

IN THE HIGH COURT OF FIJI AT SUVA

CASE NO: HAC. 433 of 2018

[CRIMINAL JURISDICTION]

STATE

V

- 1. KELEPI DURI TAUTAUMACALA KOLINISAU**
- 2. SELEMA STEVEN DENNIS TIKOENABUREVERE**

Counsel : Mr. M. Vosawale for the State
Ms. B. Malimali for the 1st Accused
Mr. A. Naco for the 2nd Accused

Hearing on : 14 - 29 October 2019

Summing up on : 30 October 2019

SUMMING UP

Madam and gentleman assessors;

1. It is now my duty to sum up the case to you. Please remember that you should accept the directions on law that I will be giving you in this summing up and should apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless you agree with that opinion. You are judges of facts.
2. As I have told you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise

come to know anything about this case outside this court room, you must disregard that information. In my opening address, I have also directed you not to discuss about the case with anyone else but with each other only. I am sure you would have complied with the said directive. I gave you that directive because the three of you are the judges of facts in this case and this court requires your opinion and not anyone else's. It is the three of you who heard all the evidence and saw the how witnesses gave evidence. Therefore, in the event you have come across an opinion of anyone else through any means including social media and the internet, either accidentally or otherwise, you should totally disregard that opinion.

3. Evidence you should assess in this case is what the witnesses said from the witness box inside this court room, the admitted facts and the exhibits tendered. A few things you heard inside this court room are not evidence. This summing up is not evidence. Arguments raised by the lawyers for the prosecution and the defence during the proceedings, their questions and comments are not evidence. A suggestion made by a lawyer during the cross examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by lawyers in their addresses are not evidence. You may take into account those arguments and comments when you evaluate the evidence only if you agree with them.
4. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. In this case there were questions raised about not acquiring certain CCTV footage during the investigation. The prosecution is relying on the evidence of eye witnesses in this case. You should decide the guilt or the innocence of the accused based on the credibility and the reliability of that evidence adduced before this court. Therefore, you should not make any assumptions regarding the absence of any CCTV footage.

5. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or the deceased. No such emotion should influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behaviour when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide how much of it you believe. You may believe all, part or none of any witness' evidence.
7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts. Sometimes we honestly forget things or make mistakes when recalling past events.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies when you compare the evidence given by witnesses on the same issue. This is how you should deal with any inconsistency you may come across. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. In this regard, you may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next.

9. However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide.
10. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him/her to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you how you assess the evidence and what weight you give to a witness' testimony.
12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proven facts and reasonable inferences. However, you should bear in mind that the inference you draw should be the only reasonable inference to draw from the proved facts. If there is a reasonable inference to draw against the accused as well as one in his favour based on the same set of proved facts, then you should not draw the adverse inference.
13. In this case, there are certain facts which are agreed by the prosecution and each accused. You have been given copies of those admitted facts. You should consider those facts as proven beyond reasonable doubt.

14. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused is presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that an accused is guilty and an accused is not required to prove that he is innocent. The prosecution should prove the guilt of an accused beyond reasonable doubt in order for you to find him guilty. You must be sure of an accused person's guilt.
15. You are not required to decide every point the lawyers in this case have raised. You should only deal with the offence the accused is charged with and matters that will enable you to decide whether or not the charge has been proved.
16. Please remember that you will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not necessary.
17. Let us now look at the Information. The Director of Public Prosecutions has charged the accused for the following offence;

Statement of Offence

Murder: contrary to Section 237 of the Crimes Act, 2009.

Particulars of Offence

KELEPI KOLINISAU and SELEMA TIKOINABUREVERE on the 11th day of October 2018, at Suva in the Central Division, murdered **JOSEUA LALAUVAKI also known as JOSUA LALAUVAKI.**

18. Even though the two accused are jointly charged in this case, you should remember to consider the evidence against each accused separately. In the event you find one accused guilty, you must not simply assume that the other accused must be guilty as well. It is necessary that you consider whether the prosecution has proved the offence beyond reasonable doubt against each accused separately.

19. In order to prove that an accused is guilty of the above offence, the prosecution should prove all the elements of the offence against that accused beyond reasonable doubt.
20. To prove the offence of murder, the prosecution should prove the following elements beyond reasonable doubt.
 - a) the accused
 - b) engaged in a conduct
 - c) that conduct caused the death of a person
 - d) accused intended to cause the death of that person,
or
accused was reckless as to causing the death of that person by the conduct.
21. The first element of the offence is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the accused who committed the offence and no one else.
22. "Engage in a conduct" means –
 - (a) do an act; or
 - (b) omit to perform an act.
23. However the conduct should be a product of the will of the accused. In order to prove the second element, the prosecution has to prove beyond reasonable doubt that the act of the accused in question or the omission of the accused to perform the act in question was deliberate and not accidental.
24. Further, you should also remember that the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct

substantially contributed to the death of the deceased, that is sufficient to satisfy the third element above.

25. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this fourth element. It is not possible to have direct evidence regarding a person's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of an accused from the facts and circumstances you would consider as proved.
26. In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that he meant to bring about the death or that he was aware that death will occur in the ordinary course of events as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
27. In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether the accused had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. The accused was reckless with respect of causing the death of the deceased, if;
 - a) The accused was aware of a substantial risk that the death will occur due to his conduct; and
 - b) Having regard to the circumstances known to the accused, it was unjustifiable for him to take the risk.

28. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death of the deceased was a probable consequence or the likely result of his conduct; and yet he decided to go ahead and engage in the conduct regardless of that consequence. Accused must foresee that death was a probable consequence or the likely result of his conduct and after realising that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
29. The two accused are jointly charged for the offence of murder. An offence may be committed by one person acting alone or by more than one person acting together with the same criminal purpose. The accused persons' agreement to act together need not have been expressed in words. It may be the result of planning or it may be a tacit understanding reached between them on the spur of the moment. Their agreement can be inferred from the circumstances.
30. You have to consider the case against each accused separately and decide whether each accused formed a common intention with one another to commit the offence. Those who commit crime together may play different roles to achieve their purpose. You have to consider whether the two accused acted together to commit the offence and took some part in that offence.

Evidence

31. Now let us look at the evidence. Please remember that I will only refer to evidence which I consider important to explain the case and the applicable legal principles to you. If I do not refer to evidence which you consider important, you should still consider that evidence and give it such weight you may think fit.

32. The prosecution led the evidence of nine witnesses. At the end of the prosecution case you heard me explain several options to the accused. Each accused had those options because they do not have to prove anything. The burden of proving an accused's guilt beyond reasonable doubt remains on the prosecution at all times. The first accused chose to give evidence on oath and called two witnesses. The second accused also chose to give evidence on oath and called one witness.
33. At the outset, given the admitted facts and the evidence given by the prosecution witnesses and the defence witnesses, you may find that there is no dispute over the following facts;
- a) The deceased, his girlfriend the first prosecution witness [PW1], PW1's elder sister (Sala) and Sala's boyfriend Tomasi were approached by Police Constable Pita Bese [2DW2] and his team when the four of them were trying to get into a taxi, early morning on 02/09/18;
 - b) The four of them came from a nightclub and by this time Sala, Tomasi and the deceased were drunk;
 - c) The police team that consisted of the two accused, the second prosecution witness Alivereti Gade who was assisting the police as a 'polfriend' and the driver Special Constable Temesi came in a twin cab in response to a call made by 2DW2 seeking assistance and the four of them were boarded onto the back tray of the twin cab. PW1 also got into the said tray of the vehicle;
 - d) The deceased and the aforesaid three others were brought in to the Totogo Police Station car park and the vehicle was parked near the entrance to the charge room from the car park;
 - e) The first accused escorted Tomasi from the vehicle towards the charge room and the second accused escorted the deceased;
 - f) The deceased and three others were kept in the charge room for some time and then released;

- g) The deceased was admitted at CWM Hospital and a surgery was performed on the same day, that is 02/09/18;
- h) During the surgery it was noted that the deceased's duodenum has been ruptured;
- i) It was also noted that the deceased's pancreas has been damaged;
- j) The deceased remained admitted in the hospital and he died on 11/10/18.

34. The 1st prosecution witness was Melania Davetawalu [PW1]. She said in her evidence that;

- a) *There was an exchange of punches between the four police officers who approached them and the deceased and Tomasi, when they were trying to get into the taxi. She said that the punches mainly landed on the deceased's face. The twin cab she and the other three boarded, stopped near Signals Nightclub because the deceased and her sister Sala were screaming and an officer who was sitting in front came with a baton and hit the deceased on the back and at the back of the head.*
- b) *At Totogo Police Station, the deceased and Tomasi were thrown out of the vehicle. While the two of them were being escorted into the police station she was trying to cover her sister because the sister was not wearing the blouse and only had her bra on. She said that she escorted her sister out of the vehicle.*
- c) *While she was trying to cover her sister, she heard the deceased screaming out for help. When she turned, she saw the deceased lying on his back on the ground and two men standing beside him. She said that one person was in uniform and the other one was in civilian clothes. Then she saw the man in civilian clothes stomping all over the deceased's chest. She screamed and went towards the deceased. When she was trying to help the deceased to stand up, a lady from the second floor screamed at them and then all of them were escorted into the police station.*
- d) *She said that when she went to the deceased while he lay on the floor, he was in a lot of pain and the pain was felt over the abdomen and the chest. She said that the person who stomped the deceased was part of the officers who transported them and that he was sitting inside the vehicle. She said she and the other officer in uniform helped the deceased to stand up and then they were taken inside the police station.*
- e) *She said that while they were inside the police station the deceased was lying down on the floor sideways with his knees pressed upon his chest and touching his stomach saying that he is in so much pain. When she tried to help him up he told her not to because he felt better in that position. The deceased requested her to take him to the*

- washroom. When he was taken to the washroom, the deceased told her that he cannot urinate because he felt so much pain. When they got back to the front desk she got to know that her sister and Tomasi had been discharged.*
- f) Around 6.00 am a lady officer asked them if they could reconcile with the four officers. Then four officers came there and asked for forgiveness. One of the officers told her that if they (police officers) reported the matter that would mean 10 years imprisonment for the deceased. Seeing the pain the deceased was in, she told the officers that they would not report the matter and thereafter she went home with the deceased.*
 - g) That afternoon around 3.00pm the deceased was taken to the CWM Hospital Emergency Unit. The deceased was taken for a scan. After that the result was explained by the doctors where they were told that the deceased's Duodenum had torn into two. Thereafter a surgery was performed and after the surgery the deceased was taken to the ICU. She was again contacted by the police on the day the deceased passed away, to obtain her statement.*
 - h) During cross examination on behalf the first accused, she agreed with the suggestion that the deceased was taken out of the nightclub by the bouncers, but she said it was only once.*
 - i) During cross examination on behalf of the second accused she said that the deceased was taken outside the nightclub because the deceased hit a person who hassled her. She further said that the other person did not have a chance to hit the deceased because the deceased was escorted out.*
 - j) During re-examination she said that the brawl between the officers and the deceased and Tomasi took place for about 5 minutes before the police van arrived. She said that the deceased did not hold on to his abdomen or stomach after this brawl.*
35. You may have noted that PW1 did not identify any accused in this case as a person who assaulted the deceased. Further, she only saw one other person standing beside the deceased when the deceased was stomped by one person in civilian clothes. That other person was in [police] uniform. It was clear from all evidence led in this case that both accused were not in their uniform at the time of the alleged incident.
36. The 2nd prosecution witness was Alivereti Gande [PW2]. He said that;
- a) He assisted to board the deceased and three others onto back tray of the vehicle on the request of 2DW2 at Carnarvon Street. While they were on their way, the two males were trying to punch the 1st accused who was standing in the middle of the tray holding on to the bar. The 1st accused was tapping their hands away. The vehicle stopped at the*

- Signals Nightclub to seek assistance from the officers who were in the police minibus parked there to calm down the four civilians. Thereafter they went to the Totogo Police Station.*
- b) At the Totogo Police Station, the vehicle was parked facing the Reserve Bank. The 1st accused took the person who was big built (Tomasi) and the 2nd accused took the deceased out from the vehicle. He said that he was speaking to the sober female [PW1] and was telling her not to swear. The drunk lady was swearing in the car park and she only had her bra on.*
 - c) The 1st accused then took the big built person inside the charge room. He saw the 2nd accused and the deceased exchanging punches. He said that the 2nd accused and the deceased were punching each other beside the vehicle and the 1st accused and other person were near the door. He then turned to the lady who was sober [PW1] and when he turned back he saw the 1st accused kick and then stomp the deceased who was lying on the ground.*
 - d) When he observed this, the Totogo Police Station car park was bright. When he saw the 2nd accused and the deceased exchanging punches, he was 5 foot steps away. He said his view was blocked because the two girls were swearing.*
 - e) He said that the 1st accused stomped on the stomach and then kicked on the side of the deceased's hip. When he saw the 1st accused kick, his view was not blocked in any way. While he was observing this, he saw ASP Ryland and PC Meli. He said that ASP Ryland and PC Meli stopped them (accused). When he saw what the 1st accused did to the deceased, the sober lady [PW1] said some words to them. Then 'Sergeant La' told them to be quiet and to respect the station. He said Sergeant Pradip was the officer in-charge of the station that night. He said that Sergeant Pradip was inside the station when he observed the incident. Thereafter the drunkards and PW1 were taken to the charge room. He identified both accused in court.*
 - f) During cross examination on behalf of the 1st accused, when he was asked about the lighting condition he said that it was not that bright. He said that the light was coming from the street lights and from the vehicles passing by. He agreed with the suggestion that he saw the bigger built person the 1st accused took to the charge room turn around and punch the 1st accused in the mouth. He said that the two of them exchanged punches after that. He agreed that he saw the 1st accused bleeding from the mouth. He said that after the 1st accused went inside the charge room, the 1st accused came back and that was when the 1st accused stomped and kicked the deceased who lay on the ground. He agreed with the suggestion that when the deceased was lying on the ground ASP Ryland and Meli were also standing there.*
 - g) During the cross examination on behalf of the 2nd accused he said the deceased and the 2nd accused threw two punches each against each other and the 2nd accused's punches*

landed on the deceased's mouth and the chest. When he was asked whether he saw the punches very clearly he said 'no'.

- h) During re-examination he said that there was sufficient light in the car park that morning. He said that he is not mistaken about the 1st accused stomping the deceased. He said that Sergeant Pradip had the better view of the incident.*

37. The 3rd prosecution witness was Sergeant Pradip Lal [PW03]. He said that:

- a) His office is in the charge room and his unit is responsible for maintaining the station diary among other duties. After 5am on 02/09/18 the Operations Team brought in some drunkards from the city. He came out of his office and noticed that ASP Ryland was also present in the charge room. It was the shouting of the two ladies that led him to come out of the office. He went towards the vehicle which the two ladies were brought in. It was parked just behind the charge room in the car park. Apart from the two ladies there were two males who were drunk and one was without a shirt.*
- b) When he got there the two iTaukei ladies were asked to come inside the charge room. They were still shouting at the top of their voices. ASP Ryland who was also present in the charge room was trying to pull them.*
- c) Just then he saw one of the iTaukei men (deceased) who was standing a few meters away from the vehicle run towards the 2nd accused and throw a punch at the 2nd accused. The 2nd accused dodged the punch, held the person by the neck, lifted him up and then pushed him on to the ground. Then that person lay motionless on the ground.*
- d) He, Constable Meli and ASP Ryland ran towards the 2nd accused and pushed the 2nd accused away from that person. Then the 1st accused who was standing behind the 2nd accused walked up slowly to the person who lay on the ground and suddenly stomped him on the stomach. The person who was stomped shouted out in pain. Then he with others pushed the 1st accused away. Thereafter with the help of the other iTaukei man, he lifted the person who was lying down on the ground and took him inside the police station. He said that the person who was stomped was limping when he went inside the station.*
- e) He said that the two accused were not in their uniforms that morning. He said that he saw the 2nd accused and the other person confronting each other from a distance of 5 meters. He was at the door to the charge room. He said that when he saw the incidents, his view was not blocked in any way. He said that there was a 4 feet tube light behind the charge room and there were three searchlights in the car park and that morning those lights were switched on.*
- f) He said the person who was stomped was holding his stomach and was 'sitting down and standing up'. The two iTaukei ladies who were brought to the station were again shouting at the top of their voices. When he asked ASP Ryland why they are shouting*

- and what they want, ASP Ryland told him to wait and that he is dealing with the case. After ASP Ryland spoke to the iTaukei ladies they quietened down. After a while they all left. When he asked ASP Ryland if they wanted to put down a report, ASP Ryland said 'no'. He also asked the police officers if they want to put down any report and they also said 'no'. Since nobody placed any report nothing was put down in the diary.*
- g) He said, that morning he was in police uniform and so were Constable Meli, WPC Sisilia and ASP Ryland. He could not recall how many were there in civilian clothes at the car park that morning apart from the two accused persons.*
 - h) During cross examination on behalf of the 1st accused when he was asked why he did not direct the entries to be made in the station diary regarding the incident, he said that it was because ASP Ryland took over the situation. He said that he approached ASP Ryland and asked him whether the deceased wanted to go to the hospital, but ASP Ryland kept on telling him to wait and that he (ASP Ryland) is dealing with the situation. He said when he reported for duty on 05/09/18, he was told that an iTaukei man is in the hospital but he did not know which one until he went to the CWM hospital. He denied that the 1st accused was punched by the other iTaukei man.*
 - i) During cross-examination on behalf of the 2nd accused he said that he had been informed that the CCTV images are erased from the system after one month. He said that after the 2nd accused threw the iTaukei man on the ground, ASP Ryland and PC Meli ran outside the charge room.*
 - j) He said that when he walked out of his room that morning he noticed PC Meli writing the diary and ASP Ryland dealing with some suspects in the charge room. He said that when he was standing at the door of the charge room the 2nd accused was standing beside the vehicle facing the charge room and the 1st accused was standing next to the vehicle behind the 2nd accused. He agreed with the suggestion that the deceased lunged forward to hit the 2nd accused. He also agreed with the suggestion that everything happened very fast.*
 - k) He agreed with the suggestion that the 2nd accused lifted the deceased holding from the neck in response to the deceased assaulting the 2nd accused.*
 - l) During re-examination he said that when ASP Ryland said that he will handle the matter he had to listen because ASP Ryland was his senior officer.*

38. The 4th prosecution witness was ASP Rusiate Ryland [PE4]. He said that;

- a) On 02/09/18 when he came into his office, he heard a female shout. He went in front of his office and he saw a police vehicle coming in and parking just in front of the charge room. He saw a girl and also the 2nd accused coming out of the vehicle. He also saw someone lying down on the back of the tray. Because of the voices he heard, he called*

- out to the 2nd accused and said "when someone is brought into the station there must be no other force being used on them".
- b) Just after he said that he saw an exchange of punches. He then went inside his office to keep his bag and when he came out again he saw the 1st accused joining the fight. Then he went down to the charge room.
 - c) During the cross examination on behalf of the 1st accused when he was asked whether he can recall being called to see DPC Sakeo on 05/09/18 he said he can't recall. He also said that he cannot recall when it was suggested that when DPC Sakeo called him on 05/09/18, he went with PC Isikeli Rabuku and the two accused persons to meet DPC Sakeo. He said that he went to the charge room after the incident happened. He said that the 1st accused entered the charge room with a big dark civilian and after the 1st accused came in, he was concentrating on the woman who was without a top. He said that he rushed to his office to get a t-shirt to cover her. Then he went to PW3's office. He said that he told PW3 to look into the incident where the girl was shouting in the charge room.
 - d) He said that PW3 told him that the civilian that was brought in did not want a report to be lodged and therefore no statement was given. He agreed with the suggestion that it was the duty of PW3, the Sergeant who is in-charge to supervise the entries made in the station diary. He denied telling PW3 that he will handle the matter.
 - e) He denied releasing the deceased and the others that morning and said that they were still there in the charge room when he went back to his office. He said that a report concerning this case did not reach his office.
 - f) When it was initially suggested to him that he did not see the 1st accused kick anybody, he said that he only saw the 1st accused joining the 2nd accused in the fight. Again when the same suggestion was made, he said that he saw the 1st accused kicking. He denied the suggestion that the 1st accused told him that the 1st accused wants to lodge a complaint. When it was suggested that he told DPC Sakeo that he did not witness any assault at the police station, he said that he did not say that. He agreed that in his police statement he did not mention that he saw the 1st accused kick someone that morning. Then he said that he was supposed to say that but he meant punching to be indicative of kicking as well.
 - g) He agreed that he brought a person to the charge room to be questioned at 4.51am. He agreed that he did not commence an investigation into the conduct of his police officers.
 - h) During cross-examination on behalf of the second accused he said that he was not in the charge room but was outside his office when the commotion took place and he does not know where Sergeant Pradip was at that time. He said he went to Sergeant Pradip and told him to come and see what is happening in the charge room after he brought the shirt for the girl who was inside the charge room without a top.

39. The 5th prosecution witness was WPC Fiona Vulaono [PW5]. She said that;
- a) *Around 4.00am on 02/09/18 while she was sitting in front of the Crime Office at the Totogo Police Station, a vehicle came inside the yard and parked at the back of the charge room. She saw people in civilian clothing at the back tray of the vehicle and also saw the 1st accused coming out from the back door of the vehicle. She saw the 2nd accused sitting in the front seat next to the driver. She said that one dark, short and slim built male got down from the tray and went towards the 2nd accused. The 2nd accused was talking to the driver of the vehicle through the window. Then she saw the slim built man (deceased) throw three punches at the 2nd accused. The 2nd accused looked at the deceased and held the deceased from the neck. Then the deceased fell down. At the same time the other man who came in that vehicle was exchanging punches with the 1st accused. Thereafter her attention was caught by a short lady who was brought in the same vehicle. The said lady was swearing. Then she saw Sergeant Laniana instructing that lady to behave. Then she took a walk towards the male toilet which is next to the crime office. She saw Constable Meli trying to help the man that was lying down. Thereafter she went back to her office.*
 - b) *During cross-examination on behalf of the first accused, she agreed that the commotion she saw that morning was very quick and that her attention was mostly on the drunken woman.*
40. The 6th prosecution witness was Laniana Mudonavosa [PW6]. She said that;
- a) *On 02/09/18 while she was in her office she heard a lady swearing for few minutes. She got irritated as the lady was swearing at the police officers and about their work. So she went to the balcony and when she looked down she saw that lady. She yelled out to the lady and told her to stop swearing but the lady talked back and swore at her as well. So she knew that the lady was drunk and she went back to her office.*
 - b) *During cross examination on behalf of the 1st accused she said that she was back in her office when she heard ASP Ryland yelling. She also agreed with the suggestion that she knew that ASP Ryland was handling the situation because she could hear him. She agreed that the drunk lady was still in the car park when she walked back into the office.*
 - c) *During cross examination on behalf of the 2nd accused, she agreed that she expected a report against the lady who was swearing to be filed but that did not happen.*
41. The 7th witness for the prosecution was Dr. Iferemi Waqanabete [PW7]. He said that;
- a) *He is a surgeon by profession where he has been a specialist for 12 years and had undergone 8 years of training. He had obtained his MBBS degree in 1996 and master's degree in 2003. He said that he had conducted more than 5000 surgeries.*

- b) *He was 'on-call' on 02/09/18 and he was called in to attend to the deceased that evening. The deceased was referred to his unit as he was suspected of having an abdominal injury. An urgent CT scan indicated free air in the abdominal cavity which was highly suggestive of a perforation or a rupture. Accordingly it was decided to have an urgent surgery.*
- c) *Upon surgery, they noted that 75% of the deceased's duodenum was ruptured and there was 2.4 – 2.5 liters of free fluid in his abdomen where the normal quantity of free fluid that is expected to be there is 200ml – 300ml. They repaired the duodenum, washed out the abdominal cavity. He said that the deceased was treated in line with the best practice in keeping with 'definitive trauma surgical care principles'. The doctors had to bring the deceased to the theatre every 2 – 3 days to check the repair and to wash out the abdomen where they had to open the abdomen. During this period the doctors also noted that there was a pancreatic injury as they suspected, in the same area where the perforation was.*
- d) *He said that the injury that was noted was rare and has a very high mortality. The deceased passed away after about one month after being admitted. He said that a rupture of 75% as noted in this case can be fatal in up to 30% of people. However, duodenal rupture compounded with a pancreatic injury have the mortality up to 60%.*
- e) *He said that the duodenum could be ruptured by direct blunt force trauma like a kick or punch directly over the area or in a motor traffic accident. He said that a stomp can cause a rupture in the duodenum.*
- f) *During cross examination on behalf of the 1st accused he said that the initial suspicion regarding damage to the pancreas was confirmed after the 2nd week. Being asked to show where the duodenum is situated, he explained that it is placed towards the right side of the body closer to the mid line but towards the back and it is between the rib cage and the navel.*

42. The 8th prosecution witness was Doctor James Kalougivaki [PW8]. He said that;

- a) *He graduated in 2007 and obtained his Post Graduate in Pathology in 2013. He said he has conducted more than 1000 autopsies in Fiji and the Pacific. He said he conducted a forensic pathology examination on the deceased and he tendered the report he prepared, dated 14/10/18 [PE03]. He said that the main cause of death was severe infection within the abdominal cavity and within the chest cavity. According to him, hospitalisation due to a multi resistant organism sepsis, kidney failure, duodenum perforation, acute liver and pancreatic injury were antecedent causes. He said that there was bruising within the muscles in front and at the side aspects of the neck. He said that this can be due to blunt force trauma and generally where there is an*

- involvement of muscles that would require a significant amount of force compared to bruises over the skin. He said that if someone was grabbed by the neck and lifted off the ground it is possible to cause such bruises. He also said that the entire abdominal wall showed presence of bruising throughout.*
- b) During cross examination on behalf of the 1st accused he said that there were no injuries on the deceased's back. He said that it is possible for the infections to be caught from the hospital.*
 - c) During cross examination on behalf of the 2nd accused he said that the cause of the injuries on the neck is highly likely to be due to the throttling of the neck however it does not rule out the possibility to include a brawl.*
43. The 9th prosecution witness was Inspector Rupeni Taoka [PW9]. He said that;
- a) He was the investigating officer of this case. The case was handed over to his department in October 2018 by the Internal Affairs Department. The investigation commenced on 11/10/18. He said that there were CCTV cameras at Totogo Police Station but because the system overwrites after one month he was unable to extract the footage.*
 - b) During cross examination on behalf of the 1st Accused he agreed with the suggestion that the file pertaining to this case had been with the Internal Affairs because a report regarding a police assault had already being made. He said that he did not find any record in the station diary with regard to the deceased and his friends being brought into the police station. He agreed that there was an entry on 04/09/18 where the brother of the deceased had made enquiries.*
44. The 1st accused [1DW1] said in his evidence that;
- a) He joined the Police Force in 2011. He became part of the operations team in 2015. On 01/09/18 he was doing the night shift and he was part of the Drug Operations Team that night. On Sunday 02/09/18 the 2nd Accused received a call and the 2nd Accused told him that PC Pita called for help at Wrecktangles Nightclub. When they met Pita, he asked them if they could load four drunkards into their vehicle because the said drunkards were involved in a scuffle outside the nightclub. With PC Pita he saw PC Isikeli, PC Mosese and PC Akaripa. He said PC Pita and his team loaded the 4 individuals onto the vehicle.*
 - b) They stopped the vehicle near Dolphin and then near Signals Nightclub to calm down Sala who was one of the females who was loaded onto the vehicle. A police officer by the name Joka got into the vehicle near the Signals Nightclub to calm her down. Thereafter*

- they went to the Totogo Police Station and the vehicle was parked near the back door of the charge room.*
- c) After the vehicle was parked at the police station, he took Tomasi out of the police vehicle and took him to the charge room. He said that Tomasi was of big built. He took Tomasi to the charge room, holding onto Tomasi's shoulders from behind. He said that when he and the 2nd Accused got off from the vehicle ASP Ryland was standing in the doorway (back entrance) of the charge room. He also saw PC Meli and WPC Sisilia. As he was taking Tomasi to the charge room ASP Ryland told him and the 2nd Accused that if a person is brought under arrest to the station he does not want any assault to take place. When ASP Ryland said this, because he was their boss, they just unloaded them (the drunkards) from the vehicle and took them straight to the station.*
 - d) He said that while he was escorting Tomasi to the charge room and when the two of them were about to enter the door where ASP Ryland was standing, Tomasi turned and punched him on the nose. The force of the punch made him sit down on the ground. He then stood up and tried to pull Tomasi's t-shirt collar. When he was trying to pull the collar, ASP Ryland pulled Tomasi away and took him inside the station. He said that at the same time ASP Ryland pulled him up and they all went inside the station. When the three of them walked inside the charge room Sergeant Pradip was not in the charge room and he does not know where Sergeant Pradip was at that time.*
 - e) When he went inside he could feel that he was bleeding from his nose and then he went to the sink in the charge room to wash away the blood. He came back and told ASP Ryland that he wants to lodge a report. ASP Ryland told him to wait for the arresting team, for the said team to lodge the report first, before he lodges his. However he could not lodge a report because by the time the arresting team arrived Tomasi and Sala were already released by ASP Ryland. He said that ASP Ryland told him that he (ASP Ryland) released them.*
 - f) Thereafter on 05/09/18 ASP Ryland called him when he was at home and requested him to come to the police station. When he went to the police station the 2nd Accused, Isikeli Rabuka and ASP Ryland were there. ASP Ryland told them that DPC Sakeo wanted see them. Then they went and met DPC Sakeo. He said that ASP Ryland told DPC Sakeo at that time that there was no assault done when they were questioned about the allegation that someone was assaulted at Totogo. He said that he did not even touch the deceased on 02/09/18.*
 - g) During cross examination on behalf of the prosecution he agreed that PW2 was also part of the arresting team on 02/09/18. He also agreed that he was also at the back tray but moved to the back passenger seat when the vehicle was stopped at the Signals Nightclub. He said that he was not wearing safety boots that morning but the shoes he was wearing were brown in colour. He said that there was no exchange of punches between him and Tomasi and it was only Tomasi who punched him.*

45. The 2nd witness for the 1st accused was Police Constable Isikeli Rabuka [1DW2]. He said that:
- a) *On 02/09/18 he arrested the deceased outside the Wrecktangles Nightclub for obstruction. He said that when he came to the police station his Commanding Officer, ASP Ryland had initiated a reconciliation and because of that he was unable to lodge a report regarding the arrest. He said that he lifted the deceased up to the vehicle and made him sit down on the tray leaning on to the tailgate.*
 - b) *During cross examination on behalf of the Prosecution he agreed that he saw the deceased when he went to the police station that morning and that he saw the deceased lying down on the floor, in pain. He said that when he asked the deceased what happened he was told that the deceased was assaulted by the police. He agreed with the suggestion that the state of the deceased when he saw the deceased at the police station was different from the state the deceased was in when he first arrested the deceased.*
46. The 3rd witness for the 1st accused was Woman Police Constable Jokoviti Rabuku [1DW3]. She said that:
- a) *On 01/09/18 she was on night duty. Early morning on 02/09/18 she received a call from PC Pita informing her that a police vehicle will be coming with two females and requesting her to assist. At this time she was with Special Constable Paula. After the vehicle arrived she got into the vehicle and tried to calm the girl who was swearing and standing up. She said that when she was in the vehicle, two male occupants were lying across and two females were standing. She said that there was also a volunteer in the vehicle. She got off in front of Onyx Nightclub to attend to another fight, with PC Paula.*
 - b) *She said that she followed the vehicle carrying the two females in a different vehicle and got off from the vehicle at the back of Butt Street in order for her to go through the back gate of the police station. The same time she arrived at the back door, the vehicle with the two females also arrived at the station. As the vehicle arrived, she could hear the screaming and the swearing by the females.*
 - c) *She said that she got the female out from the vehicle and then took her inside the charge room. She said that when she went to the charge room, PC Meli and ASP Ryland were there in the charge room. She said that Sergeant Pradip at that time was inside the duty officer's room.*
 - d) *Sergeant Pradip came to the charge room after ASP Ryland told Sergeant Pradip to come out. She said that she told ASP Ryland to keep the girl till she come back to the station and she left to attend to another report. However when she came back to the station, she got to know that ASP Ryland had released that girl. ASP Ryland told her*

- this when she asked. She said that she was making fun of the 1st Accused because he was bleeding from his nose.*
- e) During cross examination on the behalf of the 2nd Accused she admitted that the 1st Accused helped Tomasi to get off the vehicle and that the 2nd Accused helped the deceased to get off the vehicle.*
 - f) During cross examination on behalf of the Prosecution she first denied that she had given a different account in her statement to police. Later she agreed that the fact that she disembarked a female occupant off the back tray is not mentioned in her statement to the police. She also agreed that it is not mentioned in the police statement that she came through the back gate.*
 - g) She agreed with the suggestion that when she came to the police station, she saw a man without a t-shirt on the floor of the charge room in a crawling position. When it was suggested that the person was in pain, she said that he was just sweating. She said that she was just concentrating on the female and therefore she did not see the 1st Accused or the 2nd Accused doing anything.*

47. The 2nd accused [2DW1] said in his evidence that;

- a) He joined the police on 02/01/14. He was part of the Drug Operations Team in 2018. At about 0330 hours on 02/09/18, he received a call from Police Constable Pita Bese requesting for the assistance of his team. The 1st Accused and the driver Special Constable Temesi were the other team members. They were using the vehicle, Fleet 311. When they reached the place where PC Pita was, PC Pita and his crew loaded four iTaukei youth on to the tray of the vehicle. PC Pita told him to take the four persons to the station and that he will be there in a short while.*
- b) On their way, he felt that the vehicle was shaking and he told the driver to stop the vehicle near Dolphins. When he got off, he saw two females and two males. One female was standing and trying to pull the 1st Accused down. He also saw Tomasi pulling the 1st Accused's shirt and he saw the deceased lying next to the tailgate. They stopped again near the Signals Nightclub to seek assistance from the mini bus which was parked there and which was a static location for uniform personnel. He said that when they left Dolphins the 1st Accused, 'polfriend' Alifereti Gandhe and the four iTaukei youth who were loaded at Wrecktangles Nightclub were all sitting at the back tray of the vehicle.*
- c) When they stopped at Signals Nightclub WPC Jokapeci Rabuku got into the tray and tried to calm the drunkards. Thereafter they went to the police station.*
- d) When they came to the Totogo Police Station the four youth were screaming and shouting. He said that he saw WPC Sisilia outside the CID office and he saw ASP Ryland looking through a window. The vehicle was parked at the back of the charge*

- room facing the Reserve Bank. He said that after he got off from the vehicle the two iTaukei males and the two females were told to respect the police station. Then the two iTaukei males were asked to get off the vehicle. He said that Tomasi was escorted by the 1st Accused. At this time ASP Ryland was standing at the doorway of the back entrance to the charge room.
- e) He assisted the deceased to get off the vehicle. Then they all went towards the charge room. Tomasi was in front, then the 1st accused, then him and the deceased was behind him.
 - f) He said that all of a sudden Tomasi turned and punched the 1st Accused. The 1st Accused went down and when he tried to assist the 1st Accused, the deceased pulled him from his right shoulder. As he turned, the deceased punched him and two punches landed on his head. He then got hold of the deceased's shirt and told the deceased not to punch. Thereafter when he turned back to check on the 1st Accused, he saw ASP Ryland between the 1st accused and Tomasi.
 - g) Then he felt that something behind him went down and when he looked down, he saw the deceased. He said that he "got into a shock how he (the deceased) might have fell". He then pulled the deceased up and made the deceased rest on his knees. He explained that he was standing and he made the deceased sit down leaning onto his knees. Thereafter he took the deceased inside the charge room.
 - h) Thereafter he went to ASP Ryland and he saw the 1st Accused having a conversation with ASP Ryland. He told ASP Ryland that the arresting officer will be coming to lodge a report regarding the four iTaukei youth that were brought to the station.
 - i) Thereafter he was informed by SC Temesi that there is another fight in progress and then he left the station. He said that the 1st Accused did not join him because the 1st Accused was bleeding from his nose and was in pain.
 - j) During cross examination on behalf of the 1st Accused he agreed with the suggestion that the 1st Accused never handled or touched the deceased.
 - k) During cross examination on behalf of the prosecution he agreed that the deceased was a slightly built person who was shorter than him. He agreed that the deceased charged at him when he got the deceased off the vehicle. When it was suggested that he was stopped by PC Meli and ASP Ryland when the deceased was lying on the floor in the car park, he said that ASP Ryland was not there and he assisted the deceased.
 - l) During re-examination he said that everything that happened that morning after he arrived at the station happened in the presence of ASP Ryland.
48. The 2nd witness for the 2nd accused was Police Constable Pita Bese [2DW2]. He said that;

- a) *On 01/09/18 he was conducting a foot patrol in the Suva City area where he started at 8.00pm. He was in-charge of a team of 5 male officers. On 02/09/18 around 4.00am he saw a vehicle that was parked in the middle of the road causing traffic near the Wrecktangles Nightclub. He said that the driver of that vehicle requested them (police) to chase away the drunkards who were trying to get inside his vehicle. Then he approached a female who was heavily intoxicated and yelling. He identified himself by showing his police ID card.*
- b) *He said that the female tapped his hand. Then he pushed her and raising his tone informed her that he is arresting her. With that she started swearing and passing bad remarks. Then there was an exchange of words where her friends also got involved. He said that when he arrested her, she looked back and called her boyfriend whose name was Josua. He said Josua was leaning on the fence towards TLTB. He said that the said person Josua was leaning like he was in pain, touching his chest. After that, members of the public started coming in. He then called the 2nd Accused to come and assist them.*
- c) *During cross examination on behalf of the prosecution when he was asked whether he was involved with lot of operations with the two accused he said 'yes'. He said that he knew that the person who was leaning on the fence was Josua because the female called out that name and that person replied saying 'yes'. He agreed that his version given in court where he said that Josua was leaning on the fence and that he was leaning like there was pain touching the chest, does not appear in the police statement he made on 13/10/18. He agreed that he only recalled this when he was summoned to be in court on the request of the 2nd Accused. When it was suggested that when Josua was loaded into Fleet 311, Josua was fine but drunk, he took some time and said 'yes'.*

Assessing Medical Evidence

49. PW7 and PW8 gave their medical opinion based on what they observed and their experience. You are not bound to accept that evidence. You will need to evaluate that evidence for its strengths and weaknesses, if any, just as you would with the evidence of any other witness. It is a matter for you to give whatever weight you consider appropriate with regard to the observations made and the opinion given by PW7 and PW8. Evaluating the evidence of these two witnesses will therefore include a consideration of their expertise, their findings and the quality of the analysis which supports their opinion.

Analysis

50. The prosecution says that the first accused and the second accused acted together and committed the offence of murder.
51. Therefore, you have to consider whether each accused formed a common intention with one another to perform a criminal or an unlawful purpose.
52. The prosecution case is that the first accused stomped on the stomach of the deceased who was lying on the ground as a result of being pushed by the second accused, at the Totogo Police Station car park, with the intention of causing the death of the deceased or being reckless as to causing the death. That conduct ruptured the duodenum of the deceased and damaged the pancreas. This injury substantially contributed to the death of the deceased.
53. You should first ask yourselves; 'was there an agreement between the two accused, a meeting of minds, to perform a criminal or unlawful purpose?' Was there an agreement between the two accused to cause the death of the deceased or to cause unlawful bodily harm to the deceased? You should be mindful that there is a distinction between common intention and similar intention. If the intentions of the two accused were only similar but there was no meeting of their minds, then there is no common intention; no agreement.
54. It is not disputed that after the vehicle was parked near the charge room, the first accused escorted Tomasi and the second accused escorted the deceased to the charge room. As I have pointed out earlier, PW1 did not see the second accused near the deceased when the deceased was stomped. PW2 did not say what the second accused did when he saw the first accused kick and stomp the deceased. PW2 also did not say what the first accused did when he saw the exchange of punches between the second accused and the deceased. According to PW3, there was no exchange of punches between the second accused and the deceased and it was the

deceased who threw a punch at the second accused where the second accused avoided the punch and held the deceased by the neck. Further, according to PW3, after the second accused pushed the deceased onto the floor, he with two others pushed the second accused away from the deceased and then the first accused walked slowly and stomped the deceased. It is a matter for you to decide which evidence you would accept as credible and reliable. Having considered the evidence you accept as credible and reliable, do you find that there was an agreement as a result of planning or tacit understanding, between the first accused and the second accused, to perform a criminal or an unlawful purpose in relation to the deceased?

55. If the answer to the above question is 'yes', each accused is responsible for the conduct of the other which would constitute an offence provided that that offence is of such nature that its commission was a probable consequence of carrying out that unlawful purpose. If the answer is 'no', each accused is only liable for any offence that is constituted based on their individual conduct.
56. Now let me again briefly remind you the evidence in relation to the alleged conduct of the first accused and the second accused at Totogo Police Station.
57. According to PW1, she saw a police officer in civilian clothes stomping all over the deceased's chest when she turned towards the deceased after hearing the deceased scream for help. The deceased was lying down on his back and she saw only two men standing near the deceased including the person who stomped. She said that the deceased was in a lot of pain after this and the pain was felt over the abdomen and the chest. She did not identify the person who stomped the deceased and according to her evidence the other person who was there at the time the deceased was stomped cannot be the second accused.

58. According to PW2 who was the 'police friend', he saw the deceased and the second accused exchanging punches. At this time the first accused and Tomasi were near the door. He then turned to PW1 as he was trying to control her. When he turned back, he saw the deceased on the ground and the first accused stomped the deceased on the stomach and then kicked on the side of the hip. He saw the exchange of punches at a distance of about 5 footsteps. He said his view was blocked when he saw the exchange of punches between the deceased and the second accused because of the two ladies who were swearing, but his view was not blocked when he saw the first accused stomp and kick the deceased. According to him the first accused came back from the charge room and then stomped and kicked the deceased.
59. The counsel for the first accused argues that PW2 could not have seen the alleged incident because the vehicle was blocking his view. However, during re-examination he said that he was standing behind the vehicle and nothing was blocking his view when he saw the first accused stomp the deceased and that he is not mistaken in what he saw. During cross-examination he said that he did not see the exchange of punches between the deceased and the second accused very clearly. Further, he did not say and he was not asked by the prosecution where the second accused was and what the second accused was doing when he saw the first accused kick and stomp the deceased. According to PW2, it was PW3 who had the better view of the incident.
60. According to PW3, he saw the deceased run towards the second accused and throw a punch at the second accused. The second accused then avoided the punch, held the deceased by the neck, lifted the deceased off the ground and pushed the deceased onto the ground. At this point he ran towards the second accused together with PC Meli and PW4, and pushed the second accused away from the deceased. Then the first accused who was behind the second accused walked slowly to the deceased and stomped the deceased on the stomach. The deceased shouted out in

pain. PW3 said that he was near the charge room door when he saw the altercation between the second accused and the deceased.

61. Counsel for the first accused says that PW3 was not there near the charge room at the material time and therefore, he could not have witnessed what he said in his evidence. According to the counsel for the first accused, PW3 was still in his office which was situated inside the charge room when the commotion took place outside the charge room. The counsel appear to rely on PW4's evidence that PW4 requested PW3 who was inside the office to come out and attend to the situation. However, according to PW4, he told PW3 when PW3 was standing inside his office to look into the incident when the girls were shouting in the charge room.
62. PW1, PW2 and PW3 were the main witnesses the prosecution called to give evidence on the conduct of the two accused persons. The next three witnesses were called on the request of the defence counsel for them to be cross-examined.
63. PW4 said in his examination in chief that he saw an exchange of punches and then saw the first accused join the fight. During cross-examination on behalf of the first accused when it was first suggested to him that he did not see the first accused kick anybody, he again said that he only saw the first accused join the fight. However, when the same suggestion was put to him again, he said that he saw the first accused kick the deceased.
64. It was pointed out during cross-examination that PW4 has not mentioned in his police statement that he saw the first accused kick someone. In reply, PW4 said that he was supposed to say that, but when he mentioned punching he meant that it is indicative of kicking as well. When you assess PW4's evidence it may be relevant to take into account that according to PW3, the reason for PW3 not to take steps to make entries in the station diary regarding the incident was because PW4 took over the situation. Moreover, according to the first accused and 1DW3, it was PW4 who

released the deceased and the three others and the first accused said that PW4 did not allow him to file a report regarding the alleged assault made on him by Tomasi as he was told to wait for the arresting team and by the time the arresting team arrived the four were released by PW4.

65. PW5 said that she saw one dark, short and slim built man throw three punches at the second accused and that the second accused looked at the person and held him by the neck. Then that person fell down. Considering all the evidence it was clear that PW5 was referring to the deceased when she said “dark, short and slim built man”. She also said that, at the same time the other person was exchanging punches with the first accused. Thereafter her attention was diverted to the lady who was swearing.
66. PW6 is the witness the counsel for the first accused asserts as the person who had the best view of the incident as she was said to be standing in the balcony above the place where the alleged incident took place. However, according to PW6, her main concern was regarding the lady who was swearing at the police officers and she did not stand at the balcony for long. PW6 went back inside, when that lady talked back and swore at her as well.
67. According to the first accused, he never even touched the deceased.
68. 1DW2, the second witness for the first accused was the officer who arrested the deceased near the Wrecktangle Nightclub. He said he lifted the deceased up and made him sit on the tray of the twin cab. During cross-examination he agreed that he saw the deceased when he came back to the station and that the deceased was lying down in pain. He also agreed that the state of the deceased when he saw the deceased at the police station was different from the state when he saw the deceased when the arrest was made.

69. 1DW3 in her evidence said that she arrived at the police station the same time the vehicle with the deceased and the other three arrived at the police station. But she agreed that she had not mentioned this in her police statement. She agreed that, she had mentioned in her police statement that when she came to the police station, she saw a man without a t-shirt in a crawling position on the floor, in the charge room. She also said that she was just concentrating on the female and therefore she did not see the first accused or the second accused do anything.
70. According to the second accused, while he was escorting the deceased, he saw Tomasi punch the first accused. When he tried to assist the first accused, the deceased pulled from his right shoulder and when he turned, the deceased punched him in the head. He got hold of the deceased's shirt and told him not to punch. Then again he turned to the first accused and he felt that something behind him went down and when he looked down he saw the deceased on the ground and he got a shock. He then assisted the deceased to sit and then took him to the charge room.
71. 2DW2, who was in-charge of the unit that arrested the deceased said in his examination in chief that he saw the deceased leaning, touching the chest like he was in pain before the deceased was boarded into the twin cab. But during cross-examination he reluctantly agreed that the deceased was fine and only drunk at that time.
72. With regard to cause of death of the deceased, PW8 said that the death was due to a severe infection in the abdominal cavity and the chest cavity. He agreed that it is possible for the infections to be caught from the hospital. According to PW7, an urgent surgery needed to be performed on the deceased on 02/09/18 due to the abdominal injury noted in the scan which was suggestive of a rupture. During the surgery they discovered that 75% of the deceased's duodenum was ruptured. Later on, it was also confirmed that the pancreas was also injured. In his opinion, a 75% rupture of the duodenum compounded with a pancreatic injury presented a high

mortality rate. He also said that a kick or a punch directly over the area where the duodenum is situated could rupture the duodenum.

73. In this connection you should remember that according to law, if the accused inflicts bodily injury on another person in consequence of which that other person undergoes surgical or medical treatment which causes death, the accused is deemed to have caused the death of that person although the accused's act is not the immediate or the sole cause of death. It is immaterial whether the treatment was proper or mistaken, if the treatment was employed in good faith and with common knowledge and skill.

The first accused

74. The first accused says that he did not even touch the deceased on 02/09/18. If you believe him or if you think that what he says may be true, then you should find the first accused not guilty.
75. If you find that all the elements of the offence of murder are established beyond reasonable doubt against the first accused then you should find the first accused guilty of the offence.
76. In the event you are satisfied beyond reasonable doubt that the first accused did engage in a conduct and that conduct caused the death of the deceased, but you are not satisfied beyond reasonable doubt that the accused either intended to cause the death of the deceased or was reckless as to causing the death of the deceased; you should then consider whether the first accused is guilty of the lesser offence of manslaughter.
77. The offence of manslaughter has the same first three elements of murder. But it is an offence having a lesser culpability than murder. The distinction between the two

offences is found in the fourth element which concerns the state of mind of the accused. When it comes to the offence of manslaughter, what is required to be proved is that the accused intended or was reckless as to the risk, that the conduct will cause serious harm.

78. Accordingly, based on the evidence you would decide as credible and reliable, if you are satisfied beyond reasonable doubt that the first accused stomped the deceased on the stomach and/ or kicked on the side of the deceased's hip and that conduct substantially contributed to the death of the deceased, you should first consider whether;
- a) the first accused had the intention to cause the death of the deceased when he so stomped and/ or kicked; or
 - b) whether the first accused had the knowledge or the perception that there was a substantial risk that stomping and/ or kicking the deceased in that manner will cause the death of the deceased and he stomped and/or kicked the deceased being aware of that risk and it was unjustifiable to take that risk.
79. If you are not satisfied beyond reasonable doubt that the first accused either had the intention to cause the death or was reckless as to causing the death as explained above, then you should consider whether the first accused had the intention to cause serious harm to the deceased or was reckless as to causing serious harm to the deceased when he stomp and/ or kick the deceased in the same manner as explained.
80. In the event you are satisfied beyond reasonable doubt that the first accused did engage in a conduct which caused bodily harm to the deceased, but not satisfied beyond reasonable doubt that the said conduct caused the death of the deceased,

then you should consider whether the first accused is guilty of assault causing actual bodily harm to the deceased. Assault is the use of unlawful force.

The second accused

81. According to the second accused, he did not cause any bodily injury to the deceased or push the deceased onto the floor. If you believe him or if you think he may be telling the truth, then you should find him not guilty.
82. If you find that the first accused and the second accused acted together to commit the offence of murder and the second accused took some part, then you should find the second accused guilty of murder.
83. If you find that the first accused and the second accused acted together to commit the offence of manslaughter and the second accused took some part, then you should find the second accused guilty of manslaughter.
84. If you find that there was no meeting of minds and that the first accused and the second accused did not act together to perform a criminal or an unlawful purpose, then you should consider the conduct of the second accused separately. Accordingly, you should find the second accused not guilty of murder and not guilty of manslaughter.
85. You should then consider whether the second accused is guilty of the offence of assault causing actual bodily harm to the deceased. Assault is the use of unlawful force.
86. You should remember that a person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence. At law, a person carries out a conduct in self defence if he or she believes that the conduct is necessary to defend himself or herself and the conduct is a reasonable response in

the circumstances as he or she perceives them. In the event you find that the second accused acted in self defence, and the second accused's conduct is a reasonable response in the circumstances as he perceived those circumstances, then you should find the second accused not guilty of any offence.

87. I must again remind you that even though an accused person gives evidence, he does not assume any burden of proving his case. The burden of proving the case against an accused beyond reasonable doubt remains on the prosecution throughout. An accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.

88. Generally, an accused would give an innocent explanation and one of the three situations given below would then arise in respect of each accused;

- (i) You may believe his explanation and, if you believe him, then your opinion must be that the accused is 'not guilty'.
- (ii) Without necessarily believing him you may think, 'well what he says might be true'. If that is so, it means that there is reasonable doubt in your mind and therefore, again your opinion must be 'not guilty'.
- (iii) The third possibility is that you reject his evidence. But if you disbelieve him, or his witnesses that itself does not make him guilty. The situation would then be the same as if he had not given any evidence at all. You should still consider whether the prosecution has proved all the elements beyond reasonable doubt.

If you are sure that the prosecution has proved all the elements, then your proper opinion would be that the accused is 'guilty' of the offence.

89. Any re-directions?

90. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against each accused. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.

91. Your opinion on each accused should be as follows;

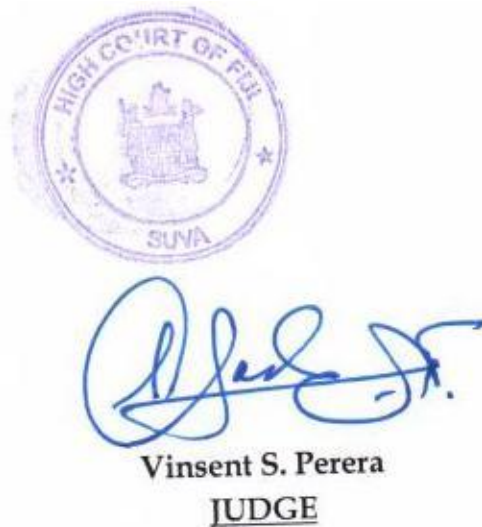
Murder - guilty or not guilty

If not guilty

Manslaughter - guilty or not guilty

If not guilty

Assault occasioning actual bodily harm - guilty or not guilty



The image shows the official seal of the High Court of Fiji, featuring a central emblem with a crown and two lions, surrounded by the text "HIGH COURT OF FIJI" and "SUVA". Below the seal is a handwritten signature in blue ink, which appears to be "Vinsent S. Perera". Underneath the signature, the name "Vinsent S. Perera" and the title "JUDGE" are printed in a serif font.

Solicitors;

**Office of the Director of Public Prosecutions for the State
Pacific Chambers for the 1st Accused
Naco Chambers for the 2nd Accused**