

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 220 of 2016

STATE

V

VENKAT RAJU

Counsel : Mr. T. Tuenuku for the State.
: Ms. V. Diroiroy with Ms. K. Vulimainadave
[LAC] for the Accused.

Dates of Hearing : 14, 15, 16 and 17 October, 2019
Closing Speeches : 21 October, 2019
Date of Summing Up : 21 October, 2019

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to

reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an 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 facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel 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 Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests 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 or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
10. You must decide the facts without prejudice or sympathy to either the accused or the deceased. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. At this point in time I must give each one of you a word of caution. This caution should be borne in mind right throughout until you reach your own opinion. This case involves a loss of life this certainly shocks the conscience and feelings of our hearts.
12. It is quite natural given the inherent compassion and sympathy with which human beings are blessed. You may perhaps have your own personal, cultural, spiritual and moral thoughts about such an incident. You must not, however, be swayed by such emotions and/or emotive thinking. You act as judges of facts in this case not to decide on moral or spiritual culpability of anyone but to decide on legal culpability as set down by law, to which every one of us is subject to in the present day society that we live in.

13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

14. The accused is charged with the following offence: (a copy of the information is with you).

Statement of Offence

MURDER: contrary to section 237 of the Crimes Act No. 44 of 2009.

Particulars of Offence

VENKAT RAJU, on the 19th of October, 2016 at Vatulaulau, Ba in the Western Division murdered **ROSHNI LATA SHARMA**.

15. In order to prove the offence of murder the prosecution must prove beyond reasonable doubt the following:
- (a) the accused
 - (b) engaged in a conduct; and
 - (c) the conduct caused the death of the deceased; and
 - (d) the accused intended to cause the death ; or
 - (e) was reckless as to causing the death of the deceased by his conduct. The accused is reckless with respect to causing the death of the deceased if;
 - (i) he was aware of a substantial risk that death will occur due to his conduct; and
 - (ii) having regard to the circumstances known to him, it was unjustifiable for him to take that risk.

16. What you will have to consider with regard to this particular state of mind is whether the accused was aware of a substantial risk that death will occur due to his conduct and having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
17. The first element is concerned with the identity of the person who committed the offence. This element of the offence is not in dispute the defence agrees that it was the accused and no one else. This element is therefore proven beyond reasonable doubt.
18. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is a voluntary act by the accused or is a result of the will of the accused. Like the first element the defence agrees that it was the accused who had engaged in a conduct. This element of the offence is also proven beyond reasonable doubt.
19. The third element is the conduct of the accused that caused the death of the deceased. Conduct means an act done by the accused it can be anything such as punching, kicking, stomping, stabbing, strangling etc. The law requires a link between the conduct of the accused and death of the deceased. You must be sure that the conduct of the accused caused the death of the deceased.
20. In other words whether the hitting of the deceased on her face with the pinch bar that was tendered in evidence as prosecution exhibit no.1 caused the death of the deceased. You should remember that the act of the accused need not be the sole cause but the act of the accused should substantially contribute to the death of the deceased.

21. Like the other two elements the defence does not dispute this element of the offence as well so you are to accept this element of the offence as proven beyond reasonable doubt as well.
22. With regards to the final two elements of the offence which concerns the state of mind of the accused the prosecution must prove beyond reasonable doubt either that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased by his conduct.
23. The prosecution has to prove only one of the two limbs of this element. In this case the prosecution is alleging that the accused intended to cause the death of the deceased.
24. It is for the prosecution to prove beyond reasonable doubt that the accused was engaged in a conduct and the conduct caused the death of the deceased and the accused intended to cause the death of the deceased by his conduct. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.
25. The prosecution says the accused struck the deceased about five to six times on her face with the pinch bar when she was sleeping in her sitting room.
26. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of murder.
27. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of murder.

28. If you accept that the accused did not intend to cause the death of the deceased or you are not sure whether he intended to cause the death of the deceased then consider the offence of manslaughter which is a lesser charge than murder.
29. Manslaughter has the first two elements of murder, that is to say that the accused engages in a conduct which caused the death of the deceased and the accused intends that conduct will cause serious harm to the deceased.
30. Manslaughter is the killing of someone by unlawful conduct if you are satisfied that the accused was engaged in a conduct which caused the death of the deceased and the accused intended that conduct will cause serious harm to the deceased then you must find the accused guilty of manslaughter.
31. In this case there is evidence that the accused had hit the face of the deceased about five to six times when she was sleeping in the sitting room of her house.
32. Whether the accused intended to cause the death of the deceased by his conduct or intended to cause serious harm to the deceased by his conduct is a matter entirely for you to decide on the basis of the facts and circumstances of the case.

ADMITTED FACTS

33. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.

34. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
35. The admitted facts were as follows:
1. *The deceased in this matter was ROSHNI LATA SHARMA (“the deceased”).*
 2. *The accused in this matter is VENKAT RAJU also known as Ram Chandar.*
 3. *The deceased had 2 daughters namely MEENAL MISHADRI DEVI (“the elder daughter”) and SHEENAL SHADRIKA DEVI (“the younger daughter”) and a grand – daughter namely MUNI DISHA DARSHANI (“the granddaughter”).*
 4. *The accused has a daughter namely JOTIKA MALA.*
 5. *In October, 2016, the deceased resided at Vatulaulau, Ba in her house (“the house”) with her younger daughter, the granddaughter, and the accused.*
 6. *In October, 2016, the deceased owned a Samsung brand S3 Touch Screen mobile phone.*
 7. *In October, 2016 the defendant was a carpenter and he and the deceased were in a de facto relationship.*
 8. *The accused was taken into police custody as the suspect by PC Mosese Maraivalu, PC Setareki Rokotuivuna, PC Sekove Vuniwaqa and SC Eroni Serukalou.*
 9. *The accused was caution interviewed by DC Kamal Goundar in the Hindustani language on 24/10/2016.*
 10. *Police Officer Adi Krishna was the witnessing officer for the accused’s caution interview.*

11. *The accused was formally charged for 1 count of 'Attempted Murder' in Hindustani language on 25/10/2016 by Cpl 3062 Irshad Ali.*
 12. *Police Officer Cpl Ajit Singh was the witnessing officer for the accused's charge interview.*
36. I will now remind you of the prosecution and defence cases. In doing so it would not be practical of me to go through all the evidence of every witness in detail. It was a short trial and I am sure things are still fresh in your minds.
37. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

38. The prosecution called eight (8) witnesses to prove the charge against the accused.
39. The first prosecution witness Meenal Devi, the daughter of the deceased informed the court that she knows the accused who was hired by her mother to work as a carpenter for the maintenance of their house which was damaged by Cyclone Winston.
40. On 19th October, 2016 the witness who was residing at Natabua, Lautoka received a message that her mother was admitted at Ba Mission Hospital. When she went to Lautoka Viti Mini Bus Stand to go to Ba she received information that her mother was being transferred to Lautoka Hospital.

41. The witness was at the Lautoka Hospital Emergency Department when her mother was brought in an ambulance from Ba Mission Hospital. She saw her mother's forehead was bandaged with blood on it and both her cheeks were swollen. Upon seeing her mother's condition the witness started to cry. When she asked her sister Sheenal what had happened to their mother, the witness was told that the accused had assaulted their mother and left their house.
42. On the same day at the Intensive Care Unit the witness had the opportunity to speak to her mother. When she held her mother's hand, her mother recognized her and did some actions with her hands indicating that she was in pain. At this time the witness asked her mother, who had done this to her.
43. The response received was that it was Chandar the accused and the final words her mother said was "*has Chandar been arrested or not.*" After two weeks her mother passed away at the Lautoka Hospital.
44. In cross examination the witness stated that she was not aware that her mother and the accused had begun a relationship in 2013.
45. The second witness Sheenal Devi (the sister of PW1) informed the court that the deceased was her mother and she was living with her mother and her niece at Vatulaulau, Ba. The accused had come to build their house after Cyclone Winston in July, 2016 and was staying at their house. On 19th October, 2016 at around 2am, the witness heard her mother call her name twice. When she went into the sitting room where her mother was sleeping she was asked by her mother to switch on the light.
46. At this time, she saw her mother was covered in blood particularly her breast, face, mattress and blanket. The witness was shocked to

see this, she asked her mother what had happened. The response received was somebody had assaulted her, when the witness asked her mother again she was told it was the accused. At this time her mother asked the witness to check if the accused had taken with him his bag.

47. When the witness went into the bedroom which was occupied by the accused, she did not see the bag of the accused. Later the witness with the help of her neighbours and relatives took her mother to the hospital. At the hospital two police officers came and asked the witness what had happened to her mother.
48. The witness took the police officers to where her mother was. Her mother told the police officers in her presence that the accused had hit her. The witness also recalled when she had entered the sitting room where her mother was she had seen a pinch bar lying beside her mother's pillow. Furthermore, the witness was a student at the Fiji National University Natabua Campus in the year 2016 and one week before the incident her mother had called her to come home and tell the accused to leave since he was forcing her to be in a relationship with him. When she went home she had confronted the accused and had told him to leave, the accused informed her that he will leave after three days.
49. In cross examination the witness stated on Sunday before the alleged incident her mother had told the accused to leave her house. According to the witness on the night of 18th October at around 10 to 11pm, there was no argument between her mother and the accused.
50. The witness denied that on the night of the 18th her mother had repeatedly sworn at the accused and had used vulgar language in the Hindi language such as "*maichod*" meaning mother fucker, "*Batiara*"

meaning he was not man enough to keep a wife, “*dogla*” meaning his mother and father had lots of sexual partners and also the deceased had said in Hindi “*jao apan larki ke chodo*” meaning go and have sexual intercourse with your daughter and “*gandu*” meaning not man enough when telling the accused to leave her house.

51. The witness also disagreed that her mother had also said “*bastard*” to the accused. When the witness was referred to her police statement dated 24th October, 2016, the witness agreed it was not in her police statement that one week before the alleged incident her mother had called her and asked her to come and tell the accused to leave their house. According to the witness the accused and her mother were not talking to each other from the previous Sunday till the incident.
52. In re-examination the witness explained she does not know why it was not in her police statement that her mother had called her to tell the accused to leave their house when the accused had wanted to be in a relationship with her mother.
53. The third prosecution witness Mereseini Naola informed the court that she was a Registered Nurse and in the year 2016, she was based at the Ba Mission Hospital. On 19th October the witness was at work when she received an emergency case, the deceased was brought to the hospital she was bleeding from her head, eye brows and below her nose.
54. When the witness approached the patient, she tested the patient’s level of consciousness and proceeded to stop the bleeding thereafter the doctor was called. According to the witness the injuries she saw on the deceased were really bad and serious. Due to the seriousness of the injury, the deceased was transferred to the Lautoka Hospital.

55. In cross examination the witness stated that she was not the only nurse on duty that early morning there were other nurses on duty as well. According to the witness before calling the doctor she attended to whatever was necessary such as applying pressure on the injuries to stop the bleeding.
56. The fourth prosecution witness Laisenia Vuniivi informed the court that he was a Registered Nurse and in the year 2016 he was stationed at the Intensive Care Unit at the Lautoka Hospital. On 19th October, 2016 he received the patient Roshni Lata who was transferred from the Emergency Department.
57. The witness was able to ask the patient some questions which the patient had answered. The patient had told him that she lived with her daughter and her granddaughter and that it was her carpenter who had done this to her because he wanted to stay with her and when she refused, he used a pinch bar and struck her two times on her upper lips below her nose.
58. The witness had observed the patient had laceration on the left side of her head, her left leg was swollen and bruised and both her eyes were swollen and closed.
59. In cross examination the witness stated the dressing on the patient was done on the head, forehead and on the upper lip where a deep wound was noticed.
60. The fifth witness was DC 3016 Kamal Goundar who had interviewed the accused at Ba Police Station and also he had in his possession the pinch bar which was uplifted by the initial investigating officer from the crime scene and handed over to the witness. The red

coloured pinch bar was marked and tendered as prosecution exhibit no. 1.

61. During the caution interview of the accused the witness had shown the pinch bar to the accused who had confirmed it was his and he had used it to strike the deceased.
62. The accused was caution interviewed by the witness on 24th October, 2016 before the commencement of the interview the accused was normal and cooperative. Before the interview commenced the accused did not complain about any ill treatment by the other police officers. The interview was conducted in the Hindi language which had commenced at about 1.50pm. The accused, the witness and the witnessing officer had signed the interview.
63. The original caution interview of the accused in the Hindi language dated 24th October, 2016 was marked and tendered as prosecution exhibit no. 2. The witness also translated the Hindi version into English which was marked and tendered as prosecution exhibit no. 3.
64. The witness stated that the accused was not assaulted, threatened, induced or forced to sign the caution interview or to give the answers. According to the witness the accused also did not make any complaints about any of the arresting officers or the witnessing officer before, during or after the caution interview.
65. In cross examination the witness stated that he was not aware that the accused was beaten and assaulted by the arresting officers. The witness denied that the answers to questions 54, 55, 56, 58, 88, 89, and 92 were fabricated. When it was suggested that the accused had told the witness that he had only struck the accused once, the

witness denied this and said that whatever the accused had told him was recorded.

CAUTION INTERVIEW

Ladies and Gentleman Assessors

66. The answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
67. During the cross examination of the Police Officers the counsel for the accused had asked questions of these officers suggesting when the accused was arrested he was threatened and assaulted by police officers and he was also not told of his rights at the time of his arrest. This means counsel was putting to these witnesses that the admissions made by the accused in his caution interview were not voluntarily made by him and therefore you should disregard those admissions.
68. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made the admissions in his caution interview then you should disregard those admissions. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
69. The sixth witness PC 4707 Mosese Maraivalu informed the court that he was part of the arresting team that had arrested the accused on

23rd October, 2016. The witness was accompanied by Constables Setareki, Sekove and Eroni they had gone to Yaladro, Tavua upon receiving information and had arrested the accused. It was Constable Sekove who had approached the accused and arrested him.

70. According to the witness he heard Constable Sekove explain to the accused his rights at the time he was arrested. The accused was handcuffed and escorted to the waiting police vehicle, on the way to Ba Police Station the accused did not complain about any ill treatment, false promises, assault or threat made to him.
71. On the way to the Ba Police Station the accused requested if he could be taken to Vatulaulau to pick his clothes this was done. When the accused was arrested he was calm and cooperative.
72. The witness denied assaulting the accused with Constable Eroni and two (2) other police officers on his head and hand. The witness also denied poking the stomach and chest of the accused with his fingers and pulling his hair. According to the witness at Vatulaulau the accused was not subjected to any swears and verbal abuse by one Anand Sami. The witness did not see Constable Eroni assault the accused and take a big stick and press the accused's right thigh with the stick for about 10 to 15 minutes. Constable Eroni also did not throw the accused out of the police vehicle at the Ba Police Station.
73. The witness denied the accused had made requests to be taken to the hospital which was not allowed.
74. In cross examination, the witness was referred to his police statement dated 8th November, 2016 he agreed in his police statement he had stated that he had arrested the accused, however,

he confirmed it was Constable Sekove who had arrested the accused and not him.

75. The witness agreed it was also not in his police statement that Constable Sekove had approached, spoken to and arrested the accused. He also stated that he had forgotten to put it in his police statement that Constable Sekove had given the accused his rights at the time of the arrest.
76. The witness maintained that although he did not include in his police statement that Constable Sekove had given the accused his rights, he confirmed that Constable Sekove had done so.

Ladies and Gentleman Assessors

77. The learned counsel for the accused in this regard was cross examining PW2 Sheenal Devi and the PW6 PC 4707 Mosese Maraivalu about some inconsistencies in the statement they gave to the police after the incident when facts were fresh in their mind with their evidence in court. I will now explain to you the purpose of considering the previously made statements of these two witnesses with their evidence given in court. You are allowed to take into consideration the inconsistencies in such a statement when you consider whether the witness is believable and credible as a witness. However, the police statement itself is not evidence of the truth of its contents.
78. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.

79. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witnesses.
80. The sixth witness also denied he and the other arresting officers had assaulted, allowed one Anand Sami to swear and verbally abuse the accused or throw the accused out of the police vehicle at Ba Police Station. Furthermore it was not true that the accused was denied his request to be taken to the hospital.
81. The seventh witness Eroni Serukalou informed the court that in 2016 he was a police officer based at the Ba Police Station. This witness basically confirmed what PC Mosese Maraivalu (PW6) had told the court he was the driver of the police vehicle that had gone to arrest the accused.
82. In cross examination the witness stated that at Yaladro, Tavua he was standing beside the police vehicle when PC Sekove had brought the accused to the vehicle. The witness denied hitting the accused on his head and face or slapping his face or pulling the accused's hair. The witness could not recall if there was one Anand Sami at the house of the deceased when they had gone to collect the clothes of the accused.
83. The witness denied from Vatulaulau he had driven the police vehicle to Vutuni and that he had stuck a big stick on the right thigh of the

accused and had pressed the stick very hard for about 10 to 15 minutes.

84. The final witness Dr. Praneel Kumar a Forensic Pathologist graduated with MBBS Degree in 2010 from the Fiji School of Medicine.
85. After completing his internship he worked for 1 year as a medical officer. Thereafter the witness joined Forensic Pathology and at the same time did a two year Post Graduate Diploma in Pathology from the Fiji National University.
86. On 2nd November, 2016 the witness had conducted the post mortem examination of the deceased Roshni Lata Sharma at the Lautoka Hospital Mortuary. The post mortem report of Roshni Lata Sharma dated 2nd November, 2016 was marked and tendered as prosecution exhibit no. 4.
87. The doctor explained the deceased had received blunt force trauma to her head which had resulted in cerebral edema which was the swelling of the brain. As a result it came into contact with the dura mater. The doctor explained the swelling of the brain can also be caused by fall from a height, motor vehicle accident as well.
88. Furthermore, the membrane covering the brain contained blood which meant there were two areas of subarachnoid hemorrhages seen on the left and the right side of the brain measuring 75mm x 45mm and 80mm x 40mm respectively. According to the doctor, any kind of blow to the head could cause subarachnoid hemorrhage which can also be by natural causes as well but in this case the injuries caused were due to trauma to the head of the deceased. The injuries were serious which led to the death of the deceased.

89. According to the doctor the cause of death was a result of blunt force trauma to the head of the deceased resulting in cerebral edema (brain swelling) and subarachnoid hemorrhage (bleeding of the brain).
90. In cross examination the doctor stated that it was high velocity impact that had the effect of causing hemorrhages and swelling in the brain. The doctor agreed it was the blunt force trauma that caused the brain to swell and internal bleeding in the brain which had led to the death of the patient.
91. When suggested that striking 5 to 6 times on the head with a pinch bar would have caused much greater injuries than seen by the doctor, the doctor disagreed and said much depended on the sort of contact the pinch bar had with the head of the patient even one good contact could do much more harm than 5 or 6 contacts.

Ladies and Gentleman Assessors

92. You have heard the evidence of Dr. Praneel Kumar who was called as an expert witness on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide you with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The Post Mortem Report of the deceased is before you and what the doctor said in his evidence as a whole is to assist you.
93. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the doctor. When coming to your own conclusions about this aspect of the case

you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

94. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
95. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

96. As you already know the accused Mr. Venkat Raju is not present in court. The law provides for an accused to be tried in his absence known as trial in absentia. Although the accused was not in court throughout the duration of the trial he is entitled to all the rights of an accused who is present in court that is a fair trial.
97. You are reminded not to take the absence of the accused from this trial to his disadvantage or against him or his non-attendance negatively.
98. On 14th October, 2019 the first day of the trial the information was read in court and a not guilty plea was entered for the accused in his absence.

99. At the end of the prosecution case, a case to answer was ruled which required the accused to open his defence although he was not present in court the defence counsel was. The accused was deemed to have exercised his right to remain silent and as you heard the defence counsel had informed the court that no witness will be called.
100. As mentioned earlier the burden to prove the guilt of the accused person beyond reasonable doubt remains with the prosecution. The absence of the accused is not an admission of guilt and adds nothing to the prosecution case it does not make this burden any lesser on the prosecution remember you are not to draw any negative inference against the accused because he is not here.
101. The accused denies committing the offence as alleged. According to the line of cross examination the defence takes the position that the accused and the complainant were in a defacto relationship and he never intended to kill the deceased. There was an argument between the deceased and the accused in which the deceased had sworn at the accused and used vulgar language against the accused, his parents and his daughter which was very insulting to him. Moreover, the accused had hit the deceased with the pinch bar once only.

Ladies and Gentleman Assessors

102. The defence raised by the accused that you need to consider is the defence of provocation. Provocation is not a complete defence but is a partial defence reducing what would otherwise be murder to the lesser offence of manslaughter. Since the prosecution must prove the accused's guilt, it is for the prosecution to make sure that this was

not a case of provocation and not for the accused to establish that it was.

103. This means before you can find the accused guilty of murder the prosecution must satisfy you beyond reasonable doubt that he was not 'provoked' to do what he did. 'Provocation' has a special meaning in this context which I will explain to you in a moment. If the prosecution satisfies you beyond reasonable doubt that the accused was not provoked to do what he did, he will be guilty of murder. If, on the other hand, you consider either that he was, or may have been, provoked, then the accused will be not guilty of murder, but guilty of the less serious offence of manslaughter. It is not for the accused to prove that he was provoked, it is for the prosecution to prove beyond reasonable doubt that he was not provoked.
105. How then do you decide whether the accused was, or may have been, provoked to do what he did? There are a number of questions you have to consider when deciding whether the accused was, or may have been, provoked to kill the deceased.
106. The first question has two parts to it. The first is did the deceased's conduct, that is the things she did or said, or both, provoke the accused, or may they have provoked him? If they did, or may have done, then you must consider the second issue, which is did the provocation cause the accused to suddenly and temporarily lose his self-control?
107. When considering whether the accused was provoked you must take the accused as you find him. For example, if the accused was disabled in some way, to call him a cripple might be very much more hurtful than it would be to someone who is not disabled.

108. You will also note that it is necessary that the accused must have been provoked to “suddenly and temporarily” lose his self-control. That is because the law only permits the defence of provocation where the accused is for the moment not the master of his mind. If he had time to think about what has provoked him, to reflect on how he is going to react, and to decide how he is going to react, then the essential element of the defence of provocation of a sudden and temporary loss of self-control does not exist.
109. When considering whether the accused’s loss of self-control was sudden and temporary you must consider the length of time which had passed since the actions or words of the deceased that are relied upon as provocation took place, and whether the accused had in fact regained his self-control before he killed the deceased.
110. If you are satisfied beyond reasonable doubt that the accused was not provoked, or if he was, or may have been provoked, that he had regained his self-control before he killed the deceased, then the accused cannot rely on provocation to reduce his crime to manslaughter, and you should find him guilty of murder, and that is the end of the matter.
111. If, however, you accept that the accused was, or may have been provoked, and that his loss of self-control was, or may have been, sudden and temporary, then you must go on to consider a further question, which is whether everything done and said by the deceased was, or may have been enough to make a reasonable person do what the accused did?
112. A “reasonable person” in this context means an ordinary person of the accused age and sex who is not exceptionally excitable or aggressive, but is possessed of such powers of self-control that

everyone is entitled to expect that people will exercise in community as it is today. In other words a reasonable person is a person of ordinary self-control.

113. You should bear in mind that community requires ordinary people to exercise reasonable control over their emotions and their tempers. Your views represent the views of the community as to what control over their emotions and tempers is to be expected today of people of ordinary self-control.
114. If you are satisfied beyond reasonable doubt that the provocation was not enough to make a reasonable person do what the accused did, then you should find him guilty of murder.
115. On the other hand if you consider that the provocation was, or may have been, enough to cause a reasonable person to do what the accused did, then you should find him not guilty of murder, but guilty of manslaughter.
116. This was the defence case.

ANALYSIS

117. The prosecution alleges that the accused had struck the deceased on her head with his pinch bar for about five or six times. The accused was living with the deceased as a defacto partner and he did not want to leave her house despite her requests to do so. The accused was also angry that the deceased had started to ignore him and spent more time on the Facebook. He heard the deceased talking with someone over the phone in an intimate manner which made him jealous and lose his temper so in the early hours of 19th October,

2016 when the deceased was sleeping he went and struck the deceased with his pinch bar.

118. The prosecution further says this anger of the accused was building up for some time that he had made up his mind to harm the deceased so he got his pinch bar and struck the deceased about five to six times on her head which resulted in the death of the deceased. The prosecution is asking you to consider the caution interview of the accused (prosecution exhibit no. 3) which was given voluntarily by the accused to the police during investigation. The prosecution says the deceased did not provoke the accused since she did not swear at the accused as per the evidence of Sheenal Devi who was present in the house at the time of the incident and as per the caution interview of the accused he had retaliated later after writing a letter to the deceased.
119. On the other hand the defence position is that the accused had no intention to kill the deceased. They were in a defacto relationship and the accused had only hit the deceased once with the pinch bar after he was provoked by the deceased who had sworn at and used vulgar language at the accused, his parents and his daughter which the accused who was 67 years of age could not tolerate and/or accept.
120. The accused was so angry that he suddenly and temporarily lost his self-control the defence further says that you should not believe the confession contained in his caution interview which was not voluntarily given by the accused since he was threatened and assaulted by the arresting police officers.
121. The defence says when the accused was arrested he was not given his Constitutional Right by the arresting officer and therefore you should disregard the accused confession completely. The defence is

also asking you disregard the answers to question 54, 55, 56, 58, 88, 89, and 92 since those answers were fabricated or made up by the police.

Ladies and Gentleman Assessors

122. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.
123. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.
124. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses give evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
125. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth

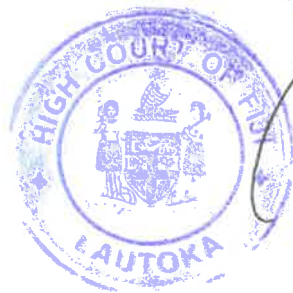
about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.

126. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with his or her previous statement or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
127. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
128. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
129. The accused is not required to prove his innocence he is presumed innocent until proven guilty.
130. In this case the accused is charged with one count of murder, however, you are to also consider the offence of manslaughter in reaching your opinions.
131. Your possible opinions are:-

1. **MURDER - ACCUSED - GUILTY OR NOT GUILTY.**
2. If you find the accused not guilty of murder then you are to consider whether the accused is guilty or not guilty of **MANSLAUGHTER.**
3. If you find the accused guilty of murder then you are not to consider the offence of manslaughter.

Ladies and Gentleman Assessors

149. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.
150. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka

21 October, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.