

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 377 of 2017

STATE

vs.

- 1. NOA RAVUTANASAU**
- 2. MELACI TIKOMAIRARATOGA**

Counsel: Ms. Kantharia B with Ms. J. Fatiaki for the State
Ms. Prakash A for Accused 1
Ms. Ratidara L for Accused 2

Date of Hearing: 31st October 2019, 1st, 4th, 5th, 6th November 2019

Date of Closing Submission: 07th November 2019

Date of Summing Up: 14th November 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.
2. Your function is to give your opinion about the facts of the case, based on the evidence that has been placed before you. That involves deciding what evidence you accept or refuse. You

will then apply the law, as I will explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.

3. I may comment on the facts if I think it will assist you when considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.
6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused, deceased or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to

influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused are presumed to be innocent until they are proven guilty. The presumption of innocence is in force until you form your own opinion that the accused are guilty of the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused are presumed to be innocent until they are proven guilty. In other words there is no burden on the accused persons to prove their innocence, as their innocence is presumed by law.
9. The standard of proof in criminal trial is "proof beyond reasonable doubt". It means that you must be satisfied in your mind that you are sure of the accused's guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offence

10. The first and the second accused are being charged with one count of Murder, contrary to Section 237 read with Section 45 of the Crimes Act 2009. The particulars of the offence are that:

"Noa Ravutanasau and Melaci Tikomairaratoga on the 30th day of November 2017, at the Total Service Station car park at Suva in the

Central Division, as joint principle or either aiding and abetting the other, murdered Rusiate Vakalakovi."

11. I now explain you the main elements of the offence of Murder.

1. The accused person,
2. Have engaged in a conduct,
3. The said conduct caused the death of the deceased,
4. The accused intended to cause the death of the deceased by that conduct or reckless that the conduct cause the death of the deceased.

12. The first element is concern about the identity of the accused. In this case the first and the second accused did not dispute their presence at the car park of the service station during the material time of this incident. Moreover, the learned counsel for the first and the second accused suggested their respective defences to the witnesses of the prosecution, confirming that the first and second accused were present at the car park. Hence, the identities of the two accused are not disputed.

13. To engage in a conduct is to do an act which is a product of the will of the accused. Again I find the first accused, during the cross examination of the witness of the prosecution suggested that he assaulted the deceased after he was assaulted by the deceased, which was confirmed by the prosecution witness. The first witness of the prosecution said that he saw the second accused also punched, kicked and stepped on the deceased.

14. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, in law, the act of the accused need not be the sole or principal cause, but the act should significantly contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the conduct of the accused had significantly contributed to the death of the deceased, it is sufficient to satisfy the third element above.

15. With regard to the fourth element which concerns the state of mind of the accused, the prosecution must prove beyond reasonable doubt either, the accused intended to cause the death of the deceased or the accused was reckless as to causing the death of the deceased. The prosecution should prove either the intention or the recklessness only.
16. 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.
17. In order to conclude that the accused intended to cause the death of the deceased, you must 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.
18. In the event you find the accused did not have the intention to kill the deceased or you are not sure whether he 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:
 1. He/She was aware of a substantial risk that the death will occur due to his/her conduct; and;
 2. Having regard to the circumstances known to him/her, it was unjustifiable for him/her to take the risk.
19. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realize that death 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 the consequence. Accused must foresee the death was a probable consequence or the likely result of his conduct and after realizing it, 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.

20. If you find the accused not guilty of murder, then you are allowed to consider an alternative count that is manslaughter, though it is not charged in the information. The main elements of the offence of manslaughter are that:

1. The accused,
2. Engaged in a conduct,
3. The conduct causes the death of another person,
4. The accused intended that conduct will cause serious harm, or is reckless as to take a risk that the conduct will cause serious harm to the other person.

21. First two elements of manslaughter are similar to the first two elements of murder. The only difference between the two offences are their fault elements. In murder, the accused must intend to cause the deceased's death, or was reckless in causing the death. In manslaughter, the accused must intend to cause serious harm, not death to the deceased.

Agreed Facts

22. I now take your attention to the agreed facts which are the facts that the prosecution and the defence have not disputed. Hence, you are entitled to consider them as facts proven by the prosecution beyond reasonable doubts.

Evidence of the Prosecution

23. Let me now remind you briefly the summary of the evidence presented by the prosecution during the course of the hearing. This is a quite a lengthy hearing and lasted for several days. However, I trust you can properly and correctly recall all of the evidence adduced during the hearing.

24. The first witness of the prosecution is Sakopo. He sold BBQ with his mother at a place close to the Union Night Club on the night of 30th of November 2017. At around 5.30 a.m. to 6.00 a.m. in the morning an i-taukei man and a woman came and bought BBQ from his stall. They then went to the railings of the Total Service Station.
25. You may recall Sakopo explained the physical features of this i-taukei man and the woman. He was a big man and the lady had a plaster on her nose. Sakopo also went to the railings and spoke to the i-taukei man and the woman for about 2 to 3 minutes. He was closed to the man and woman when he was talking to them at the railings. Thereafter, the man and the woman went down to the car park of the service station which is located about 2 ½ meters below the railings. They then got into the car but in a while got off from the car. Then he saw the deceased was swearing at the man. The deceased swore at the man saying that *"I am not afraid of how big you are, we can punch each other, I am not afraid of how big you are"*. The deceased then came and punched the man, falling him down. The man then stood up and the lady also came in. The man then punched the deceased. The deceased then leant on the vehicle and then fell on to the ground.
26. When the deceased fell down, the man punched the deceased on his face and chest and then stepped on the stomach of the deceased. The fight lasted for about 10 to 15 minutes. The man was kneeling down and punched the deceased when he fell down on the ground. He punched with the force. You saw the witness demonstrated the way the man stepped on the stomach of the deceased. The lady also punched and stepped on the deceased. The lady had stepped on the stomach and the chest area of the deceased and also kicked the deceased. Sakopo saw blood was coming from the boy. The deceased was lying on the ground. Then a man who was standing on the side had brought a vehicle and loaded the deceased into the vehicle.
27. Sakopo identified the first accused and the second accused as the man and the woman who got involved in this incident with the deceased on the early hours of the morning of 30th of November 2017.

28. During the cross examination, Sakopo said people have to cross the road in order to come to the railings from the BBQ stall. When the first accused went down to the car park from the railings, the deceased was at the railing. He was not alone as other people were also standing at the railings. The deceased had started swearing at the first accused from the railings. Sakopo cannot recall whether the deceased said Mother's vagina and sex with your father at the first accused. The deceased and the man, they were all very drunk at that time. The first accused had told the deceased that he does not want to fight when the deceased was swearing at him from the railing, but the deceased continued to swearing at the first accused. The deceased then moved from the railings and went down to the place where the first accused was standing at the car park. The first accused had told the deceased again that "*I do not want to fight and what's wrong with you*". Yet, the deceased continued to swearing and came towards the first accused, staying that "*I am not frighten of your build*". The first accused then again said that he does not want to fight with the deceased and turned to walk away. Sakopo cannot recall whether the deceased then hit the first accused on the back of his head. He did not hear the first accused was saying "*Enough*"
29. The deceased then punched the first accused on his face with his both hands. He kept punching on the first accused till he fell down backward on the ground. The deceased kept on punching the first accused with his both hands even after the first accused fell down on the ground. Only the girlfriend of the first accused was there. No one came to help the first accused. The second accused was shouting and telling the deceased to stop hitting the first accused.
30. Sakopo does not know whether the first accused got injured as a result of the assault by the deceased. The first accused got up when the deceased stopped hitting him. The deceased shouted against challenging the first accused "*Do you want to fight*". The first accused then punched the deceased when the deceased was coming towards the first accused with his fist up in the air. He did not see whether the first accused punched the deceased again. However, as a result of these punches, the deceased fell down on the cement. The first accused then kicked the deceased three times on his stomach. All these things happened suddenly and Sakopo caught by surprised with this sudden incident.

31. During the cross examination Sakopo further said the kicking and stepping both involve with the movement of legs. At no time during this incident he was standing next to the first accused. He was standing at a distance from the scene of the incident. When the first accused was kicking three times on the deceased, the people was shouting for him to stop. Sakopo did not see the deceased was moving on the ground, when the first accused stopped and moved away from the deceased. However, Sakopo had told the police in his statement that the deceased moved around slowly when the first accused moved away from him.
32. Sakopo further said the first accused did not get into any vehicle and then did not get off from it when he came to the car park of the Service Station. Moreover, Sakopo said that he never spoke to the first accused after the first accused bought BBQ from the stall. Sakopo further said that the first accused had not stepped on the stomach of the deceased at no time.
33. During the cross examination by the learned counsel for the second accused, Sakopo said he referred the lady who was with the first accused as the couple or wife in his statement given to the police. He had not mentioned about the plaster on the nose of the lady in his statement. Moreover he has not given any description of the lady who was with the first accused in his statement made to the police as well.
34. The lady came to assist the first accused when he fell down. She tried to stop the deceased from punching the first accused when he fell down on the ground. In that process, the lady was also punched by the deceased. He did not see whether the lady was also fell down due to the punching of the deceased.
35. Sakopo had stated in his statement to the police the wife of the man also punched and kicked the deceased. However, during the evidence Sakopo said that he saw the lady not only kicked the deceased but also stepped on the deceased.
36. During the re-examination by the learned counsel for the prosecution, Sakopo said that he did not speak to the first accused after he bought BBQ from the stall.

37. The second witness of the prosecution is Leone Rokovaka. He had observed this alleged fight from a location near to the Traps night club. He saw they were punching. A person fell down after he received a punch. A lady then came and punched the person who fell down. Leone then went and stopped the fight. He was mainly concerned about the person who fell down, therefore, he did not notice the person and the lady who punched the fallen man. He put the fallen man into a taxi and tried to take him to the hospital. The fallen man walked to the taxi while talking. In the taxi, the fallen man had punched Leone. He then turned the taxi back and pulled the fallen man out of the taxi. The police then came and took the fallen man into the police vehicle.
38. During the cross examination by the learned counsel for the first accused, Leone said the fallen man was very drunk and aggressive. Leone did not take the fallen man to hospital because he punched him and wanted to fight with him too. Once the fallen man pulled out from the car, Leone asked him why did he punch Leone.
39. The third witness of the prosecution is Dharmendra Prasad. He was driving a taxi on the early morning of the 30th of November 2017. While he was driving passed the Total Service Station, he had seen a fight. They were swearing and punching. The passenger of his taxi got down and went to the scene of the fight. The passenger then brought the man who was involved in the said fight. Mr. Dharmendra said that he saw one big man and a lady among the crowd and they were swearing and punching. He then later said that he did not see anything as his view was blocked by the crowd and only heard the sound of swearing and hitting. Once his passenger brought the man, he asked Dharmendra to take him to the hospital. When they reached near the Suva library, the passenger told him to turn back and drop the man. Then he went back and dropped the man at the service station.
40. The fourth witness of the prosecution is Filimone Bainivalu. He is a security officer at the FNFP Plaza. He finished his night shift in the morning of the 30th of November 2017. He heard the sounds of people from the direction of the service station. He then walked across the service station and saw a big man punched another man who fell down. He then stepped and kicked the fallen man. He then started to move away. He heard a voice of a lady, saying

that "why did you punch my husband and don't you know I am Civa's daughter". According to Mr. Bainivalu, the big man punched the fallen man only once. He then kicked and stepped on the fallen man only once. After he heard the voice of a woman, he saw a person came and pulled the fallen man.

41. The next witness of the prosecution is Special Constable Suliasi Nalotawa. He did the night patrol along the Victoria parade in the early morning of the 30th of November 2017. While he was driving passed the Total Service Station, he saw two boys were arguing. He went and stopped them. Then the deceased said that he want to go to the hospital. Accordingly, Cpl. Suliasi took him into his car. Then the deceased said he does not want to go to the hospital, but to the Village Six Cinema as his car was parked there. Cpl. Suliasi then took him to the Village Six Cinema. When the deceased got down from the police vehicle, Cpl. Suliasi saw him lying down, Cpl. Suliasi called another police vehicle to come and take him to the hospital.
42. The sixth witness of the prosecution is Cpl. Akimo. He explained in his evidence that he went and picked the deceased from the village six cinema. He then dropped him at the CWM Hospital.
43. The last witness of the prosecution is Doctor James. He has conducted the postmortem of the deceased. Doctor James explained the outer injuries of the deceased body. He then explained the internal injuries found in the deceased body. Having explained those findings, Doctor James then explained the cause of the death of the deceased. I do not wish to explain them in details as the postmortem report is before you as one of the exhibits of the prosecution, which contains all the details and findings of the postmortem conducted by Doctor James. He then explained the rupture or the damaged of the liver and abdominal cavity and the traumatic injuries of the head of the deceased were due to blunt force. Blunt force trauma is a trauma that can be inflicted on the body by the use of a blunt object. Blunt object ranges from a fist, a foot and even up to a baseball club. The injuries and damages found in the abdominal area and the head area of the deceased could have been sustained by kicking and punching. Doctor James said a force that would have been applied to the

abdomen area would be significant in nature as there were significant injuries to the wall of the abdomen and significant tearing of the liver.

44. Moreover Doctor James explained there were significant amount of fluid found in the abdominal cavity, more particularly peritoneal cavity, which houses all the organs generally has no fluid visible. This was due to the extensive presence of blood due to the damage or trauma to the liver and the rest of the structure within the abdomen. Doctor James was not cross examined by the learned counsel for first and the second accused.

Right to Remain Silent

45. At the conclusion of the prosecution case, the two accused were explained about their rights in defence. The accused opted not to give evidence on oath and exercised their rights to remain silent. The accused does not have to give evidence. You must not assume that he or she is guilty because he/she did not give evidence. The fact that he/she has not given evidence proves nothing. It does nothing to establish his guilt.
46. I have summarized the evidence presented during the course of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only to draw your attention to the main items of evidence and help you in recalling yourselves of the evidence.

Analysis and Direction

47. The prosecution alleges that the first and the second accused had assaulted the deceased on his face and stomach by punching, kicking and stepping on, on the early morning of the 30th of November 2017 at the car park of Total Service Station. The said assaults by the first and second accused had ruptured and damaged the liver of the deceased and also caused severe injuries in the head of the deceased, causing hemorrhage in the brain of the deceased. Due to these injuries the deceased has succumbed to death.

48. The defence through their cross examination of the witnesses of the prosecution tries to establish the first and second accused acted in self defence. The deceased had started to swear and then assaulted the first accused until he fell down. Even after the first accused fell down on the ground, the deceased kept on punching the first accused. The second accused had tried to stop the deceased and in that process she was also punched by the deceased. The first accused then got up and punched the deceased. The deceased had fallen down and the first accused then punched and kicked the deceased. The second accused had also punched and kicked the deceased.
49. In order to determine the guilty of the two accused, you have to evaluate the evidence presented by the prosecution. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence.

Reliability of Evidence

50. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

51. The assessment of credibility of evidence is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his/her motivations, his/her relationship to and the reaction to the particular situation.
52. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, you may accept or reject such parts of the evidence as you think fit. It is for you to determine whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified.

53. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking about in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his or her own evidence but also with other evidence presented in the case.
54. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence.
55. Moreover, you must bear in your mind that 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 accurate in another thing.

Expert Evidence

56. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion.
57. In this case you have heard the evidence of Dr. James Kalounivaki. He is a medical doctor and works as a pathologist. He has conducted the postmortem of the deceased and made the report of the postmortem. He gave his professional opinion about the injuries that he found on the body of the deceased and the cause of the death. It is for you to decide whether the expert opinion given by Dr. Kalounivaki is relevant to the matter that you have to determine. If you decide it is relevant, then you have to decide what is the weight you give to this expert evidence. If not you can disregard it.

Mode of Participation and Criminal Responsibilities of the Two Accused

58. According to the information, the prosecution cannot say who had actually caused the particular assaults which damaged the liver and the head of the deceased, but say both of the accused had assaulted the deceased by punching, kicking and stepping on the face and stomach of the deceased, therefore, each of the accused guilty of Murder as joint principles or as an accessory. The prosecution presented evidence to establish each accused had punched the deceased on his face and then kicked and stepped on his stomach when the deceased fell down.
59. Accordingly, there are three ways to find either accused guilty of murder;
60. The first is as joint principles. As said before, the prosecution alleges that the first and the second accused had assaulted the deceased separately with the intention to cause death or reckless as to cause the death of the deceased and the said assaults had caused the death of the deceased.
61. Before you find either of the accused guilty of murder as principle offender, you must be satisfied that the first accused and/or the second accused had assaulted the deceased with the intention of causing his death or reckless as to causing the death of the deceased and the said assaults have caused the death of the deceased.
62. You must consider the cases of each accused separately and you will return a separate option in respect of each accused. Your opinion may or may not be the same for each accused.
63. Secondly, the accused would be guilty if he/she did not personally cause the assault which eventually caused the death of the deceased, but did an act or omission to help, aid or encourage the other accused with the intention to help, aid and or encourage the other accused to commit an offence of murder, or a similar offence Therefore, if you are satisfied that either the first accused or second accused had aided, helped or encouraged the other

accused by kicking, stepping and punching on the deceased for other accused to commit the offence of murder, you can find he or she is guilty of murder as a secondary offender.

64. Thirdly, even if one of the accused did not assault, kick or step on the deceased, that accused could still be guilty of murder if you are satisfied that he/she had joined in with the other accused with the intention of assaulting the deceased and while executing the said intention, the other accused had killed the deceased, which is a probable consequence of the said common intention of assaulting the deceased.
65. If you are satisfied beyond reasonable doubt the first accused is responsible to this crime as the principle offender or at least responsible as a secondary offender under the second and/or third scenarios, you can find him guilty of murder as charged. Likewise, if you are satisfied beyond reasonable doubt the second accused is responsible to this crime as the principle offender or at least responsible as a secondary offender under the second and/or third scenarios, you can find her guilty of murder as charged.

Self Defence

66. If you are satisfied the prosecution have established that the first and the second accused had assaulted the deceased by punching, kicking and stepping on the deceased, you are then required to consider whether the two accused acted in that manner in order to exercise their right to self defence:
67. The law of self-defense is that if someone is under attack or believes that they are about to be attacked they are entitled to defend themselves so long as they use no more than reasonable force. If you find that both accused or one of them have assaulted the deceased in order to defend him/herself or themselves from the deceased, then he/she/they are not guilty of murder.
68. The accused has no burden to prove beyond reasonable doubt that they acted in order to defend themselves. The accused is only required to adduce or point to evidence that suggest

a reasonable possibility that they have exercised their right to self-defense when the deceased assaulted them. It is the burden of the prosecution to prove beyond reasonable doubt that such self-defense was not existed and the assaults by the accused do not come under the definition of self-defense.

69. If you are sure that the two accused were the aggressors and do not believe they were under threat from the deceased then no question of self-defense arises. If, however, you consider it was or may have been the case that the accused were or believed they were under attack or believed they were about to be attacked you must go on to consider whether response of the accused were reasonable. If you consider what the accused did was, in the heat of the moment when fine judgments are difficult, no more than the accused genuinely believed was necessary, that would be strong evidence that what accused did was reasonable; and if you consider accused did no more than was reasonable, accused was acting in lawful self-defense and not guilty of any offence. It is for you to decide whether the force used was reasonable and you must do that in the light of the circumstances as you find accused believed them to be. If you are sure that even allowing for the difficulties faced in the heat of the moment accused used more than reasonable force, then accused were not acting in lawful self-defense.
70. If you do not believe the defence of self-defense, that does not mean the accused guilty of murder. Still the prosecution has to prove with their own evidence that the accused guilty of murder beyond reasonable doubt.

Defence of Provocation

71. I will now take your attention to the defence of provocation. It is not a complete defence as of self-defense. If you find that the accused assaulted the deceased as a result of provocation or if you have a reasonable doubt when the accused assaulted the deceased, accused may have acted under provocation; then, even though you are satisfied all the other elements of the offence of murder have been proved beyond reasonable doubt, you should find the accused not guilty of murder; but guilty of manslaughter.

72. You have to remember the “provocation” is not a complete defence. It is a partial defence. It reduces the culpability of an accused from murder to the lesser offence of manslaughter.
73. Let me explain the main facts that you have to take into consideration when you consider the provocation, that:
1. Any wrongful act or insult in a nature as to be likely when done to an ordinary person,
 2. Deprive such ordinary person of his power of self-control, and
 3. Induce him to commit an assault of the kind which the accused committed on the deceased,
74. The ‘ordinary person’ in this case means, an ordinary person of the accused’s age who has ordinary powers of self-control expected from a person of that age.
75. Accordingly, provocation consists three main components, they are that:
1. The act of provocation,
 2. The loss of self-control, both actual and reasonable, and
 3. The retaliation proportionate to the provocation.
76. The accused has no burden to prove beyond reasonable doubt that he was provoked by the deceased and they assaulted the deceased as they lost their self-control due to the said provocation. The accused is only required to adduce or point to evidence that suggest a reasonable possibility that the provocation was existed and they acted in that manner as they lost their self-control due to the provocation. It is the burden of the prosecution to prove beyond reasonable doubt that such provocation was not existed and the accused did not assault the deceased due to the loss of their self-control. If there was a provocation, the prosecution is then required to prove that the retaliation of the accused is not proportionate to the said provocation.

Final Directions

77. Upon consideration of whole of the evidence adduced during the course of the hearing, if you are satisfied that the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of Murder as charged, you can find the first accused guilty of the said offence of Murder.
78. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of Murder as charged, you must find the first accused not guilty of the said count of Murder.
79. If you find the first accused is not guilty of murder, then you can proceed to consider the alternative count of manslaughter.
80. If you are satisfied that the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of manslaughter, you can find the first accused guilty of the said offence of manslaughter.
81. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the first accused has committed the offence of manslaughter, you must find the first accused not guilty of manslaughter.
82. Likewise, if you are satisfied that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of Murder as charged, you can find the second accused guilty of the said offence of Murder.
83. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of Murder as charged, you must find the second accused not guilty of the said count of Murder.

84. If you find the second accused is not guilty of murder, then you can proceed to consider the alternative count of manslaughter.
85. If you are satisfied that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of manslaughter, you can find the second accused guilty of the said offence of manslaughter.
86. If you are not satisfied or have doubt whether the prosecution has proven beyond reasonable doubt that the second accused has committed the offence of manslaughter, you must find the second accused not guilty of manslaughter.

Conclusion

87. Madam and Gentlemen assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.
88. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?




R.D.R.T. Rajasinghe
Judge

At Suva

12th November 2019

Solicitors

Office of the Director of Public Prosecutions for the State.
Office of the Legal Aid Commission for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.