh informed him to remove the masking tape on the bus window. He removed the masking tape and was about to throw the masking tape in the rubbish bin. When he was on the last step, the bus suddenly moved in front. He was shocked that why the bus suddenly moved. He ran and got into the driver's seat. It's a manual vehicle. He applied the clutch. Before applying the clutch, he saw Suresh and 3 other persons present there. The bus was moving so fast. He was trying to save them so that they don't get bumped. As soon as he applied the clutch in full the bus went back.
80. He didn't reverse the bus or didn't apply the reverse gear. He started yelling for help for him to stop the bus. Then the bus stopped. He came out of the bus and went and held Suresh. Then they took him to the Namaka Health Centre in a van.
81. He did not at any time attend to starting the bus or sit on the driver's seat before Suresh was injured.
82. He gave a statement to police on 08<sup>th</sup> of December, 2009. He was caution interviewed by Police in 2010 and was charged for Manslaughter 2 years after he was interviewed.
83. He did not reverse the bus at Shiva Mani's request. He can't recall whether Mani came and requested him to reverse the bus. As the bus moved forward, he was only trying to save everyone. Engine of the bus turned off when the switch on the engine named choker was pulled. He was not sure who pulled the choker which was on the engine.
84. Under Cross-examination witness said that Suresh Chandra and other boys were working in front of the work bench. No one else was present inside the bus. To his recollection, at the time when he was inside the bus, engine was off.
85. He can't recall if Shiu Sanjay Mani asked him to move the bus backwards. Mani was not his Supervisor. He only followed his Supervisor's instructions. If a manual vehicle is moving, to stop that vehicle, any driver has to press the clutch, then the vehicle will be on neutral mode.

86. He tried to stop the bus. When he applied the clutch then the bus moved backwards. He had no idea how the bus moved backwards. The bus went back by itself. The ramp looked like a flat ramp, but he is not an expert to determine whether it's flat ramp or not.
87. He denied that he moved the bus although he was the only person present inside the bus at that time.
88. He is not sure if applied any brakes to stop the bus. He did not check the brakes or the gear. The bus started itself. Accused admitted having given the answer to question No. 71 of the caution interview where he had stated 'engine was activated'.

### **Kalaveti Narain Samy**

89. Witness Kalaveti was working for Coral Sun in 2009 under his boss Vijay Singh. He was drilling the wall and while he was drilling his boss was standing beside him. He could not hear any other sound other than the sound generated by drilling.
90. They were in front of the bus which was parked on the ramp. Suddenly his boss shouted aloud. He saw the Accused standing on the last step of the bus. The Accused went and did something. The bus went backwards. Accused reversed the bus.
91. Under Cross-examination, the witness said that he was looking at the opposite direction when the incident happened. He did not see who was inside the bus when the bus moved forward. Before the incident he did not see the Accused.

### **Summary**

92. In summary the Prosecution says that Accused started the bus that was parked on the ramp and he caused it be moved forward when people including the deceased were working in front of the bus and the Accused acted in such a grossly negligent way that his conduct deserves criminal sanction. The Prosecution says that the only reason the deceased was taken to hospital was because of the injuries received from this incident and that his death a few days later was directly caused by the Accused's negligent act or omission.
93. The defence says that the bus started itself and in applying the clutch and neutralizing the engine, the Accused acted in a way that any reasonable person would have acted and that there is no breach of the duty of care, nor any gross negligence on the part of the Accused.
94. The issues for you to consider are very simple. Did the Accused person, start the bus? On an objective test, did he act unreasonably and was in breach of his duty of care towards the deceased. If he acted unreasonably, was his conduct so serious that it justifies criminal punishment? And lastly did the deceased die as a result of injuries he received in this incident?
95. If you are satisfied beyond reasonable doubt that the Accused caused the death of the deceased by an act of gross negligence, then you must find him guilty as charged. If


you have any reasonable doubt either about whether he started the bus or acted with gross negligence or that he caused the death of the deceased, you must find him not guilty.

96. Your possible opinions are guilty or not guilty.

97. You may now retire.

Any redirections?



  
Aruna Aluthge  
Judge

AT LAUTOKA  
16<sup>th</sup> August, 2016

Counsel: Office of the Director of Public Prosecution for the State  
Office Siddiq Koya Lawyers for the Accused