

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 05 of 2019

STATE

V

SEMESA BOKINI

Counsel : Mr. Taitusi Tuenuku for the State
Ms. Keli Vulimainadave and Mr. Paula Gade for the Accused

Dates of Trial : 17-20 and 23-25 October 2023

Closing Submissions : 1 December 2023

Judgment : 29 April 2024

The name of the complainant is suppressed. Accordingly, the complainant will be referred to as "NSN".

JUDGMENT

[1] As per the Information filed by the Director of Public Prosecutions (DPP), the accused, Semesa Bokini, is charged with the following offences:

Count One

Statement of Offence

AGGRAVATED ROBBERY: Contrary to Section 311 (1) (b) of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, armed with an offensive weapon robbed MOHAMMED SHAFIQUE and NSN of the following items: 1 x Samsung J2

Prime mobile phone valued at \$500.00, 1 x Apple I-Phone valued at \$2,000.00, 1 x Android Mobile Phone valued at \$900.00 and 1 x Nokia Mobile Phone valued at \$100.00 all to the total value of \$3,500.00, the properties of **MOHAMMED SHAFIQUE** and **NSN** and immediately before the robbery force was used on the said **MOHAMMED SHAFIQUE** and **NSN**.

Count Two

Statement of Offence

ATTEMPT TO COMMIT RAPE: Contrary to Section 208 of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, attempted to have carnal knowledge of **NSN**, without her consent.

Count Three

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

SEMESA BOKINI, on the 5th day of January 2019, at Korovou, Tavua, in the Western Division, murdered **MOHAMMED SHAFIQUE**.

- [2] The accused pleaded not guilty to the three charges and the ensuing trial was held over 7 days. Thereafter, the Learned Counsel for the Defence and the State made their closing submissions in that order.

The Burden of Proof and the Standard of Proof

- [3] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

- (1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*

(2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

(3) *In this Decree (Act)—*

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

[4] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

Legal Provisions and the Elements of the Offences

[5] As could be observed the accused is charged with one count of Aggravated Robbery, contrary to Section 311 (1) (b) of the Crimes Act, one count of Attempt To Commit Rape, contrary to Section 208 of the Crimes Act and one count of Murder, contrary to Section 237 of the Crimes Act.

[6] The first count the accused is charged with is a count of Aggravated Robbery, contrary to Section 311 (1) (b) of the Crimes Act.

[7] Section 311 (1) of the Crimes Act reads as follows:

"A person commits an indictable offence if he or she-

(a) Commits a robbery in company with one or more other persons; or

(b) Commits a robbery, and at the time of the robbery, has an offensive weapon with him or her."

[8] Section 311 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Aggravated Robbery.

[9] As could be observed, in this case the prosecution has charged that the accused committed Robbery and at the time of the Robbery, had an offensive weapon with him or that he was armed with an offensive weapon.

[10] The offence of Robbery is defined in Section 310 (1) of the Crimes Act as follows:

"310. — (1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and —

(a) immediately before committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person —

with intent to commit theft or to escape from the scene; or

(b) at the time of committing theft, or immediately after committing theft, he or she—

(i) uses force on another person; or

(ii) threatens to use force then and there on another person—

with intent to commit theft or to escape from the scene.”

[11] Therefore, in order for the prosecution to prove the first count of Aggravated Robbery, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case on the 5 January 2019);
- (iii) At Korovou, Tavua, in the Western Division;
- (iv) Armed with an offensive weapon;
- (v) Robbed Mohammed Shafique and NSN of their property (the items listed in the charge); and
- (vi) Immediately before the Robbery used force on the said Mohammed Shafique and NSN;
- (vii) With the intention to commit the Robbery or escape from the scene.

[12] To further elaborate on these elements in respect of the first count.

[13] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[14] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[15] The fourth element is that at the time the accused committed this offence he was armed with an offensive weapon. Section 311 (3) of the Crimes Act provides that an offensive weapon includes:

(a) an article made or adapted for use for causing injury to, or incapacitating, a person; or

(b) an article where the person who has the article intends, or threatens to use, the article to cause injury to, or to incapacitate, another person.

[16] The fifth and sixth elements can be discussed together. The prosecution should prove beyond reasonable doubt that the accused, robbed Mohammed Shafique and NSN of their properties (the items listed in the charge) and immediately before the Robbery used force on the said Mohammed Shafique and NSN. A person commits robbery if he immediately before committing theft; or at the time of committing theft; or immediately after committing theft; uses force or threatens to use force on another person, with intent to commit theft or to escape from the scene.

[17] As stated before, Robbery when committed in the company of one or more other persons, amounts to Aggravated Robbery; OR as in this case, the accused is charged for Aggravated Robbery on the basis that he committed Robbery and at the time of the Robbery, had an offensive weapon with him or was armed with an offensive weapon.

[18] In terms of Section 291 (1) of the Crimes Act it is stated: *“A person commits a summary offence if he or she dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property”*. Section 291 (2) of the Crimes Act provides that an offence against sub-section (1) is to be known as the offence of Theft.

[19] Therefore, a person commits Theft if he or she dishonestly, appropriates property belonging to another, with the intention of permanently depriving the other of that property. In this instance the property concerned is the property belonging to Mohammed Shafique and NSN.

[20] The final element the prosecution should prove beyond any reasonable doubt is that at the time the accused used force on Mohammed Shafique and NSN, he did so with the

intention to commit the Robbery or escape from the scene. I must reiterate that no witness can look into an accused's mind and describe what his state of mind was at the time of the alleged incident. Therefore, it is not possible to have direct evidence regarding an accused's state of mind. Knowledge or intention of an accused can only be inferred based on relevant proven facts and circumstances.

[21] The second count the accused is charged with is a count of Attempt to Commit Rape contrary to Section 208 of the Crimes Act. Section 208 of the Crimes Act reads as follows: *"Any person who attempts to commit a rape commits an indictable offence (which is triable summarily)."*

[22] The offence of Rape is defined in Section 207 of the Crimes Act. Section 207(1) of the Crimes Act reads as follows:

207. — (1) Any person who rapes another person commits an indictable offence.

[23] Section 207(2) of the Crimes Act is reproduced below:

(2) A person rapes another person if —

- (a) the person has carnal knowledge with or of the other person without the other person's consent; or*
- (b) the person penetrates the vulva, vagina or anus of the other person to any extent with a thing or a part of the person's body that is not a penis without the other person's consent; or*
- (c) the person penetrates the mouth of the other person to any extent with the person's penis without the other person's consent.*

[24] Therefore, in order for the prosecution to prove the second count of Attempt to Commit Rape, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case on the 5 January 2019);
- (iii) At Korovou, Tavua, in the Western Division;
- (iv) Attempted to have carnal knowledge of the complainant NSN;
- (v) Without the consent of the complainant NSN; and

- (vi) The accused knew or believed that the complainant NSN was not consenting, or the accused was reckless as to whether or not she was consenting.

[25] To further elaborate on these elements in respect of the second count.

[26] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[27] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[28] The fourth element the prosecution must prove beyond reasonable doubt is that the accused attempted to have carnal knowledge of the complainant. In layman's terms, having carnal knowledge with or of the other person, means having penile sexual intercourse with that other person or having sexual intercourse with the use of the penis. In this instance the prosecution must prove beyond reasonable doubt that the accused attempted to have carnal knowledge of the complainant.

[29] The fifth and sixth elements are based on the issue of consent. To prove the fifth element, the prosecution should prove that the accused attempted to have carnal knowledge of the complainant, without her consent.

[30] It should be borne in mind that in terms of Section 206 (1) of the Crimes Act, consent means, consent freely and voluntarily given by a person with the necessary mental capacity to give the consent, and the fact that there was no physical resistance alone shall not constitute consent. Section 206 (2) of the Crimes Act provides that a person's consent to an act is not freely and voluntarily given if it is obtained under the following circumstances:

- (a) by force; or
- (b) by threat or intimidation; or
- (c) by fear of bodily harm; or
- (d) by exercise of authority; or

- (e) by false and fraudulent representations about the nature or purpose of the act; or
- (f) by a mistaken belief induced by the accused person that the accused person was the person's sexual partner.

[31] Apart from proving that the complainant did not consent for the accused to attempt to have carnal knowledge with her, the prosecution must also prove that, either the accused knew or believed that complainant was not consenting or that he was reckless as to whether or not she consented. The accused was reckless, if the accused realised there was a risk that she was not consenting, but carried on anyway when the circumstances known to him it was unreasonable to do so. Simply put, whether the accused did not care whether the complainant was consenting or not. Determination of this issue is dependent upon who Court believes, whilst bearing in mind that it is the prosecution who must prove it beyond any reasonable doubt.

[32] A woman of over the age of 13 years is considered by law as a person with necessary mental capacity to give consent. The complainant in this case was around 37 years of age at the time of the alleged incidents, and therefore, she had the mental capacity to consent.

[33] It must also be noted that in terms of Section 129 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act), it is stated that no corroboration of the complainant's evidence is necessary to prove an offence of a sexual nature. Rape and Attempted Rape are obviously considered as offences of a sexual nature. Corroborative evidence is independent evidence that supplements and strengthens evidence already presented as proof of a factual matter or matters.

[34] The third count the accused is charged with is a count of Murder contrary to Section 237 of the Crimes Act. Section 237 of the Crimes Act reads as follows:

"A person commits an indictable offence if —

- (a) the person engages in conduct; and*
- (b) the conduct causes the death of another person; and*

(c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.”

[35] Therefore, in order to prove the third count of Murder, the prosecution must establish beyond reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case on the 5 January 2019);
- (iii) At Korovou, Tavua, in the Western Division;
- (iv) Engaged in a conduct; and
- (v) The said conduct caused the death of Mohammed Shafique (the deceased); and
- (vi) The accused intended to cause the death of the deceased; or the accused was reckless as to causing the death of the deceased by his conduct.

[36] To further elaborate on these elements in respect of the third count.

[37] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[38] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

[39] The fourth element relates to the conduct of the accused. Section 15(2) of the Crimes Act defines as to what is meant by the term conduct. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. Meaning that the act should be voluntary. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.

[40] When dealing with the fifth element, whether the said conduct of the accused caused the death of the deceased, what must be borne in mind is that, at law, the act of the accused need not be the sole or principal cause of the death, but the act should substantially contribute to the deceased's death. Therefore, Court must be satisfied beyond reasonable doubt that the conduct of the accused substantially contributed to the death of the deceased. This would be sufficient to satisfy the element that the 'conduct caused the death of the deceased'.

- [41] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this element. As stated previously, it is not possible to have direct evidence regarding an accused'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, Court can deduce the state of mind of the accused from the facts and circumstances that it would consider as proved. Knowledge or intention of an accused can be inferred based on relevant proven facts and circumstances.
- [42] In order for Court to conclude that the accused intended to cause the death of the deceased, Court 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. Court will have to consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
- [43] In the event Court finds that the accused did not have the intention to cause the death of the deceased or is not sure whether he had that intention, Court will then have to consider whether the accused was reckless as to causing the death of the deceased. An accused will be reckless with respect to causing the death of the deceased, if;
- a. He was aware of a substantial risk that death will occur due to his conduct; and
 - b. Having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
- [44] What Court must to consider with regard to this particular state of mind is whether the accused did foresee or realise 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 that consequence. The 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 by the prosecution.

[45] It must be said at the outset that the prosecution is basing its case on the fact that the accused was reckless as to causing the death of the deceased by his conduct.

The Admitted Facts

[46] Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), deals with “Admission of facts”. The Section is reproduced below:

135. — (1) An accused person, or his or her lawyer, may in any criminal proceedings admit any fact or any element of an offence, and such an admission will constitute sufficient proof of that fact or element.

(2) Every admission made under this section must be in writing and signed by the person making the admission, or by his or her lawyer, and—

(a) by the prosecutor; and

(b) by the judge or magistrate.

(3) Nothing in sub-section (2) prevents a court from relying upon any admission made by any party during the course of a proceeding or trial.

[47] Accordingly, the prosecution and the defence have consented to treat the following facts as “Admitted Facts”:

1. THAT the accused in this matter is Semesa Bokini, 19 years, Unemployed of Korovou, Tavua.
2. THAT the complainants in this case are Mr. Mohammed Shafique, 53 years, Labourer of Korovou, Tavua (hereinafter referred to as “Complainant 1”) and Ms. NSN, 35 years, Domestic Duties also of Korovou, Tavua (hereinafter referred to as “Complainant 2”).
3. THAT Complainant 2 is the daughter of Complainant 1.

[48] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them, the above facts are proved beyond reasonable doubt.

[49] For the avoidance of any doubt, during the course of this judgment, this Court would be referring to Mohammed Shafique as the deceased and to NSN as the complainant.

Case for the Prosecution

[50] The prosecution, in support of their case, called the following 15 witnesses:

1. NSN (The complainant).
2. Farisha Shabana Nisha (Sister of the complainant).
3. Mohammed Rauf (Neighbour of the deceased and the complainant).
4. Mohammed Shohal Faiyaz Dean (Neighbour of the deceased and the complainant).
5. Mohammed Fahim (Neighbour of the deceased and the complainant).
6. Paulini Saurogo (Forensic Biologist).
7. Dr. Daniella Eliora John (Forensic Pathologist).
8. Dr. Sefton Rigamoto (Medical Officer).
9. Dr. Akesa Kotoveiqaravi Funaki (Medical Officer).
10. Police Constable 5368 Apisalome Ratusuka
11. Detective Sergeant 3556 Kesi Ratavo
12. Detective Sergeant 2408 Annual Prakash
13. Police Constable 3947 Joji Naliva
14. Detective Corporal 4949 Pita Davuiqalita
15. Detective Corporal 3923 Deepak Sami

[51] The prosecution also tendered to Court the following Exhibits:

- | | | |
|-----|---|---|
| PE1 | - | Maroon and black coloured dress. |
| PE2 | - | Black coloured pant (Suthna). |
| PE3 | - | Green coloured pant (Suthna). |
| PE4 | - | Black Android Mobile Phone. |
| PE5 | - | Forensic DNA Report and Police Statement. |

- PE6 - Photographic booklet for the piece of timber.
- PE7 - Piece of timber.
- PE8 - Post Mortem Report of the deceased.
- PE9 - Medical Examination Report of the 2nd complainant.
- PE10 - Medical Examination Report of the deceased.
- PE11 - Medical Examination Report of the accused.
- PE12 - Original copy of the Record of Interview of the accused (Further Caution Interview).
- PE13 - Typed copy of the Record of Interview of the accused (Further Caution Interview).
- PE14 - Photographic Booklet of the Scene of Crime.

[52] Evidence of the complainant NSN

- (i) *The complainant testified that she is currently residing at Korovou in Tavua. She is 41 years of age and doing domestic duties.*
- (ii) *Even in the year 2019, she had been residing at Korovou in Tavua. At the time she was staying with her father. There was no one else staying with her father and her. Her mother was residing in Australia at the time.*
- (iii) *The witness said she has one brother and two sisters (So 3 sisters including her). Her brother's name is Mohammed Shafil (he was staying in Australia at the time). Her sisters are Farisha Shabana Nisha (in 2019 was residing in Suva) and Shabneez Shabana Nisha (in 2019 was residing in Lautoka).*
- (iv) *The complainant testified to the events which took place on the night of 5 January 2019. She said she can recall the date and the time. Around 10.30 in the night, she was at home with her father, at Korovou in Tavua.*
- (v) *At the time, she had had her shower and was in her room. Her dad was sitting in front in the sitting room/living room. She said there are 4 bedrooms in her house (her room, her dad's room, one room for her sisters and one for her brother). From the sitting room, there is a dining room and then her room. Then she heard a loud noise- a bang sound-from the living room. Then she had turned as she was in her room. When she turned, she found a male person standing in front of her. The witness said: "When I turned I saw him with a*

stick and same time he hit me with that stick on my forehead. I still have a scar on my forehead.” The witness showed the scar on her forehead.

(vi) *The witness continued: “When he hit on my forehead, I was about to fall in front and then he hit me again at the back of my head with the same stick.” On being hit on the back of her head, the complainant had fallen face down on the tiles (tiled floor).*

(vii) *The following questions were then asked from the witness and she answered as follows:*

Q. *So what happened after you fell face down on the tiles?*

A. *Then he turned me face up. Then he pulled the pants which I was wearing (the witness used the term suthna for pants). He pulled it out and threw it on the side.*

Q. *Then what happened?*

A. *He was trying to put his finger inside my vaginal part.*

Q. *How was he trying to do this?*

A. *After he tried putting the finger then he was trying to put his penis. I was still strong enough and I pushed him with my leg and I started shouting. Then he kicked on my face while I was shouting. Then with the bed sheet he tried to cover my face and hit on the bed sheet.*

Q. *Then what did you do?*

A. *I was shouting. When I was shouting then my nephew heard my voice. Then the nephew from outside was shouting and coming in towards us-saying like who is there? Who is there? Then the I-Taukei person ran away and I was saved.*

(viii) *The complainant testified that she then tried to get up slowly with the help of the walls. She was trying to go and see why her dad (Appa) did not come especially since she was shouting so loudly.*

(ix) *So she got up. Then she saw her dad was sitting on the floor leaning on the sofa as if he was having grog (in that position). “So when I went to my dad and I was telling him what had happened with (to) me. I could see him only staring at me not knowing that he was also injured at the back of his head.”*

(x) *The witness explained as to how she got to know that her father was injured at the back of his head: “I was calling him and like no response from him and in between like I was also losing my memory. It was coming and going....after calling my dad several times, then I saw the iron door/the gate was open. I went to close that and when I turned after closing the door, then I saw the blood at the back of my dad’s head. The blood was coming out from the head.”*

- (xi) *The complainant said that at this stage she also started feeling dizzy. So she just sat on the sofa and meanwhile people started coming. She said she had sustained injuries on the front and the back of her head. Blood was coming out from the front and the back of my head.*
- (xii) *She said the people who came to her house included her cousin sister's husband- Mohammed Firoze, her neighbours- Mohammed Fahim and Mohammed Rauf and her cousin sister's son- Mohammed Shohal Faiyaz Dean.*
- (xiii) *Her cousin sister's husband had noticed that she was not wearing her pants. He brought her pants and helped her to wear it. While she was doing this, she saw her father crawling to his room. From the sitting room to his bedroom. "I couldn't understand-might be because of the pain and he was not talking".*
- (xiv) *The complainant testified that she was then sitting on the sofa when the police arrived and took her and her father to the Tavua Hospital.*
- (xv) *She was medically examined at the Tavua Hospital. They had put bandages on her forehead and her hand. She had also been given an injection at the Tavua Hospital. Both she and her father were unconscious and they were transferred to the Lautoka Hospital, in two separate ambulances.*
- (xvi) *She and her father had been admitted at the Lautoka Hospital together but in separate wards. She was admitted for nearly one week. Her father had passed away at the Lautoka Hospital. She could not remember the exact date, but stated that he was admitted for two weeks prior to passing away.*
- (xvii) *The complainant testified that several items were stolen from her house that night. Four phones had been found missing – two used by her (one Android phone and one Apple iPhone) and two used by her father (one Nokia button phone and one Samsung J2 touch screen phone).*
- (xviii) *The Android mobile phone used by her was black in color and it had a blue cover.*
- (xix) *The witness was asked to explain as to how the person had tried to insert his finger into her vagina. She said that after putting her face up, he parted her legs and was trying to insert his finger. He had been sitting on his knees and was on the middle of her legs. "He was putting his finger in my vaginal part. He was almost on me and was trying to insert his penis into my vaginal part". He had not been able to insert his penis into her vagina because she had pushed him with her leg. However, he had inserted his finger into her vagina. [This Court is conscious that this is an uncharged act].*
- (xx) *The witness testified that at the time of incident, she was wearing a maroon and black dress, which was knee length and a black suthna pants (which was loose fitting). Inside she was wearing a pantie. The panty had been removed together with the suthna pants. It was pulled together. She doesn't know what happened to the pantie, but the black suthna pants were besides the bed.*

- (xxi) *The witness explained that at the time of the incident she was talking on her Android phone to her sister in Suva. Her sister had then heard her shouting. At this point, using her husband's phone, her sister had called another cousin sister who is staying in Korovou in Tavua and asked her to check as to what was happening at the complainant's house. Her cousin sister's son, Mohammed Shohal Faiyaz Dean, having heard the conversation his mother was having, had come over to the complainant's house and had started shouting from outside, "Who is there? Who is there?"*
- (xxii) *Her cousin sister's husband whom she referred to earlier was Mohammed Firoze, who is the father of Mohammed Shohal Faiyaz Dean. They were residing about 20 metres away from the complainant's house.*
- (xxiii) *The prosecution tendered the maroon and black coloured dress worn by the complainant at the time of the incident as Prosecution Exhibit PE1. The witness said that she had been wearing this dress after having her shower that night together with the black suthna pants. The dress had to be cut open in the hospital since her body was swollen. The black suthna pants was tendered as Prosecution Exhibit PE2. The green coloured suthna pants was tendered as Prosecution Exhibit PE3. This was the pants she was wearing at the time she was taken to hospital. Her black coloured Android mobile phone was tendered as Prosecution Exhibit PE4.*
- (xxiv) *The complainant was shown the Photographic Booklet containing the 12 photographs. She explained in detail what the said photographs depicted [The said Photographic Booklet was later tendered to Court as Prosecution Exhibit PE14].*
- (xxv) *As to the assailant's identity, the complainant said that he was an iTaukei man. He was not wearing any mask on his face at the time. She testified, "When I saw him, I knew he is Fijian/iTaukei".*
- (xxvi) *The witness said that the Police had taken her DNA sample in Suva for the purpose of DNA analysis.*
- (xxvii) *The witness further testified that at the time her nephew came towards her house, the iTaukei man was still in her room. When she was shouting the iTaukei man was still in her room. When her nephew came, he had heard her shouting. That is the time at which her nephew had shouted "Who is there? Who is there?" When the iTaukei man had heard her nephew shout, that is the time he ran away from the house. He had left through the front door of the house.*
- (xxviii) *The complainant was cross examined by the defence. The defence also put several suggestions to the complainant in line with the defence case.*
- (xxix) *The complainant agreed that it was the first time she had ever seen this person. She had never seen him earlier in her life.*
- (xxx) *The Defence highlighted the following inconsistencies in the evidence given by the witness vis a vis her statement made to the Police.*

- i. *In her testimony in Court she stated that she heard a loud noise- a bang sound-from the living room. Then she had got off the bed and turned around as she was in her room. When she turned, she found a male person standing in front of her.*

However, in her statement made to the Police it is recorded as follows: "I was having a conversation with her (her sister) for about three minutes. Suddenly I saw someone standing in front of my bedroom door".

- ii. *In her testimony in Court she stated that she was lying on the bed face down and talking to her sister when she heard something (the sound). She then got off the bed and turned.*

However, in her statement made to the Police it is recorded as follows: "I was lying on the bed facing the ceiling and talking on the phone to my sister Farisha".

- iii. *In her testimony in Court she stated that she got off the bed and stood up on hearing the bang sound.*

However, in her statement made to the Police it is recorded as follows: "As soon as I saw the person entered my room I suddenly stood up".

(xxxi) The complainant explained that she was lying on her bed talking to her sister on the phone. Then she heard the loud bang noise/sound from the living room. On hearing this sound she got off the bed and stood up. Then she saw the iTaukei man standing at her bedroom door.

(xxxii) The defence also highlighted an omission that nowhere in her police statement had the complainant stated that the person she saw on the day of the incident was iTaukei. The witness explained that from the beginning she had been saying that it was an iTaukei man who was standing at her bedroom door.

(xxxiii) It was put to the complainant that only in her testimony in Court did she say that the person was iTaukei. She answered as follows: "Yes only today I am saying he was a Fijian man. But on the day of the incident when I was sitting on the sofa, whoever came that night, I told everyone it was an iTaukei person".

[53] Evidence of Farisha Shabana Nisha

- (i) *The witness testified that she is residing at Lokia, Nausori, in Suva. She is 31 years of age and doing domestic duties.*
- (ii) *Even in 2019, she was residing at Suva. However, it was at 8 Miles in Makoi.*

- (iii) *The witness testified that the complainant NSN is her real sister (biological sister). In 2019, the complainant was staying in Korovou, Tavua with their father, Mohammed Shafique. The family is originally from Tavua. Her husband is from Suva. So she moved to Suva after marriage.*
- (iv) *The witness testified to the events which took place on the night of 5 January 2019. She said she can recall the date and the time. At around 10.30 in the night she was at home in Suva. She was helping her husband (Mohammed Ilyas) with some paper work. Thereafter, she had called the complainant on her mobile phone. The witness said, she calls her sister every day since she is staying alone with her father.*
- (v) *The complainant had stated that she had already had her dinner. She also said that she had her shower and that she was very tired. While talking to her sister, suddenly there was no reply from her. At this stage, the witness heard a banging noise. A very hard banging noise. Then she had heard a deep breathing sound on the phone (the witness demonstrated how this happened). Although, she had asked the complainant as to what was happening, the complainant didn't reply.*
- (vi) *Thereafter, she had heard something dragged on the floor. She was on the phone with her sister for over an hour. She said she had heard everything from the background. She had heard something dragged and dropped on the floor – like something being pulled and dropped on the floor. Then she heard her sister screamed. She felt that her sister was struggling because the sound was blurry/not clear. She had also heard someone swear in the iTaukei language.*
- (vii) *At this stage the witness had quickly grabbed another phone (while she was still on the call with her sister). She had called her cousin sister, Shayam Bano, who stays close to the complainant's house. She had told her that someone is at the complainant's house. Her cousin sister's son, Shohal Faiyaz Dean, having heard what was being spoken, had quickly run to the complainant's house.*
- (viii) *Thereafter, the witness had called the Tavua Police Station and told them about the incident. She had also called her other sister living in Lautoka and told her that something was wrong at home and to go and see. Her name is Shabneez Shabana Nisha.*
- (ix) *Soon after the witness had got to know that her father and her sister were injured and were bleeding heavily. On hearing this, she had quickly packed her things and left for Tavua at the same time.*
- (x) *She had got to know from her cousin sister that her father and her sister had been taken by the Police to the Tavua Hospital. Since the bleeding was heavy, they had both been transferred to the Lautoka Hospital. Therefore, the witness had gone to the Lautoka Hospital.*
- (xi) *On arrival at the hospital, she saw her sister at the Emergency Ward. Her father had already been taken for surgery. The complainant had been admitted at the hospital for over a week.*

- (xii) *Her father had passed away on 19 January 2019. From 5 January 2019 to 19 January 2019, he had remained at the Lautoka Hospital in the ICU.*
- (xiii) *The witness was cross examined by the defence.*
- (xiv) *The Defence highlighted the following omissions in the evidence given by the witness vis a vis her statement made to the Police.*

- i. *In her testimony in Court she stated that she heard a very hard banging noise and a deep breathing sound over the phone.*

However, in her statement made to the Police this is not recorded.

- ii. *In her testimony in Court she stated that she had heard something dragged on the floor.*

However, in her statement made to the Police this is not recorded.

- iii. *In her testimony in Court she stated that she had heard something dragged and dropped on the floor – like something being pulled and dropped on the floor.*

However, in her statement made to the Police this is not recorded.

- iv. *In her testimony in Court she stated that she had heard someone swear in the iTaukei language.*

However, in her statement made to the Police this is not recorded.

- (xv) *With regard to the first three omissions the witness explained that she had told the police about the said matters, but she doesn't know why it was not recorded. As to the final omission, she said she had forgotten to tell that to the police in the heat of the moment, as she was tense.*

[54] Evidence of Mohammed Rauf

- (i) *The witness testified that he is residing in Korovou, Tavua, since 1999. He is 73 years of age and is retired.*
- (ii) *In 2019, the witness was residing at Korovou, Tavua. He knows the complainant and the deceased, as they are his neighbours. They are staying about 20 yards away from his house. The witness said that he first built his house in Korovou. Thereafter, they had built their house in the same location.*
- (iii) *The witness testified to the events which took place on the night of 5 January 2019. At the time, he was a Mowlavi at the Korovou Muslim mosque. When the Mowlavi is not present and the Pesh Imam is not present then he leads the prayers (namaz) for the day.*
- (iv) *Around 10.30 p.m. on 5 January 2019, he was at home and was going to sleep. Then he had heard some noise. He was sitting on his bed and trying to figure*

out where the noise was coming from. The noise was of a girl shouting for help.

- (v) *The witness said: "Then I was standing at my door and I can hear a girl screaming. Then I saw a man jumping over the fence and went". The witness explained that this fence was a barbed wire fence which was in front of his house. It is the fence separating his house from the complainant's house.*
- (vi) *The witness further testified that the man jumped over the fence from the direction of the complainant's compound into his compound. After his compound there is like a river. The man had run towards the river and then he disappeared. They never found him at that time.*
- (vii) *The witness said that it was dark at the time. However, he was carrying a torch at the time. He saw the man with the aid of the torch light. He said: "I could see him. While he was jumping (over the fence) he fell down. Then he got up and ran away. I couldn't recognize him".*
- (viii) *Thereafter, he had gone to the complainant's house. Other people who came were standing outside the sitting room. He was the first person to enter the sitting room. Then he saw the complainant sitting on the sofa and could see blood coming out of her forehead. Her dad was sitting down leaning on the sofa and blood was also coming out of his head. The complainant said that one iTaukei man had hit her.*
- (ix) *Thereafter, the Police had arrived and said that the complainant and her father were badly injured. The Police had taken them to the hospital.*
- (x) *When asked where exactly the man fell down, the witness explained: "On top of the fence. It was dark. He didn't know there was a fence. He got entangled on the fence. Then he got up and then he ran away".*
- (xi) *It was put to the witness in cross-examination that as per the statement given by him to the Police, the only words that the complainant had told him in Hindi was that a thief had hit her (chormaro – meaning thief). There is no mention in his statement to the Police that one iTaukei man had hit her.*
- (xii) *The witness said that he had told this to the Police. It is not his fault that it is not in the Police statement. It is the fault of the Police.*

[55] Evidence of Mohammed Shohal Faiyaz Dean

- (i) *The witness testified that he is residing in Korovou, Tavua. He is 28 years of age and is an Electrician by occupation. He has been residing in Korovou, Tavua, since birth.*
- (ii) *In the year 2019, he was working in Nadi at Trade Air Engineering. As such, he used to stay in Nadi in the company flat. He used to go home only during weekends.*
- (iii) *He knows the complainant as they are related. The complainant is his mother's cousin sister. His mother's name is Shayam Bano. His father's name is Firoze Azad.*

- (iv) *The witness testified to the events which took place on the night of 5 January 2019. Around 10.20 p.m. he was talking to his girlfriend on his mobile phone. At that time, there was a call that his mother had received over her mobile phone. Since it was late in the night, he was wondering who was calling his mother at that time. During the conversation his mother was having, she asked the caller as to who had entered the complainant's house and when the thief had entered. From the tone of his mother's voice he had realized there was something wrong.*
- (v) *On hearing this, he had run down to the complainant's house to see what was happening there. On the way, he had met Mohammed Fahim, another neighbour, who was taking his car out of his compound. The witness had told Fahim to come with him to the complainant's house. Fahim had accompanied him.*
- (vi) *From his house to the complainant's house, the distance is approximately 120 metres. Fahim's house is about 15 metres before the complainant's house.*
- (vii) *Before entering the compound of the complainant's house, the witness had been shouting and trying to raise alarm. Upon entering the compound, from a distance, he could see a person jumping the fence. The witness said that there was a light at the back of the complainant's house, but it wasn't that bright. He could only see someone jumping over the fence. He could also hear the noise from the fence. Due to the distance between him and the fence, he couldn't recognize the person.*
- (viii) *The witness explained further: "From the place I met Mohammed Fahim I started shouting – may be less than 2 minutes. From the time I entered the compound within 30 seconds the person ran away. He was very fast".*
- (ix) *Thereafter, he had entered the complainant's house through the porch door which was opened. He had entered together with Mohammed Fahim. At the time, he saw the deceased was sitting down leaning on the settee. There was blood all over. Then he saw the complainant too sitting on the settee with blood all over her body.*

[56] Evidence of Mohammed Fahim

- (i) *The witness testified that he is residing in Korovou, Tavua. He is 39 years of age and is currently unemployed. He has been residing in Korovou, Tavua, since 20 years.*
- (ii) *In the year 2019, the witness was residing at Korovou, Tavua. The complainant is his neighbour and also his cousin sister.*
- (iii) *The witness testified to the events which took place on the night of 5 January 2019. Around 10.30 p.m. he was at home. He had some friends and families at his place. They were sitting and playing cram board.*
- (iv) *At the time he was leaving home to drop his nephew (Zarin Safraaz Ali) at his home in Korovou, Tavua. He had told his nephew to open the gate so that he can take the car out of the garage. As soon as he got out of his driveway – as*

soon as he reached the junction where the two driveways meet – he had met Shohal. Shohal came running to him and told him that thieves had come to complainant's house.

- (v) The witness had then parked his vehicle in the complainant's compound. The distance between his house and the complainant's house is about 6 to 8 metres. He had then entered the sitting room of the complainant's house. He saw the deceased sitting down with his head tilted and blood was flowing. The complainant was also present and she was also injured. He could see blood on her as well.
- (vi) The witness said that while he was driving towards the complainant's house, with the aid of his vehicle's headlight, he could see someone running but couldn't recognize the person. He had seen the person jump over the fence.

[57] Evidence of Paulini Saurogo

- (i) The witness testified that she is 38 years of age and working as a Senior Scientific Officer - Biology at the Fiji Police Forensic Biology and DNA Laboratory in Suva. She has been serving in this capacity since 2021. She has been employed at the Fiji Police Forensic Biology and DNA Laboratory since 2014 as a Police Officer (a total of 9 years). Since June 2018, she has been working as a Scientific Officer – Biology, which is a civilian post (The witness's curriculum vitae has been previously disclosed to Court).
- (ii) The witness testified that she was awarded a Bachelor of Applied Science Degree from the Auckland University of Technology in 2009. This was facilitated by the Fiji National University.
- (iii) The witness has completed training in DNA Extraction, Quantitation, Polymerase Chain Reaction (PCR) and Capillary Electrophoresis (CE) Method facilitated by Life Technologies, Australia. Through this training it has equipped the witness in DNA process, management and administration. She has been trained on laboratory procedures, including exhibit management, microscopy, item examination, DNA analysis and interpretation. She has also obtained training on adapting the new Laboratory Information Management System (LIMS).
- (iv) The witness testified that she was the case officer in this case that was assigned exhibits for examination and downstream analysis-for DNA analysis processes. Also for interpretation of the DNA profiles and reporting. The exhibit she examined in this case was a piece of timber-She was the examiner of the piece of timber, which was submitted for examination by the Crime Scene Officers.
- (v) The Forensic DNA Report prepared by the witness was tendered by the prosecution as Prosecution Exhibit PE5.
- (vi) The Photographic booklet pertaining to the piece of timber was tendered to Court as Prosecution Exhibit PE6. The witness testified that the

photographic booklet was prepared by her. The photographs found in the said booklet were taken by Ms Ela Kedrayate, another Scientific Officer.

- (vii) The piece of timber was tendered to Court as Prosecution Exhibit PE7. [This piece of timber was brought to Court in a sealed envelope]. This piece of timber was said to have been uplifted from the crime scene. The item was approximately 40 cm in length and 5.5 cm in width. The item was worn out and dirty. It weighed approximately 0.485 kg's.*
- (viii) The witness testified in detail as to how she conducted the DNA analysis on the said piece of timber. For the purpose of the examination, buccal samples (reference samples) were taken from the accused and the complainant. The DNA profiles obtained from the said reference samples of the accused and the complainant was compared to the DNA profiles obtained from the piece of timber (4 sides of the piece of timber).*
- (ix) The witness concluded that a mixed DNA profile obtained from the representative samples from three sides of the timber, consisted of major and minor components. At least three individuals have contributed DNA unequally to these samples. The accused and the complainant cannot be excluded as the minor contributors to these DNA profile. The major component belongs to unknown unidentified individual.*
- (x) The mixed DNA profile obtained from the representative sample from the fourth side of the timber, consisted of major and minor components. At least two individuals have contributed DNA unequally to this sample. The major and minor component belongs to unknown unidentified individuals.*

[58] Evidence of Dr. Daniella Eliora John

- (i) The Doctor testified that she is 37 years of age and serving as a Senior Forensic Pathologist, Forensic Pathology Unit within the Fiji Police Force (The Doctor's curriculum vitae has been previously disclosed to Court).*
- (ii) She has been a Senior Forensic Pathologist since February 2013 (for 10 years). She graduated with a Bachelor in Medicine and Bachelor in Surgery (MBBS) Degree from the Fiji School of Medicine in 2009.*
- (iii) The witness recalls conducting the post mortem examination on the deceased Mohammed Shafique, on 22 January 2019, at the Lautoka Hospital. Her findings have been recorded in the form of a Post Mortem Examination Report.*
- (iv) The Post Mortem Examination Report of the deceased, was tendered to Court as Prosecution Exhibit PE8.*
- (v) The body of the deceased was identified by Farouk Dean, his brother. The observers present at the examination was Detective Constable 3923 Deepak. The deceased was 57 years of age at the time. The estimated time of death has been given as 20.45 hours, on 19 January 2019.*

- (vi) *The doctor explained in detail the external examination she conducted on the deceased. The following external injuries were noted on the deceased's head – a 2.5 x 2 cm contusion was noted over the left mid-scalp region; and a 7 x 4 cm semi-circle contusion with a smaller 1.8 x 1 cm contusion was noted over the right mid-scalp region. The scalp is the skin over the top, sides and back of the head. A contusion or a bruise is an injury where the skin is intact and blood released from damage vessels remains under surface and is caused by blunt force trauma.*
- (vii) *The doctor then explained in detail the internal examination she had conducted on the deceased body and in particular the internal injuries corresponding to the external injuries.*
- (viii) *In her opinion the doctor testified to the cause of death as follows:*
- (a) *Disease or condition directly related leading to death was brain herniation – meaning that the brain had been pushed out on to the skull;*
 - (b) *The antecedent causes were intracranial haemorrhage (bleeding) caused by severe head injury due to the history of assault.*
- (ix) *The other significant conditions contributing to the death have been noted as aspiration pneumonia and acute renal impairment. The doctor testified that these conditions are usually due to clinical complications. These are clinical issues that the deceased developed whilst in hospital which can affect his ability to recuperate or get better. So even if he was recovering from the head injury, there is a chance that he can develop sepsis or infection because of the pneumonia. So they have not only the head injury to worry about but the pneumonia and then you have the kidney problems leading to kidney (renal) impairment.*
- (x) *The doctor confirmed that the aforesaid severe head injury could have been caused if the said piece of timber (Prosecution Exhibit PE7) was used with force on the head of the deceased.*
- (xi) *When asked as to how serious the head injuries on the deceased were, the doctor stated that the injuries were serious enough to land him in hospital to begin with and then he developed other complications.*
- (xii) *The doctor emphasized that the primary cause of death was due to brain herniation. The pneumonia or acute renal impairment may have had some contribution to his death. The said conditions may have worsened or they may have impeded or decreased his likelihood of recovering from the primary cause of his admission.*

[59] Evidence of Dr. Sefton Rigamoto

- (i) *The Doctor testified that he is currently based at the Aspen Hospital, Lautoka, working at the Intensive Care Unit. He is 32 years of age.*
- (ii) *He had obtained his MBBS Degree from the Fiji School of Medicine in 2015. Thus he has been a Medical Practitioner for the past 9 years.*
- (iii) *The witness said that in the year 2019, he was based at the Tavua Hospital. He was the Medical Officer on call to receive the two patients when they were brought to hospital that night. The two patients being the complainant and the deceased. He had medically examined the two of them and prepared the Medical Examination Reports.*
- (iv) *The witness testified that he had conducted the medical examination of the complainant, NSN, on 6 January 2019, at 1.30 a.m., at the Tavua Hospital. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit PE9.*
- (v) *As per the history as related by the person to be examined, as found in column D10 of the report, it is stated as follows: Assaulted at home by an unknown assailant after a home invasion and hit in the head multiple times with a piece of timber and punched in the face and kicked.*
- (vi) *The witness said that the complainant was in severe pain during the examination. Otherwise, she had been oriented to time, person and place. [She was coherent and understood the place she was at the time].*
- (vii) *The Doctor testified as to the specific medical findings as found in column D12. He has noted the following injuries:*
 - (a) *A laceration/haematoma over forehead anteriorly (in the front) oozing blood. A laceration is a tear of the skin caused by blunt force. A haematoma is a large collection of blood below the skin (a large bruise). This injury can be caused by trauma to the head with any form of object that can break the skin.*
 - (b) *Tenderness over nasal bone with blood coming from bilateral nostrils. This injury can be caused by multiple hits by an object over the nose. Should most likely be a blunt object.*
 - (c) *Lip laceration on lower lip which was tender to touch. This injury could also be caused by blunt trauma with an object.*
 - (d) *Laceration on back of the head. It was not bleeding. As stated before, a laceration is a tear of the skin caused by blunt force.*
 - (e) *Laceration on the left finger.*
- (viii) *As to his professional opinion (column D14), the doctor has noted that the injuries were consistent with recent blunt force trauma and assault.*
- (ix) *The Doctor further explained these findings with reference to Appendix 1.*
- (x) *As per his summary and conclusions, the Doctor concluded that the complainant suffered trauma secondary to assault with a piece of timber receiving multiple blows to the head and the face.*

- (xi) *The medical examination of the complainant had been concluded at 3.00 a.m.*
- (xii) *The Doctor testified that the complainant was transferred to Lautoka Hospital for surgery and further treatment.*
- (xiii) *The witness testified that he had also conducted the medical examination of the deceased, Mohammed Shafique, on 6 January 2019, at 1.30 a.m., at the Tavua Hospital. The Medical Examination Report of the deceased was tendered to Court as Prosecution Exhibit PE10.*
- (xiv) *As per the history as related by the person to be examined, as found in column D10 of the report, it is stated as follows: Assaulted at home by an unknown assailant, struck in the back of the head with a piece of timber and loss consciousness until brought to hospital.*
- (xv) *The deceased was said to be disoriented and confused during the examination process.*
- (xvi) *The Doctor testified as to the specific medical findings as found in column D12. He has noted the following injuries:*
 - (a) *Penetrating wound at the back of the head oozing blood. A laceration is a tear of the skin caused by blunt force. A haematoma is a large collection of blood below the skin (a large bruise). This injury can be caused by trauma to the head with any form of object that can break the skin.*
 - (b) *Bleeding nose-pouring from both nostrils.*
 - (c) *Difficulty arising with decrease level consciousness. During the examination the deceased kept falling asleep.*
 - (d) *Pupils sluggish to light reaction on the left. Brain injuries can cause unequal reaction of pupils in the eye. The doctor testified that the deceased was already having severe brain injuries.*
- (xvii) *As to his professional opinion (column D14), the doctor has noted that the injuries were consistent with recent blunt force trauma to the back of the head.*
- (xviii) *The Doctor further explained these findings with reference to Appendix 1 of the report.*
- (xix) *As per his summary and conclusions, the Doctor concluded that the deceased suffered severe blunt force trauma to the back of the head resulting in a skull fracture and subdural haematoma/bleeding that needed surgical intervention and mechanical ventilation.*
- (xx) *The medical examination of the deceased had been concluded at 6.00 a.m.*
- (xxi) *The doctor was shown the piece of timber (Prosecution Exhibit PE 7). The doctor confirmed that the injuries on the complainant and the deceased could have been caused by the said piece of timber.*

[60] Evidence of Dr. Akesa Kotoveiqaravi Funaki

- (i) *The Doctor testified that she is currently based at the Aspen Hospital, Lautoka, working at the Intensive Care Unit. She is 32 years of age.*

- (ii) *She had obtained his MBBS Degree from the Fiji School of Medicine in 2015. Thus she has been a Medical Practitioner for the past 8 years.*
- (iii) *The witness said that from January to May 2019, she was based at the Tavua Hospital. Thereafter, in May 2019, she was transferred to Lautoka Hospital. Since then she has been at Lautoka Hospital (Aspen Hospital).*
- (iv) *The doctor stated that she was the on-call Medical Officer the date on which the complainant and the deceased were brought to the Tavua Hospital. She had helped to stabilize the two patients.*
- (v) *The doctor testified that she had also conducted the medical examination of the Semesa Bokini, on 5 January 2019, at 3.30 a.m., at the Tavua Hospital. Staff Nurse Natasha had been present during the examination. The Medical Examination Report of Semesa Bokini was tendered to Court as Prosecution Exhibit PE11.*
- (vi) *As per the history as related by the person to be examined, as found in column D10 of the report, it is stated that he was brought by Police with a history of injury by barbed wire.*
- (vii) *As to the initial impression of the person to be examined, as found in column D11 of the report, it is stated that he was a young Fijian male, clearly intoxicated, lying on the bench.*
- (viii) *The Doctor testified as to the specific medical findings as found in column D12. Therein she has noted that barbed wire track marks were found on the inner thigh and on the neck. There was no active bleeding.*
- (ix) *Under other observations the doctor has noted a tattoo on the arm (column D13).*
- (x) *As to her professional opinion (column D14), the doctor has noted superficial injury caused by barbed wire marks. The witness stated that although she did not specifically mention, she recalls that the injuries were fresh.*
- (xi) *As per her summary and conclusions, the Doctor concluded history as related by Police – superficial injuries noted.*
- (xii) *The doctor had concluded her medical examination at 3.45 a.m.*
- (xiii) *During cross-examination the doctor confirmed that the history as stated in column D10 was given to her by the Police.*

[61] Evidence of Police Constable 5368 Apisalome Ratusuka

- (i) *The witness testified that he is 27 years of age and currently serving in the Community Policing Department of the Tavua Police Station. He has been serving at Tavua Police Station for the past 6 years.*
- (ii) *He has been serving in the Fiji Police Force for the past 7 years. He has served in the Uniform Branch, Traffic Branch and CID Branch.*
- (iii) *The witness testified that he was the Arresting Officer in this case. He had arrested the accused, Semesa Bokini.*
- (iv) *The witness said that he had been instructed by the Station Officer, Vatukoula Police Station, Inspector Temesi to conduct the arrest. At the time of the*

incident, he was based at the Vatukoula Police Station. He was part of the Operation Team that were on their way back from Nadi when they heard on the vehicle radio transmitter that the Tavua Police was requesting for assistance with regard to a case of home invasion. The witness said this was in the morning of 6 January 2019, specifically at 1.43 in the morning.

- (v) The Operation Team comprised of four officers, who were all from the Vatukoula Police Station. Thereafter, he and his team went straight to Korovou Village and conducted inquiries. Upon conducting inquiries they had received another call from IP Temesi to check on an offender by the name of Semesa Bokini, whose house was located at Korovou Village.*
- (vi) Prior to going to the accused's house, the witness had visited the scene of the incident. From the scene of the incident to the accused's house, the distance was about 1 km.*
- (vii) On arriving at the accused's house, they were met by his mother. They had inquired from the mother as to where the accused was. The mother had said that he was asleep.*
- (viii) The Police Officers then requested the accused's mother to wake him up as they wanted to talk to him. His mother had proceeded to wake up the accused.*
- (ix) The witness testified that the accused woke up and came to see them. When he came to see them, he was very drunk and still staggering. They had informed the accused that he is suspected for the home invasion report that they were investigating and that they need to question him.*
- (x) Thereafter, the witness had explained to the accused his rights and arrested him. The accused had then been brought over to the Tavua Police Station. Prior to the accused being locked up in the cell, the witness had conducted the search of the accused. Upon searching him, the witness had seen fresh scratch marks on the back of his thighs.*
- (xi) Thereafter, the witness had been instructed by IP Temesi to escort the accused to the hospital for medical examination. Accordingly, the witness had escorted the accused to the Tavua Hospital for medical examination. The accused had been arrested, brought to the Tavua Police Station and then taken to the Tavua Hospital.*
- (xii) The witness identified Semesa Bokini as the accused in the dock.*
- (xiii) The witness was cross-examined at length by the defence.*
- (xiv) In cross-examination the witness stated that at the Tavua Hospital his team from the Vatukoula Police had handed over the accused to Police Officers who were present at the time from the Tavua Police Station – namely PC Joeli and PC Viliame. Thereafter, the witness and other members of the Operation Team had gone back to the Vatukoula Police Station.*

[62] Evidence of Detective Sergeant 3556 Kesi Ratavo

- (i) The witness testified that he is 39 years of age and currently serving at the Sigatoka Police Station. He has been serving at Sigatoka Police Station for the past 9 months. He has been serving in the Fiji Police Force for the past 17 years-mostly attached to the CID Unit.*
- (ii) The witness said that in the year 2019 he was based at the Tavua Police Station-in the CID Unit. At the time he was Detective Constable. He had been promoted to the rank of Sergeant last year.*
- (iii) The witness said that his role in the case was to caution interview the accused, Semesa Bokini. He had conducted two caution interviews in respect of the accused. The first caution interview was conducted on 6 January 2019, at the Tavua Police Station. The second caution interview was recorded at the Natabua Correction facility.*
- (iv) The witness testified that the reason for conducting the second caution interview was due to the fact that at the time of his remand the accused was charged with the offences of Robbery and Attempt to Commit Rape. After two weeks of the incident, the deceased had passed away at the Lautoka Hospital due to injuries he received on his head. So there was a need to conduct a further caution interview to clarify some points – that is what could be the result of hitting someone’s head with a piece of timber and did the accused ever take any action to assist the deceased while he was injured. That is the only reason to conduct a further interview of the accused.*
- (v) The witness said that the reason to conduct the caution interview at the Natabua Remand Centre was due to the fact that the accused was remanded in custody at the time. We don’t have any authority to bring the accused from the Remand Centre to the Police Station.*
- (vi) Detective Sergeant Ratavo testified further that for the recording of the second caution interview, Detective Sergeant Annual Prakash and Corporal Deepak had accompanied him.*
- (vii) The witness had conducted the second caution interview on 14 February 2019, commencing at 11.15 in the morning, at the Dispensary Room of the Natabua Remand Centre. Detective Sergeant Annual Prakash was the Witnessing Officer during the recording of the interview.*
- (viii) The caution interview had been conducted in the English language since the accused had stated that he understood English. The witness testified that the accused had been given all his rights during the recording of the interview. The interview has been signed by the accused, the witness and the Witnessing Officer. The accused had agreed to contents of the caution interview prior to placing his signature.*
- (ix) The witness also testified that during the recording of the caution interview, Correction Officers of the Natabua Remand Centre were coming in and out of*

the room to check on the accused, since the recording was done in their facility.

- (x) The original copy of the Record of Interview of the accused was tendered to Court as Prosecution Exhibit PE 12. The typed version of the Record of Interview of the accused was tendered to Court as Prosecution Exhibit PE 13.*
- (xi) The recording of the caution interview had been concluded at 12.18 p.m.*
- (xii) The witness testified that after the caution interview was recorded, the Officers had returned to the Police Station. No complaints have been made by the accused or by any Correction Officers relating to the recording of the interview.*
- (xiii) The witness identified Semesa Bokini as the accused in the dock.*
- (xiv) In cross-examination it was suggested to the witness that during the recording of the caution interview of the accused the witness was writing his own questions and answers (the answers are not of the accused). The witness denied this suggestion.*
- (xv) It was further suggested to the witness that the only time this caution interview was given to the accused was for him to sign at certain places that the witness had pointed out. The witness denied this suggestion.*
- (xvi) The witness was asked as to the alterations made at questions 21, 26 and 27, where the word 'stick' has been deleted and the word 'timber' has been added. The witness agreed that the said alterations were made by him and that he had placed his initial at the place where the alterations was made.*
- (xvii) It was suggested to the witness that these alterations were made by him after the recording of the caution interview had concluded. The witness denied this suggestion and said that the alterations were done in the presence of the accused and the Witnessing Officer.*

[63] Evidence of Detective Sergeant 2408 Annual Prakash

- (i) The witness testified that he is 50 years of age and currently serving at the Ba Police Station as the Crime Sergeant. He has been serving as Crime Sergeant since February 2023. He has been serving in the Fiji Police Force for the past 30 years-since 1993. He has served in the Uniform Branch, Traffic Branch, CID Unit and Prosecutions. He was promoted as Sergeant in February 2023.*
- (ii) The witness said that in the year 2019 he was based at the Tavua Police Station. He was serving at Tavua Police Station from February 2016 to February 2023. His role in the case was to function as the Witnessing Officer during the recording of the caution interview of the accused, Semesa Bokini. The caution interview had been recorded by Detective Sergeant Kesi Ratavo, at the Natabua Remand Centre.*
- (iii) As Witnessing Officer, his responsibility was to ensure that the caution interview was conducted in a fair manner and that the rights of the accused were duly explained to him.*

- (iv) *The witness said that he was aware that this was the second caution interview to be recorded of the accused. The reason for conducting the second caution interview was due to the fact that at the time of his remand the accused was initially charged with the offences of Robbery and Attempt to Commit Rape. The deceased was admitted to hospital due to the injuries he suffered. Then after two weeks of the incident, the deceased had passed away at the Lautoka Hospital. So there was a need to conduct a further caution interview to clarify certain issues from the accused. That is the only reason to conduct a further interview of the accused.*
- (v) *The original copy of the Record of Interview of the accused which was tendered to Court as Prosecution Exhibit PE 12, was shown to the witness. The witness confirmed that he had signed on all four pages of the said interview. He further confirmed that the accused and Detective Sergeant Kesi Ratavo had signed the interview.*
- (vi) *The witness confirmed that he was present throughout the recording of this interview (the entire duration of one hour).*
- (vii) *The witness denied that as Witnessing Officer he and the Caution Interviewing Officer had fabricated the answers that were given by the accused.*
- (viii) *The witness identified Semesa Bokini as the accused in the dock.*
- (ix) *It was suggested during cross-examination that the witness was not present when the alterations were made by Detective Sergeant Ratavo, at questions 21, 26 and 27, where the word 'stick' has been deleted and the word 'timber' has been added. The witness denied this suggestion and said that the said alterations were made in his presence.*
- (x) *It was suggested to the witness that these alterations were made only after the recording of the caution interview had concluded. The witness denied this suggestion and said that the alterations were done in the presence of the accused and himself.*
- (xi) *It was suggested to the witness that in the pretext of clarifying issues from the accused, he had allowed the Caution Interviewing Officer to fabricate the answers in the caution interview statement so as to fulfil the purpose of this further caution interview. The witness denied this suggestion and stated that the answers were never fabricated. The answers were recorded as answered by the accused.*
- (xii) *It was further suggested to the witness that during the recording of the caution interview statement he was walking around the vicinity of the Natabua Remand Centre and that he even did not enter the doctor's room (Dispensary) where the caution interview statement was recorded. The witness denied this suggestion. He stated that the correction authorities may also have their own records and it will be recorded there that he had entered the room and was present full time during the recording of the interview.*

[64] Evidence of Police Constable 3947 Joji Naliva

- (i) The witness testified that he is 46 years of age and currently serving at the Vitogo Community Post, attached to Lautoka Police Station. He has been serving at Lautoka Police Station since 8 September 2023 (for just over one month). He has been serving in the Fiji Police Force for the past 16 years. He has served in the Uniform Branch, Traffic Branch and the CID Branch.*
- (ii) The witness said that in the year 2019 he was based at the Tavua Police Station-in the Crimes Department. He had been the Charging Officer in this case. Apart from that he was in the team doing the search and investigation in this case. The search was for any evidence in relation to the case. The search was being conducted in the vicinity of the crime scene – around the area where the deceased’s house was located and nearby areas.*
- (iii) Instructions for this investigation had been received from the Crime Officer, Tavua Police Station, Detective Inspector Simone Ratu. The Investigating Officer in the case was Detective Constable Deepak. Other members of this search team were from Tavua and Vatukoula Police Station.*
- (iv) The witness testified that during the course of the caution interview of the accused it had transpired that he can show the place where the piece of timber was thrown by him. Accordingly, the witness had assisted the Investigating Officer to go to the scene of crime, along with the accused. Close to the scene of the crime, the accused had pointed to the place that he had thrown the timber which he had used to hit the deceased.*
- (v) The area had been searched and the witness had found the piece of timber. It was found at a place which was a cross-road to the village where the accused was residing – Korovou Village in Tavua.*
- (vi) When the piece of timber was found it had stains like blood on it. The witness had uplifted the timber from that place. The witness said that he picked up the piece of timber with his bare hands. He had not been wearing gloves at the time. This was at 5.20 in the afternoon on 7 January 2019.*
- (vii) After picking up the piece of timber the witness had brought it to the Tavua Police Station and handed it over to the Investigating Officer DC Deepak. The witness was shown Prosecution Exhibit PE7. He identified it as the piece of timber which he had recovered and handed over to DC Deepak.*
- (viii) The witness testified that the place where the piece of timber was located was about 200 to 250 metres from the accused’s house. The witness further testified that the place where the piece of timber was located was about 20 to 30 metres away from the deceased’s house. It was a jungle area close to the deceased’s house.*
- (ix) In cross-examination it was suggested to the witness that at the time the piece of timber was located he had told the accused to pick up the piece of timber. The witness said that the accused just pointed to the place where he had thrown the piece of timber on the day of the offence. A search was conducted*

and only during that search that the piece of timber was located and picked up by him.

- (x) *It was also suggested to the witness that in his presence it was the accused who picked up the piece timber and at the time the accused was not wearing any gloves. The witness denied this suggestion and stated that it was he who picked up the piece of timber. It was further suggested to the witness that the reason why the accused had picked up the piece timber was because the witness had forced him to pick it up. The witness denied this suggestion.*

[65] Evidence of Detective Corporal 4949 Pita Davuigalita

- (i) *The witness testified that he is 35 years of age and currently serving at the Lautoka Police Station. He has been serving in the Fiji Police Force for the past 10 years-2 years in the Uniform Branch and remaining 8 years in the Forensic Department. During his entire career he has been attached to the Lautoka Police Station.*
- (ii) *The witness said that his role in the case was as a Crime Scene Examiner and Photographer. He took photographs in relation to this case and prepared a Photographic Booklet. The photographs were taken on 6 January 2019. The witness said that he took photographs at the crime scene with a digital camera.*
- (iii) *The Photograph Booklet of the Scene of Crime prepared by him (containing 12 photographs) was tendered to Court as Prosecution Exhibit PE14. The witness described in detail the nature of the 12 photographs he took of the crime scene.*
- (iv) *The witness testified that he also uplifted a black coloured pant (suthna) from the crime scene. When shown Prosecution Exhibit PE2, the witness confirmed that it was the same piece of cloth he had uplifted.*
- (v) *The witness had also recovered a mobile phone in this case. This was recovered from the back yard of the deceased's house-in a bush area (as depicted in photographs 11 and 12 of the Photograph Booklet). When shown Prosecution Exhibit PE4, the witness confirmed that it was the mobile phone he had uplifted.*
- (vi) *He had also received the piece of timber from the Investigating Officer DC Deepak, at the Crime Scene Office in Lautoka. This was on 8 January 2019. The witness said he had used gloves in receiving the piece of timber which was handed over to him by DC Deepak. However, at that particular time DC Deepak had not been wearing any gloves. When shown Prosecution Exhibit PE7, the witness confirmed that it was the exact piece of timber that was handed over to him by DC Deepak.*
- (vii) *The witness testified further that the piece of timber was conveyed to the Biology Lab in Suva for the purpose of extracting DNA samples.*
- (viii) *In cross-examination the witness was asked whether the piece of timber had been dusted for finger prints. He replied that finger prints cannot be collected*

from rough surfaces. They can only be collected from flat smooth surfaces. He said: "from timber, we do not have the technology to get finger prints".

- (ix) The witness said at the time the piece of timber was handed over to him, he could not notice any blood stains on it. That is the reason he sent the piece of timber for further analysis to Biology Lab in Suva.
- (x) The witness testified that he was the officer who had obtained the sample of saliva from the accused. He explained the process of obtaining the saliva sample. He stated: "Firstly we do explain to the suspects about why we collect samples. Then we explain that he is not forced and if he is willing to give his consent. If he consents, then he signs in the presence of the Investigating Officer then I take the saliva sample". With regard to the accused, he had taken the saliva sample on 6 January 2019.
- (xi) The Officer stated that he did not have in his possession at this time a copy of the Consent Form signed by the accused. He said the signed Consent Form was submitted to the Biology Lab together with the piece of timber.

[66] Evidence of Detective Corporal 3923 Deepak Sami

- (i) The witness testified that he is 39 years of age and currently serving at the Crimes Branch of the Tavua Police Station. He has been serving at Tavua Police Station for the past 14 years. He has been serving in the Fiji Police Force for the past 17 years. He has served in the Traffic Branch, General Duties/Uniform Branch, and currently in the Crimes Branch (CID).
- (ii) The witness said that in the year 2019 he was based at the Tavua Police Station and serving in the Crimes Branch (CID).
- (iii) The witness said that he had been appointed as the Investigating Officer in this case, by the Crime Officer, Detective Inspector Simone Ratu.
- (iv) The witness testified that during the investigations he had received the piece of timber from DC Joji Naliva and also the clothes of the complainant-Prosecution Exhibits PE1, PE2 and PE3. The black coloured dress worn by the complainant at the time of the incident (Prosecution Exhibit PE1), was received from the hospital. The dress had to be removed from the complainant's body. He had also received the mobile phone (Prosecution Exhibit PE4).
- (v) The witness explained that he received the piece of timber from DC Joji Naliva after he returned from visiting the complainant and the deceased at the Lautoka Hospital, on 7 January 2019. It was around 8.00 p.m. in the evening. He received the piece of timber at the Crime Office of the Tavua Police Station. At the time of receiving the piece of timber, he had received it with his naked hands (he was not wearing gloves).
- (vi) The witness testified that after receiving the piece of timber, he had placed it in his Crime Officer, Detective Inspector Simone's room – it was locked inside the room. The next day (8 January 2019) he had handed over the said piece of timber to Corporal Pita at the Lautoka Police Station.

- (vii) *The witness was shown Prosecution Exhibit PE7. He confirmed that it is the piece of timber he had handed over to Corporal Pita after receiving it from PC Joji Naliva.*
- (viii) *In cross-examination, the witness agreed that farming places in Korovou are usually fenced with barbed wire. However, he said he was unaware whether the Korovou village boundary is marked by barbed wire separating the village from the jungle.*
- (ix) *It was suggested to the witness that he was part of the team that went for the scene reconstruction and was present when the piece of timber was found. The witness denied this suggestion. It was further suggested to the witness that when the piece of timber was found, the accused was forced by PC Joji to pick up the piece of timber. The witness reiterated that he was not present during the reconstruction of the scene or when the piece of timber was recovered.*
- (x) *It was suggested to the witness that he together with two other officers had assaulted the accused by punching him on his face and other parts of his body. The witness denied this suggestion.*
- (xi) *It was suggested to the witness that in his presence the accused had picked up that piece of timber using his bare hands and given it to PC Joji. The witness denied this suggestion.*
- (xii) *The witness confirmed that on inspection of the piece of timber that was handed over to him by PC Joji, it had stains like blood on it. Even at the time he had handed over the piece of timber Corporal Pita, he could observe the stains like blood on it.*
- (xiii) *The Officer testified that he was present at the Natabua Remand Centre when the second caution interview of the accused was being conducted. He agreed that he was neither the Caution Interviewing Officer nor the Witnessing Officer. The witness said that he was not present full time during the recording of the interview. He further testified that he did not intervene at any stage during the recording of the said caution interview statement.*
- (xiv) *It was suggested to the witness that during the recording of this caution interview statement, it was only himself, Detective Sergeant Kesi and the accused who were present. The witness denied this suggestion and stated that the Witnessing Officer, Detective Sergeant Annual was also present.*

[67] At the end of the prosecution case Court decided to call for the defence. The accused was then explained his legal rights. I explained to him that he could address Court by himself or his Counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. I explained to the accused that he need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[68] The accused testified on his own behalf. He also called one witness Marika Vunisa in support of his case.

Case for the Defence

[69] Evidence of Semesa Bokini

- (i) *The witness testified that he is 25 years old (his date of birth is 5 March 1998). He is currently residing at Korovou in Tavua. He is a Farmer by occupation.*
- (ii) *The witness said that back in January 2019, he was residing in Korovou, Tavua. He was 20 years old at the time and working as a Carpenter.*
- (iii) *The witness testified that the reason he is in Court today is because of the case he has been charged with. He said that prior to the Police coming to arrest him, he was sleeping. Prior to that he had been spirit. He said: "I started drinking from town, then I went down to the Village. We were drinking at the edge of the Village then we moved towards the graveyard side".*
- (iv) *The witness said that he only recalls drinking with two other persons – one Marika and one Atunaisa. He cannot recall as to the date or time he started drinking at the edge of the Village. However, it was in the afternoon (daylight).*
- (v) *The witness explained that by edge of the Village he meant the opposite or other side of the Village. "It is right in the middle of the Village – but on the edge on the other side, right side, the cassava plantation".*
- (vi) *The witness testified that the graveyard is located on a hill. The hill is on the other side of the Village. As you enter Korovou Village, it is on the left side. He didn't know how far the graveyard is, from the Village. The nearest house from the graveyard was just next door.*
- (vii) *The witness continued that the graveyard is separated from the Village (boundary) by a fence. It is a wooden post with barbed wire going along. The barbed wire fence goes along the Village to the hills. He has been residing at Korovou Village since birth.*
- (viii) *The witness was asked to explain further the precise location of his Village if one is travelling from Tavua on the main road. The witness said: "From the main highway, the Kings highway, there is a road leading towards the Village. It is a big Village. It is divided into three where the houses are located. That road that is going towards the Village – on one end of the road – there are houses on the side. That road will lead to Nadarivatu, Naitasiri. Another road goes this way – and there are houses on both sides of that road".*
- (ix) *The witness confirmed that all the houses he referred to are part of Korovou Village. The three parts are known as Suva, Nadroga and Nadi. The witness resides in Nadroga. The graveyard where they were drinking is also in Nadroga. The first drinking spot was on the Suva side. The boundary of the Village was marked by a barbed wire fence with wooden post (the same kind of fence that he mentioned earlier in relation to the graveyard).*

- (x) *The witness drew a sketch to depict the three parts of Korovou Village as testified to by him.*
- (xi) *The witness said that when they went to the graveyard to drink, it was dark. He couldn't recall the actual time or the duration of time they were drinking at the graveyard. He said, before the drinks finished, the witness and another boy named Lasarusa went to buy some more drinks (spirits).*
- (xii) *When asked where he and Lasarusa went to buy drinks, the witness said: "The graveyard is outside the Village boundary fence. We jumped over the fence to come to the Nadroga side. There is a house selling the drinks. ... We went to buy the drinks but we did not have enough money. From there I went home. I asked my mother if she could lend me some coins....".*
- (xiii) *The witness said that his house is a bit on a hill and at this time Lasarusa was waiting down (the hill). The witness also said that he was not able to get any coins from his mother. Thereafter, he had come down to Lasarusa and the two of them had gone back to the drinking spot. On the way he had passed the coins (already collected at the graveyard side) to Lasarusa who had proceeded to the drinking spot at the graveyard side. The witness said, he didn't go there as he was resting at a house closest to the graveyard – there was a resting porch outside.*
- (xiv) *The witness testified that he had continued resting at that spot for quite a long time. He couldn't recall the exact time. Thereafter, he had gone home. The distance from the place he had been resting to his house was about 15 to 20 metres. He went home by foot. After reaching home, he had gone to lie down. He couldn't recall the time he had reached home or who all were at home at the time.*
- (xv) *The witness testified that while he was sleeping, his mother had woken him up. She had informed him that Police Officers are waiting for him outside. He had stood up and gone outside to see the Officers. He said his head was still spinning (due to the spirit and Woodstock he had consumed). The Officers had informed him that they have to take him to the Police Station. Thereafter, he had been taken to the Tavua Police Station. He doesn't recall the time this had happened but it was still dark.*
- (xvi) *The witness continued that at the Tavua Police Station they had entered his name and taken him to Vatukoula Station – it is like a bure house where they have meetings. There the Police had been swearing at him. They had assaulted him and taken him back to Tavua Police Station.*
- (xvii) *The witness recalls being taken to the Tavua Hospital for examination. However, he doesn't recall the date or time this happened. He said: "I was still not in my right state of mind – because I was still drunk and due to what the Police did to me".*
- (xviii) *The witness testified to being visited by the Police while in the Remand Centre for further questioning. He said that they did not ask him any questions. They just informed him to sign. There were three Police Officers who were present.*

It was Police Officer Kesi who told him to sign (Detective Sergeant Kesi Ratavo). He denies what the Police said that Police Officer Kesi had asked questions from him and that he had answered the questions and then signed on the paper.

- (xix) In addition to Police Officer Kesi, there were two others in the room. One was sitting and the other one was standing and moving around. The witness said that the Police Officer who was sitting was the last Officer who gave evidence for the prosecution (Corporal Deepak) and the Police Officer who was moving around was the fat one who came to give evidence (Detective Sergeant Annual Prakash).*
- (xx) The witness was asked about Police Officer Joji's evidence in Court where he had stated that the witness is the one who pointed out to him as to where the piece of timber was. The witness said that due to the amount of assault they did to him, he had just pointed to a piece of timber on the ground. Thereafter, the Police had informed him to uplift the piece of timber but he had refused. The Police Sergeant who was accompanying that day had then started punching him to uplift the timber. Due to the assault, he had uplifted the piece of timber and hand it over to Police Officer Joji. At the time of uplifting the timber, he had done so with his bare hands.*
- (xxi) The accused totally denies the three charges of Aggravated Robbery, Attempt to Commit Rape and Murder that have been brought against him.*
- (xxii) The witness said that he recalls being taken by the Police to the house or to the compound of the deceased and the complainant. He said that even prior to this, he has been to that place: "I worked together with the complainant (deceased). I normally refer to him as Rabulu. Sometime we go there to drink grog or we go to other residence".*
- (xxiii) When asked to explain as to what sort of work he did with the deceased, the witness said, building houses/carpentry work. After they finished one job they normally go to his residence to drink grog or they go to some other residence.*
- (xxiv) The witness was cross-examined at length by the Learned Counsel for the State and the prosecution case theory was put across to him. However, the witness consistently denied the allegations made against him by the complainant.*
- (xxv) During cross-examination the witness confirmed that he knew the deceased prior to the incident and also knew where he was residing.*
- (xxvi) The witness agreed that after he and Lasarusa went to ask his mother for money to buy further spirits and after Lasarusa had left, that his friends didn't know what he was doing. He agreed and said that he also wouldn't know what his friends were doing.*
- (xxvii) It was suggested to the accused that it was at this time that he went to the deceased's house and robbed him. The accused denied the suggestion.*
- (xxviii) It was suggested to the witness that he had picked up that piece of timber and hit him (the deceased) on the back of his head. It was also suggested that thereafter he went to the complainant's room and hit her on her forehead and back of the head. It was further suggested that when the complainant lay on a*

pool of blood, that he tried to rape her. It was suggested further that he had then stolen the complainant's phone because he didn't have money to buy spirit. It was also suggested that thereafter, since people had arrived at the complainant's house, he had run away and hurt himself on the barbed wire fence. The witness denied all these suggestions.

(xxix) The witness agreed that during his medical examination, the only injuries that the doctor found on him were the barbed wire marks and no other injuries.

(xxx) It was suggested to the accused that the only reason his DNA and the complainant's DNA was found on the piece of timber was because he had used the said piece of timber to assault the deceased and the complainant. The witness denied this suggestion and said that he was forced to uplift the piece of timber.

(xxxii) It was further suggested to the accused that the place where the piece of timber was found was close to the deceased's and complainant's house. The witness said that it was on a hill and that he pointed out to the piece of timber because of the assault.

(xxxiii) It was further suggested to the accused that there was no assault on him and that it was he on his own freewill who showed the Police where the piece of timber was. The witness denied this suggestion.

(xxxiiii) It was further suggested to the accused that the Police did not beat him or force him to sign his further caution interview statement. The witness said that he signed the document because of what he had gone through.

[70] Evidence of Marika Vunisa

(i) The witness testified that he is 37 years old and residing at Korovou Village in Tavua. He is a Fisherman by occupation.

(ii) The witness said that on 5 January 2019, he was residing at Korovou Village. On that particular day, they have been drinking besides the Village side – on the Suva side of the Village.

(iii) When asked who all were drinking on that particular day, he said, it was only boys from Korovou Village and there were few boys from Vanuakula Village.

(iv) They had started drinking at 10.00 in the morning. Around 2.00 to 3.00 p.m. in the afternoon, the accused has joined them. At the time they were still on the Suva side of the Village. They had been drinking till it was getting dark. Thereafter, they had moved towards the burial site on the Nadroga side of the Village.

(v) The witness confirmed that the boundaries of the Korovou Village were marked by a barbed wire fence. It is in three lines running from the post. Even at the burial site, there was a similar barbed wire fence separating the burial site from the village.

(vi) The witness said that at the burial site they had been drinking spirit. In addition to the witness, there were several others present, including the accused. Whilst they were drinking, since there was less drinks left, they had started

contribution. They managed to collect \$15.00 from the group. Then the accused volunteered to go and ask his mother for the rest of the money to buy the drinks. The accused had left with Lasarusa.

- (vii) At the burial site, they had heard the accused's mother swearing at them – because he went to ask for more money. The witness could not recall the exact time but it was dark. The witness said that the group started swearing at the accused's mother because she was swearing at the accused – they swore at both of them. Lasarusa had returned to the place alone with the money.
- (viii) The witness indicated in the sketch drawn by the accused as to where exactly the accused's house was located, in relation to the burial site. This was around 10 to 15 minutes after he left.
- (ix) Thereafter, they had consumed the last drinks that were left in the glass. Then the whole group went to the main highway – Kings Road - to look for some money to buy drinks.
- (x) The witness said when they were on the main highway, the Police vehicle parked there and started questioning them as to their whereabouts that night. While they were being questioned, they saw the accused being brought by the Police in handcuffs. No one else had been arrested by the Police (other than for the accused).
- (xi) In cross-examination, the witness confirmed that when Lasarusa came back to join the group, he had come alone. He also confirmed that when the group went down to the main road, the accused was not with them. The only time he saw the accused next was when the accused was in the custody of the Police.
- (xii) The witness confirmed that from the time the accused left with Lasarusa to the time Lasarusa came back alone and the time they left to go to the main road, they didn't know what the accused was doing.

Analysis

[71] The prosecution in support of their case, called 15 witnesses- the complainant and 4 other civilian witnesses; the Forensic Biologist; the Forensic Pathologist; the Medical Officer who examined the deceased and the complainant at the Tavua Hospital; the Medical Officer who examined the accused at the Tavua Hospital; and 6 Police Officers, who were part of the investigating team.

[72] The accused testified on his own behalf. He also called witness Marika Vunisa in support of his case.

[73] The burden of proving each ingredient of the three charges rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt. Therefore, it is incumbent on the prosecution to prove the elements of the three charges beyond

reasonable doubt. I have made reference to the elements that the prosecution has to prove in respect of the charge of Aggravated Robbery, at paragraph 11 of this judgment; the charge of Attempt to Commit Rape, at paragraph 24 of this judgment and the charge of Murder, at paragraph 35 of this judgment. I have further elaborated on those elements in respect of each charge.

- [74] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as admitted facts without placing necessary evidence to prove them. Therefore, those facts are considered as proved beyond reasonable doubt.
- [75] Based on the said admitted facts it is admitted that the complainant is the daughter of the deceased.
- [76] I have summarized the evidence of all witnesses led during the trial.
- [77] The complainant clearly testified as to what transpired on that fateful night, on 5 January 2019. Around 10.30 in the night, she was at home with her father, at Korovou in Tavua. At the time, she had had her shower and was in her room. Her dad was sitting in front in the sitting room/living room. She had been talking on the phone to her sister in Suva. Then she heard a loud noise- a bang sound-from the living room. When she had turned she found a male person standing in front of her. She saw him with a stick and at the same time he had hit her with that stick on her forehead. [The complainant still had a scar on her forehead]. When he hit her on her forehead, she was about to fall in front. At that time, the man had hit her again at the back of her head with the same stick. The complainant had fallen face down on the tiled floor.
- [78] Then the man had turned her face up. Then he pulled the pants (suthna pants) which she was wearing. He had pulled it out and threw it on the side. The man was trying to put his finger inside her vagina. After he tried putting the finger then he was trying to put his penis into her vagina. The complainant had pushed him with her leg and started shouting for help. At this stage the man had kicked her on her face while she was shouting. Then with the bed sheet he tried to cover her face and she had hit on the bed sheet.
- [79] When she was shouting her nephew (Mohammed Shohal Faiyaz Dean) had heard her voice. Then her nephew had been shouting from outside and coming towards her house. Then the iTaukei person had run away and she was saved.

- [80] The complainant testified that she then tried to get up slowly with the help of the walls. She was trying to go and see why her dad did not come to her rescue, especially since she was shouting so loudly. So she got up. Then she saw her dad was sitting on the floor leaning on the sofa as if he was having grog (he had been sitting in that position). So she went to her dad and she was telling him what had happened to her. She could only see him staring at her. Later she found that he was also injured at the back of his head. She saw blood at the back of her dad's head. The blood was coming out from his head.
- [81] Later she and her father had been taken to Tavua Hospital and from there transferred to Lautoka Hospital. Her father had passed away about two weeks later at the Lautoka Hospital (on 19 January 2019) from the injuries sustained as a result of this incident.
- [82] The complainant testified that several items were stolen from her house that night. Four phones had been found missing – two used by her (one Android phone and one Apple iPhone) and two used by her father (one Nokia button phone and one Samsung J2 touch screen phone). The next day (6 January 2019), the black coloured Android phone had been recovered by the Police from the back yard of the deceased's house-in a bush area (as depicted in photographs 11 and 12 of the Photograph Booklet). The phone was tendered to Court as part of the evidence.
- [83] According to the complainant the person who had perpetrated these acts was an unknown person. She only identified him as an iTaukei male person.
- [84] Therefore, the primary issue for determination in this case is the issue of identification.
- [85] The defence totally denies the charges against accused. Therefore, their defence is one of mistaken identity.
- [86] In the landmark case of *R v Turnbull* (1977) Q.B. 224, [1977] 63 Criminal Appeal Reports 132, [1976] 3 WLR 445, [1976] 3 All ER 549, at 551 to 552, the English Court of Appeal enunciated special guidelines to assess the quality of disputed visual identification. Lord Widgery CJ articulated the said guidelines in the following words:

“First, whenever the case against an accused depends wholly or substantially on the correctness of one or more identifications of the accused which the defence alleges to be mistaken, the judge should warn the jury of the special need for caution before convicting the accused in reliance on the correctness

of the identification or identifications. In addition, he should instruct them as to the reason for the need for such a warning and should make some reference to the possibility that a mistaken witness can be a convincing one and that a number of such witnesses can all be mistaken. Provided this is done in clear terms the judge need not use any particular form of words.

Secondly, the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made. How long did the witness have the accused under observation? At what distance? In what light? Was the observation impeded in any way, as for example by passing traffic or a press of people? Had the witness ever seen the accused before? How often? If only occasionally, had he any special reason for remembering the accused? How long elapsed between the original observation and the subsequent identification to the police? Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance? If in any case, whether it is being dealt with summarily or on indictment, the prosecution have reason to believe that there is such a material discrepancy they should supply the accused or his legal advisers with particulars of the description the police were first given. In all cases if the accused asks to be given particulars of such descriptions, the prosecution should supply them.

Finally, he should remind the jury of any specific weaknesses which had appeared in the identification evidence.

Recognition may be more reliable than identification of a stranger; but, even when the witness is purporting to recognise someone whom he knows, the jury should be reminded that mistakes in recognition of close relatives and friends are sometimes made.

All these matters go to the quality of the identification evidence. If the quality is good and remains good at the close of the accused's case, the danger of a

mistaken identification is lessened; but the poorer the quality, the greater the danger.”

[87] The **Turnbull** guidelines have been accepted as the law in Fiji. This has been specifically stated by the Fiji Court of Appeal in **Semisi Wainiqolo v The State** [2006] FJCA 70; AAU0027.2006 (24 November 2006); and in **Mesake Sinu v The State** [2013] FJCA 21; AAU37.2009 (13 March 2013).

[88] In **Rusiate Savu v The State** [2014] FJCA 208; AAU0090.2012 (5 December 2014); the Fiji Court of Appeal held that the Learned Magistrate was in error when she concluded that the **Turnbull** guidelines did not apply to that case as it was not a situation of identification on a fleeting glance but one of recognition.

*“Clearly, the learned trial Magistrate misdirected herself when she said the **Turnbull** guidelines are not appropriate here as this was not fleeting glance case but was of recognition. The **Turnbull** guidelines equally apply to cases of disputed recognition as was the case here. In **R v Thomas** [1994] Crim. LR 120, the English Court of Appeal held that where there has been some form of recognition, the risk that needs to be assessed is whether the witness is mistaken in his or her purported recognition of the accused. That risk is assessed by taking into account the **Turnbull** guidelines against the circumstances in which the sighting occurred (**Wainiqolo** (supra) at [18]).*

[89] These principles were also considered by the Fiji Court of Appeal in **Isoa Koroivuki & Another v The State** [2017] FJCA 47; AAU0082.2012 (26 May 2017); and confirmed by the Fiji Supreme Court in **Isoa Koroivuki & Another v The State** [2017] FJSC 28; CAV7.2017 (26 October 2017).

[90] However, in this case the prosecution is not relying on the aforesaid **Turnbull** guidelines to establish its case. Following the arrest of the accused, no Identification Parade was conducted by the Police nor any form of photographic identification carried out to identify the accused. For this reason, no dock identification was carried out through the complainant or the other civilian witnesses during the trial.

[91] The prosecution is relying entirely on circumstantial evidence to establish its case. With regard to circumstantial evidence, the Fiji Supreme Court in *(Josateki) Lulu v The State* [2017] FJSC 19; CAV0035.2016 (21 July 2017); held as follows:

[15] The direction given on circumstantial evidence by the trial judge in his summing up was as follows:

“In circumstantial evidence, you are asked to piece the story together from witnesses who did not actually see the crime committed, but give evidence of other circumstances and events, that may bring you to a sufficiently certain conclusion regarding the commission of the alleged crime.

In drawing that inference, you must make sure that it is the only inference that could be drawn, and no other inferences ... could have been possibly drawn from the said circumstances. That should also be the inescapable inference that could be drawn ... in the circumstances.

It is not sufficient that the proved circumstances are merely consistent with the accused person having committed the crime. To find him guilty you must be satisfied so as to feel sure, that the inference of guilt is the only rational conclusion that could be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt, that the accused person committed the crime.”

*[16] This was wholly correct, nor was his direction challenged before us. The proper direction is to be based on the following passages in **Chamberlain v R (No 2)** [1984] HCA 7; (1983) 153 CLR 521 per Gibbs CJ and Mason J at 535f:*

*“Similarly, in a case depending on circumstantial evidence, the jury should not reject one circumstance because, considered alone, no inference of guilt can be drawn from it. It is well established that the jury must consider “the weight which is to be given to the united force of all the circumstances put together”: per Lord Cairns, in *Belhaven and Stenton Peerage* (1875) 1 App. Cas. 278, at p. 279, cited in *Reg. v Van Beelen* (1973) 4 S.A.S.R. 353, at p. 373; and see *Thomas v The Queen* [1972] N.Z.L.R. 34, at pp. 37, 38, 40 and cases there cited.*

It follows from what we have said that the jury should decide whether they accept the evidence of a particular fact, not by considering the evidence directly relating to that fact in isolation, but in the light of the whole evidence, and that they can draw an inference of guilt from a combination of facts, none of which viewed alone would support that inference. Nevertheless the jury cannot view a fact as a basis for an inference of guilt unless at the end of the day they are satisfied of the existence of that fact beyond reasonable doubt. When the

evidence is circumstantial, the jury, whether in a civil or in a criminal case, are required to draw an inference from the circumstances of the case; in a civil case the circumstances must raise a more probable inference in favour of what is alleged, and in a criminal case the circumstances must exclude any reasonable hypothesis consistent with innocence (see Luxton v Vines [1952] HCA 19; (1952) 85 C.L.R. 352, at p. 358; and Barca v The Queen [1975] HCA 42; (1975) 133 C.L.R. 82, at p. 104.

Per Brennan J at 599:

The prosecution case rested on circumstantial evidence. Circumstantial evidence can, and often does, clearly prove the commission of a criminal offence, but two conditions must be met. First, the primary facts from which the inference of guilt is to be drawn must be proved beyond reasonable doubt. No greater cogency can be attributed to an inference based upon particular facts than the cogency that can be attributed to each of those facts. Secondly, the inference of guilt must be the only inference which is reasonably open on all the primary facts which the jury finds. The drawing of the inference is not a matter of evidence: it is solely a function of the jury's critical judgment of men and affairs, their experience and their reason. An inference of guilt can safely be drawn if it is based upon primary facts which are found beyond reasonable doubt and if it is the only inference which is reasonably open upon the whole body of primary facts."

- [92] In the instant case, the complainant's nephew, Mohammed Shohal Faiyaz Dean, testified that on hearing his mother's conversation with the complainant, over the phone, he had run down to the complainant's house to see what was happening there. On the way, he had met Mohammed Fahim, another neighbour, who was taking his car out of his compound. The witness had told Fahim to come with him to the complainant's house. Fahim had accompanied him.
- [93] Shohal Faiyaz Dean said that from his house to the complainant's house, the distance was approximately 120 metres. Fahim's house is about 15 metres before the complainant's house. Before entering the compound of the complainant's house, the witness had been shouting and trying to raise alarm. Upon entering the compound, from a distance, he could see a person jumping the fence. The witness said that there was a light at the back of the complainant's house, but it was not that bright. He could only see someone jumping over the fence. He could also hear the noise from the fence. Due to the distance between him and the fence, he could not recognize the person.

- [94] Prosecution witness, Mohammed Fahim, testified that the complainant is his neighbour and also his cousin sister. At the time he was leaving home to drop his nephew (Zarin Safraaz Ali) at his home in Korovou, Tavua. He had told his nephew to open the gate so that he can take the car out of the garage. As soon as he got out of his driveway – as soon as he reached the junction where the two driveways meet – he had met Shohal Faiyaz Dean. Shohal came running to him and told him that thieves had come to complainant's house.
- [95] The witness said that while he was driving towards the complainant's house, with the aid of his vehicle's headlight, he could see someone running but could not recognize the person. He had seen the person jump over the fence. The witness said that the distance between his house and the complainant's house is about 6 to 8 metres.
- [96] Prosecution witness, Mohammed Rauf, is another neighbour of the complainant and the deceased. They were said to be staying about 20 yards away from his house. He testified that around 10.30 p.m. on 5 January 2019, he was at home and was about to sleep. Then he had heard some noise. He was sitting on his bed and trying to figure out where the noise was coming from. The noise was of a girl shouting for help. Then he had gone up to his door and was standing at the door. He could hear a girl screaming. Then he saw a man jumping over the fence and run away.
- [97] The witness explained that this fence was a barbed wire fence which was in front of his house. It is the fence separating his house from the complainant's house. The man jumped over the fence from the direction of the complainant's compound into his compound. After his compound there is like a river. The man had run towards the river and then he disappeared.
- [98] The witness testified further that although it was dark at the time, he had been carrying a torch and that he saw the man with the aid of the torch light. While the man was jumping over the fence he fell down. Then he got up and ran away. He could not recognize the man.
- [99] The Police had gone on to arrest the accused at his house early in the morning on 6 January 2019. Police Constable 5368 Apisalome Ratusuka was the arresting officer in this case. He testified as to how he carried out the arrest of the accused. The accused's house was situated approximately one kilometre away from the deceased and the

complainant's house. At the time of his arrest, the accused had been very drunk and still staggering. The accused had then been brought over to the Tavua Police Station. Prior to the accused being locked up in the cell, the witness had conducted the search of the accused. Upon searching him, the witness had seen fresh scratch marks on the back of his thighs.

[100] Thereafter, PC Ratusuka had been instructed to escort the accused to the Tavua Hospital for medical examination. At the Tavua Hospital, the accused had been examined by Doctor Akesa Funaki. This was at 3.30 a.m. on 6 January 2019 (although the Doctor has recorded that it was on 5 January 2019, this cannot be and is clearly a mistake). The Doctor confirmed that as per the specific medical findings as found in column D12 of the Medical Examination Report (Prosecution Exhibit PE11), she has noted that barbed wire track marks were found on the inner thigh and on the neck of the accused. There was no active bleeding. The Doctor stated that although she did not specifically mention, she recalls that the injuries were fresh.

[101] According to the evidence of the complainant, the incident happened at around 10.30 in the night, on 5 January 2019. The accused was arrested early in the morning on 6 January 2019. He was medically examined at 3.30 in the morning, on 6 January 2019. The fact that fresh injuries-barbed wire track marks-were found on the accused at the time of his arrest and during his medical examination, fully supports the prosecution case that it was the accused who had committed this crime and then sustained injuries while trying to escape from the scene by jumping over the barbed wire fence, which separates the complainant's house from witness Mohammed Rauf's house.

[102] Police Constable 3947 Joji Naliva was the officer who recovered the piece of timber in this case. The witness testified that during the course of the caution interview of the accused it had transpired that he can show the place where the piece of timber was thrown by him.

[103] Accordingly, the witness had assisted the Investigating Officer to go to the scene of crime, along with the accused. Close to the scene of the crime, the accused had pointed to the place that he had thrown the timber which he had used to hit the deceased. The area had been searched and the witness had found the piece of timber. It was found at a place which was a cross-road to the village where the accused was residing – Korovou Village in

Tavua. The witness testified that the place where the piece of timber was located was about 20 to 30 metres away from the deceased's house. It was a jungle area close to the deceased's house. The said location was about 200 to 250 metres from the accused's house.

[104] When the piece of timber was found it had stains like blood on it. The witness had uplifted the timber from that place. This was at 5.20 in the afternoon on 7 January 2019. The witness said that he picked up the piece of timber with his bare hands. He had not been wearing gloves at the time. After picking up the piece of timber the witness had brought it to the Tavua Police Station and handed it over to the Investigating Officer DC Deepak. The said piece of timber was tendered to Court as Prosecution Exhibit PE7. PC Naliva identified it as the piece of timber which he had recovered and handed over to DC Deepak.

[105] In cross-examination it was suggested to the witness that at the time the piece of timber was located he had forced the accused to pick up the said piece of timber. It was also suggested to the witness that in his presence it was the accused who picked up the piece of timber and at the time the accused was not wearing any gloves. The witness denied these suggestions and stated that it was he who picked up the piece of timber and not the accused. The accused had just pointed to the place where he had thrown the piece of timber on the day of the offence.

[106] Detective Corporal 3923 Deepak Sami, was the Investigating Officer in this case. He confirmed that he received the piece of timber from DC Joji Naliva. This was around 8.00 p.m. in the evening, on 7 January 2019. He received the piece of timber at the Crime Office of the Tavua Police Station. At the time of receiving the piece of timber, he too had not been wearing any gloves.

[107] The witness testified that after receiving the piece of timber, he had placed it in his Crime Officer, Detective Inspector Simone's room. It was locked inside the room. The next day, which was 8 January 2019, he had handed over the said piece of timber to Corporal Pita at the Lautoka Police Station.

[108] Detective Corporal 4949 Pita Davuiqalita, was the Crime Scene Examiner and Photographer in this case. He took photographs in relation to this case and prepared a Photographic Booklet. The photographs were taken on 6 January 2019. The Photograph

Booklet of the Scene of Crime prepared by him (containing 12 photographs) was tendered to Court as Prosecution Exhibit PE14.

[109] The witness testified that on 8 January 2019, he had received the piece of timber from the Investigating Officer DC Deepak, at the Crime Scene Office in Lautoka. The witness said he had used gloves in receiving the piece of timber which was handed over to him by DC Deepak. However, at that particular time DC Deepak had not been wearing any gloves. The said piece of timber was conveyed by him to the Biology Lab in Suva for the purpose of extracting DNA samples.

[110] Prosecution witness, Paulini Saurogo, is a Senior Scientific Officer - Biology at the Fiji Police Forensic Biology and DNA Laboratory in Suva. The witness testified that she was the case officer in this case who was assigned exhibits for examination and for DNA analysis. The exhibit she examined in this case was a piece of timber, which was submitted for examination by the Crime Scene Officers. She was the examiner of the piece of timber. The Forensic DNA Report prepared by the witness was tendered by the prosecution as Prosecution Exhibit PE5. The Photographic booklet pertaining to the piece of timber was tendered to Court as Prosecution Exhibit PE6.

[111] The witness testified in detail as to how she conducted the DNA analysis on the said piece of timber. The witness concluded that a mixed DNA profile obtained from the representative samples from three sides of the timber, consisted of major and minor components. At least three individuals have contributed DNA unequally to these samples. The accused and the complainant cannot be excluded as the minor contributors to these DNA profile. The major component belongs to unknown unidentified individual.

[112] The presence of the DNA samples of the accused and the complainant on the piece of timber clearly establishes the accused's presence at the scene of the crime at the time of the incident. This is crucial evidence which implicates the accused with the crime. Although, the accused's position was that he was forced by PC Joji Naliva to pick up the piece of timber with his bare hands, the Officer has categorically denied this suggestion made by the defence.

[113] Further evidence which the prosecution is relying on to implicate the accused with this crime are the admissions in the further caution interview statement made by the

accused. Detective Sergeant 3556 Kesi Ratavo, testified that he had conducted two caution interviews in respect of the accused. The first caution interview was conducted on 6 January 2019, at the Tavua Police Station. This caution interview statement has been ruled inadmissible in earlier proceedings.

[114] The second caution interview was recorded by Detective Sergeant Ratavo at the Natabua Correction facility, on 14 February 2019, commencing at 11.15 in the morning. Detective Sergeant Annual Prakash was the Witnessing Officer during the recording of the interview.

[115] The witness testified that the reason for conducting the second caution interview was due to the fact that at the time of his remand the accused was charged with the offences of Robbery and Attempt to Commit Rape. After two weeks of the incident, the deceased had passed away at the Lautoka Hospital due to injuries he received on his head. So there was a need to conduct a further caution interview to clarify some points – that is what could be the result of hitting someone’s head with a piece of timber and did the accused ever take any action to assist the deceased while he was injured. That was the only reason to conduct a further interview of the accused.

[116] The original copy of the Record of Interview of the accused was tendered to Court as Prosecution Exhibit PE 12. The typed version of the Record of Interview of the accused was tendered to Court as Prosecution Exhibit PE 13.

[117] The Defence states that the said further caution interview statement was fabricated. It was suggested to Detective Sergeant Ratavo that during the recording of the caution interview of the accused the witness was writing his own questions and answers and as such that the answers are not of the accused. It was further suggested to the witness that the only time this caution interview was given to the accused was for him to sign at certain places that the witness had pointed out. Detective Sergeant Ratavo firmly denied these suggestions.

[118] Having carefully considered the evidence of Detective Sergeant Ratavo and the Witnessing Officer, Detective Sergeant Annual Prakash, I am of the opinion that the further caution interview statement of the accused was not fabricated by the police. In fact, there was absolutely no reason for the police to fabricate the said statement. Thus I am of the view that the further caution interview statement was made voluntarily by

the accused and that there was no general grounds of unfairness in the recording of the said statement. I am also of the view that the contents of the statement was true and accurate and that Court can rely and accept the statement as a true version of the incident which took place.

[119] I wish to highlight the following portion of the further caution interview statement of the accused:

Q.18: Now I wish to explain to you that we are here at Natabua Correction Centre whereby you are in remand and we have come to conduct further interview on you, can you tell me why are you in remand at Natabua Correction?

A: In regards to the case between Mohammed Shafique and Nazia Shabnam Nisha.

Q.19: What happen to that case?

A: I had beaten them up.

Q.20: I want to take you back to the scene of alleged offence, can you explain as to why you choose to hit Mohammed Shafique on his head and not other parts of his body?

A: I hit to control him and not for him to move.

Q.21: As a normal person can you explain what can result when you hit someone with a timber on the head?

A: It can cause him serious injuries or death.

Q.22: After hitting the stick on Mohammed Shafique's head, did you notice the nature of it that particular night?

A: I could saw him bleeding on his head.

Q.23: Did you assist him in anyway when you saw him bleeding?

A: No.

Q.24: Why?

A: I just hit his head, I moved on.

Q.25: Now did you know that Mohammed Shafique has passed away?

A: No.

Q.26: I am putting it to you that Mohammed Shafique died at Lautoka Hospital due to the injuries he sustained when you hit him with a timber on his head on that particular night. What you have to say with that?

A: Yes.

[120] These admissions are further corroborated by the evidence of the Forensic Pathologist, Dr. Daniella Eiora John. She had conducted the post mortem examination of the deceased, on 22 January 2019. She confirmed that the estimated time of death of the deceased was 20.45 hours, on 19 January 2019. The Post Mortem Examination Report of the deceased, was tendered to Court as Prosecution Exhibit PE8.

[121] In her opinion the doctor testified to the cause of death as follows:

(a) Disease or condition directly related leading to death was brain herniation – meaning that the brain had been pushed out on to the skull;

(b) The antecedent causes were intracranial haemorrhage (bleeding) caused by severe head injury due to the history of assault.

[122] The doctor confirmed that the aforesaid severe head injury could have been caused if the piece of timber (Prosecution Exhibit PE7) was used with force on the head of the deceased.

[123] The accused totally denies the charges made against him by the prosecution. The defence position is that the accused was drinking with his friends since afternoon on 5 January 2019. He had started drinking from town, then went down to the Village. They were first drinking at the edge of the Village (on the Suva side), then they moved towards the graveyard side. The graveyard is located on a hill. The hill is on the other side of the Village (on the Nadroga side). The accused resides on the Nadroga side of the Village. The accused said that when they went to the graveyard side to drink, it was dark.

[124] The accused said that before the drinks finished, he and another boy named Lasarusa went to buy some more drinks (spirits). They had first gone to a house which was selling liquor to buy the drinks. However, since they did not have sufficient money, he went home to ask his mother if she could lend him some coins. However, he could not get any coins from his mother. Then he had returned to the place where Lasarusa had been waiting and the two of them had gone back to the drinking spot. On the way he had passed the coins (already collected at the graveyard side) to Lasarusa who had proceeded to the drinking spot at the graveyard side. The accused did not go there as he was resting at a house closest to the graveyard – there was a resting porch outside where he had rested.

[125] The accused testified that he had continued resting at that spot for quite a long time. He could not recall the exact time he had been resting at that place. Thereafter, he had gone

home. The distance from the place he had been resting to his house was about 15 to 20 metres. He went home by foot. After reaching home, he had gone to lie down. He could not recall the time he had reached home or who all were at home at the time.

[126] The accused testified that while he was sleeping, his mother had woken him up and informed him that Police Officers are waiting for him outside. He had then been arrested by the Police and brought over to the Tavua Police Station.

[127] From the above testimony it is manifest that the accused is taking up an alibi. In support of his alibi, he called witness, Marika Vunisa to testify on his behalf. However, Marika Vunisa testified that he is unaware as to what happened to the accused once he left the graveyard side, together with Lasarusa, to buy some more drinks.

[128] Although the accused is taking up an alibi, no notice of alibi has been given by the defence in terms of the provisions of Section 125 of the Criminal Procedure Act.

[129] Section 125 (1) and (2) of the Criminal Procedure Act is reproduced below:

(1) On a trial before any court the accused person shall not, without the leave of the court, adduce evidence in support of an alibi unless the accused person has given notice in accordance with this section.

(2) A notice under this section shall be given —

(a) within 21 days of an order being made for transfer of the matter to the High Court (if such an order is made); or

(b) in writing to the prosecution, complainant and the court at least 21 days before the date set for the trial of the matter, in any other case.

[130] This case against the accused was filed in the High Court as far back as 24 January 2019. The matter was taken up for trial more than 4 years later. At no time during this period did the accused notify Court that he is taking up the defence of alibi. The only time he came up with the alibi was during his testimony in Court.

[131] Therefore, Court cannot accept his alibi evidence as true and cannot give any weight to such evidence.

[132] In any event, the accused during his testimony was not specific as to time. His testimony is that he did not go back to the drinking spot at the graveyard side with Lasarusa. He was said to be resting alone at a house closest to the graveyard – where there was a resting

porch outside. This is quite strange as his own house was merely 15 to 20 metres away from the aforesaid resting spot. What must also be emphasized was that the accused was alone during this period of time, while his friends remained at the graveyard side.

[133] During this time period there was ample opportunity and every possibility for the accused to have gone to the house where the deceased and the complainant were residing and perpetrate this crime.

[134] For the aforesaid reasons, I am of the opinion, the defence version cannot be believed as true and the said version is rejected.

[135] Having analysed all the evidence in this case in its totality, I am of the opinion that the prosecution witnesses were all truthful, credible and reliable in their testimony.

[136] The defence attempted to impeach the complainant's credibility by highlighting certain inconsistencies and a single omission in her statements made to the police, in comparison to the testimony given by her in Court. I have identified and made reference to the said inconsistencies and single omission when summarizing the complainant's evidence. Similarly, the defence attempted to impeach the credibility of prosecution witness, Farisha Shabana Nisha, a younger sister of the complainant, and witness Mohammed Rauf, by highlighting certain omissions made in their statements made to the police, in comparison to the testimony given by them in Court. I have identified and made reference to the said omissions when summarizing their evidence.

[137] In *Sivoinatoto v. State* [2018] FJCA 68; AAU0049.2014 (1 June 2018); the Fiji Court of Appeal discussed as to how a Court should deal with issues arising out of contradictions and omissions. His Lordship Justice Gamalath held as follows:

[9] When a court is dealing with the issues arising out of "contradictions", "omissions", it is necessary for the Court to carefully examine the impact that such discrepancy could have on the total credibility of evidence of a witness. As decided in the case of Appabhai v. State of Gujarat, AIR 1988, S.C. 694, (1988 Cri.L.J.848) (a decision of the Indian Supreme Court).

"The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The court by calling into aid its vast experience of men and matters, in different cases must evaluate

the entire material on record by excluding the exaggerated version given by any witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishment to their version perhaps for the fear of their testimony being rejected by the Court. The Courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy."

*In the case of **Arjun and Others v. State of Rajasthan**, (1994) AIR - SC-2507, it was held that; (A decision of the Indian Supreme Court).*

"A little bit of discrepancies or improvement do not necessarily demolish the testimony. Trivial discrepancies, as is well known, should be ignored. Under circumstantial variety, the usual character of human testimony is substantially true. Similarly, innocuous omissions are inconsequential."

[10] More often contradictions and omissions become the main tool used in courts to evaluate the testimonial trustworthiness of a witness's' evidence. As defined in the Oxford Dictionary "contradictions" means 'to offer the contrary'. On the other hand, if a witness has testified in the examination-in-chief on a certain thing which he has omitted to state in his statement to the police, it is called "omission". If the said omission is on minor points, it is not contradiction and court will not take cognizance of those omissions. Court will take cognizance of those omissions which are on material points and they are called "contradictions by way of omissions". In order to prove the omissions, it is necessary to find out as to what the witness has deposed before the court in the examination-in-chief.

[11] Any statement of a witness made to an investigating police officer does not form part of the evidence in trial. Court would not be looking into police statements of witnesses to find out the truth involved in a case. However, if any party to a law suit is depending on 'contradictions' or 'omissions' to assail the trustworthiness of the evidence of any witness, it is necessary not only to highlight the 'contradictions' or 'omissions', but also to prove them at trial, so that the court could consider the effect of them according to the criterion laid down in the decided decisions referred above.

[12] Whenever it appears in the proceedings of a trial that the witness's evidence is tainted with certain contradictions and/or omissions, opportunity should be given to such witness to explain the basis for such infirmities. If the explanation is plausible that would have a direct impact on the credibility issue.

*[13] In the case of **Sri Cruz Pedro Pacheco v. State of Maharashtra**, 1998 (5) Bom. L.R. 521-1998 Crim.L.J.4628, it was decided that; (an Indian Decision)*

"Credibility of the witness can be impeached only after obtaining his explanation for the contradictory statement and by pointing out that the explanation given by him is not true or unsatisfactory. Then only the Court will be in a position to consider whether or how far the credibility of that witness is

affected in that court. It is absolutely necessary to give the witness an opportunity of explaining the alleged contradiction. It must be borne in mind that the trial has to be fair not only to the accused but also to the witness who may be the aggrieved party himself."

[138] I have duly considered the explanations offered by the complainant and witnesses Farisha Shabana Nisha and Mohammed Rauf, in respect of the inconsistencies and omission in their evidence as highlighted by the defence. It is my opinion that the said explanations are reasonable and acceptable. As such, I am of the opinion that the reliability and credibility of the complainant's evidence is unaffected. For the same reasons, I am of the opinion that the reliability and credibility of Farisha Shabana Nisha and Mohammed Rauf's evidence is unaffected.

[139] Considering the nature of all the evidence before this Court, I am satisfied beyond reasonable doubt, that it was the accused and no one else who had committed this crime.

[140] From the evidence it is established beyond reasonable doubt that on the night of 5 January 2019, the accused had entered the house of the deceased and the complainant, at Korovou in Tavua. He had been armed with a piece of timber at the time. With the said piece of timber he had attacked the deceased on his head, thereby causing severe head injuries to the deceased, which substantially contributed to the deceased's death. By his conduct the accused intended to cause the death of the deceased or the accused was reckless as to causing the death of the deceased by his conduct. The prosecution case is that the accused was reckless as to causing the death of the deceased by his conduct.

[141] Thereafter, the accused had proceeded to the room where the complainant was. He had hit the complainant on her forehead and also on the back of her head, with the piece of timber, thereby causing serious injuries to her. He had then attempted to rape the complainant, by attempting to insert his penis into her vagina. At the time, the accused knew or believed that the complainant was not consenting, or the accused was reckless as to whether or not she was consenting to the act.

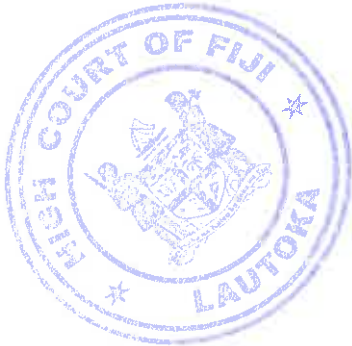
[142] While being armed with the piece of timber, the accused robbed the deceased and the complainant of their four mobile phones– two used by the complainant (one Android

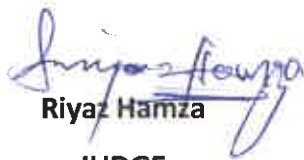
phone and one Apple iPhone) and two used by the deceased (one Nokia button phone and one Samsung J2 touch screen phone).

[143] Therefore, I am of the opinion that the prosecution has proved the three charges of Aggravated Robbery, Attempt to Commit Rape and Murder against the accused beyond reasonable doubt.

[144] In the circumstances, I find the accused guilty of the three charges of Aggravated Robbery, Attempt to Commit Rape and Murder with which he is charged.

[145] Accordingly, I convict the accused of the three charges of Aggravated Robbery, Attempt to Commit Rape and Murder with which he is charged.




Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

AT LAUTOKA

Dated this 29th Day of April 2024

Solicitors for the State:

Office of the Director of Public Prosecutions, Lautoka.

Solicitors for the Accused:

Office of the Legal Aid Commission, Lautoka.