

IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 200 OF 2014S

STATE

VS

JULIAN HEINRICH

Counsels : Ms. J. Fatiaki and Ms. U. Tamanikaiyaroi for State
Mr. S. Valenitabua for Accused
Hearings : 27 and 28 February, 1 and 2 March, 2017
Summing Up : 3 March, 2017

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, with others unknown, on 21 June 2014, at Suva in the Central Division, commit manslaughter against Sione Tufui, when they assaulted him, and which later led to his death?

E. THE OFFENCE AND IT'S ELEMENTS

9. The accused was charged with manslaughter, contrary to section 239 of the Crimes Decree 2009. For the accused to be found guilty, the prosecution must prove beyond reasonable doubt, the following elements:
- (a) the accused engages in conduct; and
 - (b) the conduct causes the death of the deceased; and
 - (c) the accused was reckless as to a risk that the conduct will cause serious harm to the deceased.
10. The phrase "engages in conduct" in paragraph 9(i) above means "to do an act or omit to perform an act". For example, if you hit someone with a stick, or punches someone with your hand, that is, to "engage in conduct" because you have "performed an act". Similarly, if you hit someone with a stick and the victim is seriously injured, and you fail or omit to take him to hospital, that is, to "engage in conduct" by "omitting to take him to hospital" for medical treatment. The above is the first element of manslaughter.
11. "The conduct must cause the death of the deceased" means "the conduct must be a substantial cause of the deceased's death". For example, you hit someone with a baseball bat (engages in conduct), and the person falls on the ground hitting his head on a stone, which fractured his skull. The fractured skull lead to serious brain injuries, which later caused the deceased's death (conduct causes death of deceased). The assault set in motion a chain of events that lead to the deceased's death. Without the assault, the deceased would not have died. So the assault was a major and/or substantial cause of the deceased's death. That is the second element of manslaughter.
12. The third element of manslaughter involved its fault element. The accused must be shown beyond reasonable doubt "to be reckless as to a risk that his conduct will cause serious harm to the deceased". A person is reckless with respect to a result if – (a) he is aware of a

substantial risk that the result will occur; and (b) 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 for you. You must consider the parties' conduct, and the surrounding circumstances, to decide whether or not the accused was reckless. Was he reckless to the risk that his conduct will cause serious harm to the deceased? Was he aware of a substantial risk that the deceased would suffer serious harm, as a result of his conduct? If so, was it justifiable for him to take the risk? If it was not justifiable for him to take the risk, and the deceased suffered serious harm as a result of his conduct, he would be reckless. If it was otherwise, he would not be reckless. If you find him reckless, then the third element of manslaughter is satisfied. If its otherwise, then the third element of manslaughter is not satisfied.

13. If you find that all the three elements of manslaughter were satisfied by the prosecution beyond a reasonable doubt, then you must find the accused guilty as charged. If you find that some of the element of manslaughter are not satisfied by the prosecution beyond a reasonable doubt, then you must find the accused not guilty as charged. It is a matter entirely for you.
14. You will notice in the information that the prosecution in their particulars of offence, began with the phrase, "...**JULIAN HEINRICH with other persons unknown, on 21st of June 2014 at Suva in the Central Division, assaulted SIONE TUFUI...**" The prosecution is alleging that the accused committed the above offence as part of a group. The fact that the prosecution had not identified the "other persons unknown", does not detract from their allegation that, the accused committed the offence as part of a group. In other words, to make the accused jointly liable with the others, the prosecution is relying on the concept of "joint enterprise".
15. "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 considering the accused's case, you will have to ask yourselves the following questions. Did the accused with the others, form a common intention, to violently assault Sione Tufui? If so, did each of them acted together in violently assaulting Sione Tufui? When Sione Tufui was violently assaulted by the group on 21 June 2014, and when he died later, was his death a probable consequence of the violent assault on him? In answering the above questions, you will have to examine and consider the whole evidence called in the trial.

To form a common intention in a particular situation could happen by conduct at the spur of the moment, without the formalities of an agreement. It could be by a wink or nod or a common understanding that someone had to be assaulted because of perceived past transgression. If your answer to the above questions for the accused was yes, and you are sure that the elements of the offence as described in paragraph 9 to 12 are satisfied, the accused was guilty as charged. If it was otherwise, he was not guilty as charged. It is a matter, entirely for you.

F. THE PROSECUTION'S CASE

16. The prosecution's case were as follows. On 21 June 2014, the accused was 19 years old and he was a Form 5 student at Ba Provincial School. He was from Nauru and came to Fiji in 2011 to do his Secondary schooling. He attended Form 3, 4 and 5 at Saint John College between 2011 and 2013. In 2014, he repeated Form 5 at Ba Provincial School. He was staying with a relative at Drasa Avenue, Lautoka, at the time. Sione Tufui, the deceased, was a Tongan national. At the time, he was studying at the University of the South Pacific.
17. According to the prosecution, the accused and two of his friends decided to come to Suva to watch a game between Fiji and Samoa on 21 June 2014 at the ANZ stadium. They left Lautoka in a minibus for Suva at about 6.30pm on 20 June 2014, a Friday. They reached Suva at about 11.30 pm. They checked into a room at Tropic Tower Hotel. Later they decided to go to the Dragons Nightclub. They took a taxi to the Nightclub and arrived there at 12.00 am midnight. According to the prosecution, the nightclub was crowded at the time. Two tables near the bar were occupied by Nauruan patrons. The accused and his friends bought a carton of Fiji Gold beer and joined their Nauruan friends.
18. According to the prosecution, some Tongan and Solomon Island patrons occupied a table each next to the stage. According to the prosecution, the accused stood up to dance at the dance floor. He suddenly felt an empty beer bottle being struck on the right side of his neck. He looked to where the beer bottle came from, and saw two Tongans standing there. One of them was Sione, the deceased. He later went back to his Nauruan friends. He did not report the same to his friends. Jamason, a friend of the accused, saw the injuries on the accused's right neck and questioned him on the same. The accused told him what occurred. Jamason went to confront the Tongan on the same, and he was also struck with a broken beer bottle on the right neck. Jamason was also injured. A fight then started between the Nauruan and Tongan boys.

According to the prosecution, Sione was punching the accused, and the two groups were throwing punches against each other.

19. According to the prosecution, the Dragon Nightclub bouncers took the Tongans and the Nauruans out of the nightclub. They continued to fight outside the nightclub. According to the prosecution, about 5 to 12 Nauruan boys were attacking Sione. They repeatedly punched his face and head. He fell down on the ground and they repeatedly kicked and stomped on him. According to the prosecution, the accused joined the group by repeatedly punching Sione in the face and head. He also repeatedly kicked Sione in the head. According to Sione's post mortem report, he died from severe head and brain injuries on the same night, as a result of the above repeated assaults on him.
20. The matter was reported to police. An investigation was carried out. The accused was interviewed by police under caution. He admitted he was part of the group that assaulted the deceased on 21 June 2014. He was later charged for the manslaughter of the deceased. 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

21. On 28 February 2017, 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 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 chose not to give evidence personally, but called two witnesses. That was his right.
22. He chose not to give sworn evidence. That was his right, and nothing negative whatsoever should be imputed to him for choosing this stance. He is entitled to remain silent. The burden of proof is not on him. There is no burden on him to prove his innocence. The burden to prove his guilt beyond reasonable doubt still remains with the prosecution, from the start to the end of the trial. He called two witnesses to challenge the state's police identification parade, concerning Finau Leone's (PW4) evidence. We will discuss their evidence later, when we analyse the evidence.

23. However, all is not lost for you on the accused's position in this case. In his closing submission, defence counsel submitted that, the accused had already given his version of events, when he gave his caution interview statements to police, when he was interviewed from 21 to 25 June 2014. The caution interview statement was tendered in evidence as Prosecution Exhibit No. 3. You must read and consider these statements carefully. According to the defence, the accused's caution interview statement speaks for itself.
24. The crux of the defence's case appears to be that Sione was already dead when the accused came to assault him. According to the defence, the other Nauruan boys who jointly assaulted Sione, had already killed him, before the accused assaulted him. They argued that, as a result, it could not be said that, the accused punches caused Sione's death, because he was already dead. According to them, the accused's conduct (ie. his punches) did not cause Sione's death, and thus the second element of manslaughter, as described in paragraph 9(b) hereof, had not been proven by the prosecution beyond a reasonable doubt. Because of the above, the defence asks 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:

25. 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 analysing the evidence, we will first discuss the "Agreed Facts" and its significance. Then we will discuss the State's case against the accused. In doing so, we will look at all the elements of the offence of "manslaughter", as described in paragraphs 9, 10, 11 and 12 hereof, and examine the question of whether or not the prosecution had proven those elements beyond a reasonable doubt, by providing the necessary evidence. Then we will consider the defence's case and the need to look at all the evidence.

(b) The Agreed Facts:

26. An "Agreed Facts", dated 28 February 2017, was submitted by the parties. A copy of the same is with you. Please, read it carefully. The "Agreed Facts" had 9 paragraphs of facts. These facts are not disputed by the parties, and you may treat the same as established facts, and that

the prosecution had proven those facts beyond a reasonable doubt. The significance of the "Agreed Facts" were that the parties do not dispute that Sione Tufui died as a result of a fight between some Tongan and Nauruan young men at the Dragon Nightclub in the early hours of 21 June 2014. As a result of the fight, the accused was arrested by police and was detained by them from 21 to 26 June 2014. From 21 to 25 June 2014, the police interviewed the accused at Totogo Police Station. On 25 June 2014, the police called 9 Nauruan Volunteers and conducted a police identification parade at Totogo Police Station, with the accused standing in with the volunteers. A post mortem examination of Sione Tufui was carried out by Doctor James Kalougivaki, at the CWM Hospital mortuary. The parties' above "Agreed Facts", in a sense, sets an introductory scene of this case, and prepares you for the multitude of evidence, which you will have to accept and/or reject, when you later deliberate on the matter.

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

27. To find the accused guilty as charged, the State will have to prove beyond a reasonable doubt all the elements of "manslaughter", as described in paragraphs 9(a), 9(b) and 9(c) hereof.

(i) The First Element: The Accused Engages in Conduct [Paragraph 9(a) and 10 hereof]:

28. In their closing submission, on this issue, the state's position was that "the accused engaged in a conduct with others" in causing the deceased's death. According to the State, the conduct involved "beating the accused to death". By "beating", the State said, it involved "the punching, kicking and stomping" of Sione repeatedly by the group until he died. According to the State, the accused had two choices that night. He saw the Nauruan boys beating the deceased repeatedly. He saw that Sione was helpless. According to the State, his first choice was to walk away. His second choice, was to join the others and beat Sione severely. According to the State, the accused choose the second option, and thus must be held accountable for it.
29. What evidence does the State rely upon to support their above position? First, you will have to look at the 9 paragraphs of facts in the "Agreed Facts", dated 28 February 2017, especially paragraphs 1, 2 and 3. It was accepted by the parties that, "in the early hours of 21st June 2014, there was a fight at the Dragon Nightclub in Suva between some Tongan and Nauruan young men. The fight started inside the Nightclub and ended at the foot path outside. A Tongan young man died after that fight".

30. Second, you will have to examine the evidence of Waqavesi Rokotuinasau (PW1), Eremasi Nukusorowaqa (PW3) and Ravuama Vakaturaganiya (PW2). PW1, PW2 and PW3 were at the crime scene at the material time and were observing the fight between the Tongan and Nauruan young men. PW1 and PW3 were working as bouncers at the Dragon Nightclub, while PW2 was the security guarding the Home Finance Company's front glass wall and door. According to PW1, on 21 June 2014 at about 3am, he was at the front doorway of the Dragon Nightclub. He was suddenly called to the top floor. He went there and saw Sione punching the accused. He took Sione out of the Nightclub. He later returned and took all the Tongan boys out of the Nightclub. He said, as he was coming up the steps, he saw the Nauruan boys going down the stairs and out of the Nightclub. PW1 said, he followed them outside the club. PW1 said, he saw Sione lying down the road near the pavement between the Home Finance and Nightclub door. PW1 said, he saw 5 Nauruan boys repeatedly punched Sione on the left shoulder and left cheek when he was lying down. He said, they were punching him for about 2 minutes.
31. PW2 next gave evidence. He said, on 21 June 2014, at 3am, he was guarding the Home Finance Company's glass wall and door. He said, he was standing between Home Finance Company door and the Nightclub door. He said, he saw the Nightclub bouncers taking the Nauruan and Tongan boys out of the Nightclub. He said, he saw them fighting in front of the Nightclub door. They were 5 footsteps away. He said, he saw about 12 Nauruan boys repeatedly punching one Tongan boy. He said, the Tongan boy fell to the ground. He said, he saw the Nauruan boys repeatedly kicked and stomped the Tongan boy on the chest and face. The Tongan boy was unconscious and his face was black and bleeding. He said, the fight went on for about 30 minutes. He said, a vehicle came and the Tongan boy was taken in the same.
32. PW3 next gave evidence. PW3 said, on 21 June 2014, at about 3am, he assisted PW1 take Nauruan and Tongan boys out of the Nightclub. PW3 said, the boys fought each other outside the Nightclub. PW3 said, he later saw a Tongan boy lying in front of Home Finance Company. He said, he saw some Nauruan boys repeatedly punching the Tongan boy on the face for about 3 minutes. He said, the Nauruan boys were previously drinking in the Nightclub. PW3 said, a police vehicle later arrived.

33. Thirdly, you will have to look at the accused's police caution interview statements, which was tendered in evidence as Prosecution Exhibit 3. DC 3427 Aminiasi Bola (PW6) caution interviewed the accused on 21, 22, 23, 24 and 25 June 2014 at the crime office at Totogo Police Station. He asked the accused 139 questions and the accused gave 139 answers. PW6 said he gave the accused his right to counsel and his other rights. He was given the standard rest and meal breaks. He was also formally cautioned on many occasions. In his caution interview statements, the accused indicated his position on the case. From questions and answers 22 to 25, he gave his background. From questions and answers 26 to 39, he stated the reasons for them coming to Suva and their trip to the Dragon Nightclub. From questions and answers 40 to 67, he described what happened in the Nightclub, wherein he was stabbed in the Nightclub allegedly by Sione. From questions and answers 68 to 77, 82 to 87, 92 to 97 and 100 to 105, he described the fighting between the Nauruans and Tongans and his role in the incident.
34. On the accused's role in the incident, it is particularly interesting to consider questions and answers 74, 75, 77, 84, 85, 86, 92, 93, 101 to 104. The accused admitted above that when he came out of the Nightclub he saw some Nauruan boys punching Sione. He said, in question and answer 77 that he joined them punch Sione repeatedly with both hands. He said, Sione was lying down on the road. In question and answer 86, he said he punched Sione because he wanted to take revenge on him for stabbing him in the Nightclub. It would appear that, on his own caution interview statements, the accused admitted he joined the other Nauruan boys beat Sione to death. He wanted to take revenge for what Sione previously did to him. According to the State, because of the above, the accused had engaged in a conduct with others to beat Sione to death.
35. You will note that the defence did not challenge DC 3427 Aminiasi Bola (PW6) when he tendered the accused's caution interview statements into evidence as Prosecution Exhibit No. 3. In his statements, the accused admitted he made his caution interview statements voluntarily and the same were the truth. In their closing submission, the defence said, the accused did not give sworn evidence because he did not need to. They said, the accused's version of events were already contained in his police caution interview statements. As a matter of law, I direct you that, because of the above, the defence admitted that the accused made his police caution interview statements voluntarily and they were the truth.

36. Lastly, you will have to consider Finau Leone's (PW4) evidence. PW4 said, he was with Sione at the material time. Both were students of the University of the South Pacific, and had come out for the night to enjoy themselves. PW4 confirmed there was a fight between Nauruans and Tongans inside the Dragons Nightclub. From his point of view, the Nauruans were attacking them inside the Nightclub and they had to fight back. PW4 said, the bouncers took them out of the Nightclub. PW4 said, when coming down the stairs, some Nauruan boys were waiting for them outside. He said, the Nauruans inside the club joined the Nauruans outside the club and attacked them. PW4 said, they repeatedly kicked and punched them. PW4 said, he later saw Sione lying on the footpath. He was 10 footsteps away. The street lights lighted the area up. PW4 said, he saw the Nauruan boys repeatedly punching and kicking Sione. He rushed over to cover Sione up by lying on him.
37. PW4 said, they continued to repeatedly kicked and punched them. PW4 said, he saw the accused repeatedly punching and kicking Sione, while he was lying down. He said, there was no impediment in the way when he saw the accused. PW4 said, he observed him for 2 minutes. PW4 said, a special reason for remembering the accused's face, was that he was standing there punching and kicking Sione, when he came to cover him up. PW4 said, he later saw the accused at CWM Hospital. He said, he later identified him at a police identification parade at Totogo Police Station on 25 June 2014. Note that the accused, in questions and answers 114 to 129 of Prosecution Exhibit No. 3 confirmed the police identification parade and confirmed, in questions and answers 119 and 120 that a Tongan boy identified him at the parade.
38. In considering PW4's evidence, I must direct you as follows. First, whenever the case against the accused depends wholly or substantially on the correctness of one or more identification of the accused which the defence alleges to be mistaken, there is a special need for caution before convicting the accused in reliance on the correctness of the identifications, because an honest and convincing witness could be mistaken. Second, you must carefully examine the circumstances in which the identification were 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? If so, how often? Are there any special reason for remembering the accused's face? Was there any police identification parade? Thirdly, are there any specific weaknesses in the identification evidence? Your

answers to the above questions will determine the quality of the identification evidence. If it's of a high quality, you may rely on it. If it's otherwise, you should reject it.

39. The defence called Sam Bruce Akibwib (DW1) and Damasus Ika (DW2). Both DW1 and DW2 volunteered to be part of the line of Nauruan men in the police identification parade held at Totogo Police Station on 25 June 2014 for the accused's case. They described how the police identification parade were held and the accused stood among them for the identification parade. They said a Tongan man was called to identify the suspect, but he identified the wrong man. Note that this is different with the accused's caution interview statement, wherein in questions and answers 119 and 120, the accused said the Tongan boy identified him at the parade. What inferences of fact that you make from DW1 and DW2's evidence is a matter entirely for you.
40. When looking at all the above evidence, it would appear that the State had provided enough evidence to make you sure that "the accused engaged in a conduct with others", that is, repeatedly assaulting Sione by kicking, punching and stomping him, at the material time. Nevertheless, your decision is entirely a matter for you.

(ii) The Second Element: The Conduct Causes the Death of the Deceased
[Paragraphs 9(b) and 11 hereof]:

41. According to the prosecution, "the accused's conduct with others" mentioned in paragraphs 28 to 40 hereof, caused the death of Sione Tufui. On this issue, they relied on the evidence of Doctor James Kalougivaki (PW5). PW5 said he is a doctor and a forensic pathologist by profession. He had conducted more than 800 post mortem examination. PW5 said, on 23 June 2014, he conducted a post mortem examination on Sione Tufui at the CWM Hospital Mortuary. He tendered in evidence Sione Tufui's post mortem examination report as Prosecution Exhibit No. 2. In the report, he described in detail the injuries Sione suffered externally and internally. PW5 said, Sione's face was swollen generally and both eyes were black. He said, both eyes and eye balls were blood shot. The fluid extracted from his eyes had blood stain. The nose and lips were swollen.
42. There were a tear in the lower lip. There were bruises on his left collar bone area and right wrist. PW5 said, Sione suffered massive brain and head injuries. His lungs were severely injured. His pancreas, spleen and liver were also injured. His kidneys were also injured.

According to PW5, the cause of Sione's death was "severe traumatic head injuries due to blunt force trauma by the alleged assaults and the presence of multiple traumatic injuries and alcohol intoxication". PW5 said, the injuries suffered could result from multiple punching, kicking and stomping of the deceased. According to PW5, Sione died on 21 June 2014 at about 3.45 am. When you link the above findings to "the accused's conduct with others", as discussed in paragraphs 28 to 48 hereof, it would appear that the above conduct caused Sione's death. However, it is entirely a matter for you.

(iii) The Third Element: The Accused was Reckless As to A Risk that the Conduct will cause Serious Harm to the Deceased [Paragraphs 9(c) and 12 hereof]:

43. It was the State's case that when the accused, with others, assaulted the deceased, he was reckless as to a risk that the assault will cause serious harm to Sione. A person is reckless with respect to a result if – (a) he is aware of a substantial risk that the result will occur; and (b) having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk is unjustifiable is one of fact for you. In discussing this issue, you will have to take into consideration the evidence we have previously discussed. The question becomes: Was the accused reckless as to a risk that if he continued to assault Sione when he was lying unconscious on the road, he will cause serious harm to the deceased? Was he aware of a substantial risk that the deceased would suffer serious harm, as a result of his conduct? Having regard to the circumstances known to him at the time, was it justifiable to take the risk?
44. You will have to answer all the above questions, while considering the evidence we have previously discussed. The evidence appear to show that the accused saw a group of Nauruan boys repeatedly punching Sione Tufui outside the Dragon Nightclub. The evidence showed that Sione Tufui fell unconscious on the road as a result of the assaults by the Nauruan boys. The evidence showed that he joined the Nauru boys and continued to assault Sione while he was unconscious. The evidence showed he wanted to extract revenge for what he did to him in the Nightclub. Was he aware of a substantial risk that he will cause serious harm to Sione, if he continued to assault him? Having regard to the circumstances known to him, was it justifiable to take the risk? The accused knew the accused was unconscious. Sione was no longer a threat to him.

45. He was motionless on the ground. Was there any need to throw further punches and kicks at a person who was already unconscious? On the evidence, it would appear that the accused was aware of a substantial risk that he will cause serious harm to Sione if he continued to assault him. On the evidence, it would appear that, he knew that it was unnecessary to further assault Sione because he was unconscious and it was unjustifiable for him to further assault Sione. On the evidence, he was driven by revenge and it was unjustifiable for him to further assault Sione. It would appear that the prosecution had satisfied the third element of manslaughter. However, it is a matter entirely for you.

(d) The Defence's Case:

46. The defence, in their closing submission, submitted that the accused was not guilty of the manslaughter of Sione, because, according to them, the accused's assault on Sione did not cause his death. They are arguing that the prosecution had failed to prove beyond reasonable doubt, the second element of manslaughter, as discussed in paragraph 9(b) and 11 hereof. They argued that the other Nauruan boys, who initially assaulted Sione, were the ones, whose conduct caused Sione's death. They argued that when the accused assaulted Sione, he was already unconscious on the ground and motionless. His assaults did not cause Sione's death, because, according to them, he was already dead. This argument faces two possible problems. First, the post mortem report of Sione showed he died as a result of serious brain and head injuries resulting from blunt force trauma as a result of multiple assaults from multiple assailants. One would argue that this evidence may include the accused. Secondly, if you apply the principle of "joint enterprise" as discussed in paragraphs 14 and 15 hereof, it was highly likely it would rope in the accused. However, whatever you decide on this issue is a matter entirely for you.

(e) The Need to Consider All the Evidence:

47. Seven witnesses gave evidence for the prosecution and two witnesses for the defence. Three Exhibits were tendered, that is, Prosecution Exhibit No. 1 – Doctor James Kalougivaki's curriculum vitae; Prosecution Exhibit No. 2 – Sione Tufui's post mortem report and Prosecution Exhibit No. 3 – the accused's caution interview statements. You must consider all the evidence together in finding out whether or not the accused is guilty as charged.

I. **SUMMARY**

48. 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.
49. Your possible opinions are as follows:
(i) Manslaughter - Guilty or Not Guilty
50. 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 : S. Valenitabua, Barrister and Solicitor, Fiji and Nauru.