

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**CRIMINAL CASE NO. HAC 183 OF 2023**

**STATE**

**-v-**

**WASEA TURAGADRAU**

Counsel : Ms R Uce for State  
: Ms L. Volau & Mr Shayal Nand for Defence

Dates of Hearing : 9- 11 April 2025  
Closing Submissions : 16 April 2025 and 13 May 2025  
Date of Judgment : 21 May 2025

**JUDGMENT**

(Voluntary Manslaughter- Involuntary Manslaughter- Defence of Provocation- Provocative act- Infidelity)

1. This case is about a murder committed in a domestic setting in Fiji. The Accused was the husband of the deceased. He was arraigned on the following information filed by the Director of Public Prosecutions:

*Statement of Offence*

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

*s*

*Particulars of the Offence*

**Waisea Turagadrau** on the 29<sup>th</sup> day of October, 2023 at Nadi in the Western Division murdered **Kelera Sivo**.

2. The Accused pleaded not guilty to the charge. At the ensuing trial, the Prosecution presented the evidence of four witnesses. At the close of the Prosecution's case, the Court, being satisfied that there was a case for the Accused to answer, put the Accused to defence. The Accused elected to give evidence and call a witness.
3. The Counsel filed the written closing submissions. Having considered the evidence presented at the hearing and the respective submissions of the parties, I now proceed to pronounce the judgment as follows.

*Burden of Proof and Standard of Proof*

4. The Accused is presumed innocent until he is proven guilty. The onus or the burden of proof rests on the Prosecution throughout the trial, and it never shifts to the Defence. There is no obligation or burden on the Accused to prove his innocence. The Prosecution must prove each charge beyond reasonable doubt. If there is a reasonable doubt, so that the Court is unsure of the Accused's guilt, the Accused must be found not guilty and acquitted.

*The Elements of the Offence of Murder*

5. To prove the offence of Murder, the Prosecution must prove beyond reasonable doubt that the Accused Waisea Turagadrau was engaged in willful conduct with the intention of causing the death of the deceased Kelera Sivo, or he was reckless as to causing the death of the deceased and that the willful conduct of the Accused caused the death of the deceased.
6. The charge of murder requires the Prosecution to prove the Accused's state of mind that demonstrates murderous intention or recklessness in causing the death of the deceased at the time of the alleged willful conduct. This necessitates drawing inferences based on all

circumstantial evidence relevant to the issue of either intention or recklessness. Drawing inferences inevitably involves applying common sense alongside the fact-finder's understanding of the world and how it operates based on established facts.

7. Having discussed the relevant legal background, I shall now summarise the salient parts of the evidence presented in the trial that I consider important to resolve the issues in this case.

### **The Case for Prosecution**

#### **PW1 - Tevita Maqu (Tevita)**

8. Tevita is 13 years old now. He is currently schooling at Nadi Primary School. He resides at Narewa with his aunty, uncle and five younger siblings after his mother passed away. His late mother is Kelera Sivo and his father Waisea Turagadrau.
9. On 29 October 2023, early morning, Tevita was home with his father and younger siblings. His mother had gone to work at Handicraft, Denarau. She used to knock off from work at 7 pm, but on that night, she came back late after midnight, at around 1 am. When mother came home, his father was angry at her because she came late. He questioned her as to why she always comes home late and goes to see the man in Lautoka whose photo card he had found inside her bag. His father blamed her for neglecting the children, not showering and feeding them on time. His father went after his mother and punched her face and her ribs. She ran outside, stepping on his foot. Father followed her outside, hit the back of her head with a steel rod. He took a can of beer and wanted to throw it at him.
10. He was awake at that time but pretending to be sleeping. It was a full moon night. He was able to see what was going on outside. He saw them having an argument at the lemon tree just beside the house (3 meters away).
11. When his mother fell, his father kicked her probably 10 times and punched her mouth. When his mother tried to stand up, his father took a coconut stem and hit her with it on her back

and front. He took a cane knife and hit his mother's stomach with the cane knife. His father came inside the house and asked him: *Should I burn your mother or not?* He replied, saying 'no'. She asked for help and asked his father if he could carry her inside the house. His father told her to try and bring herself inside on her own. After that, his father wrapped her in a tarpaulin and left her outside.

12. In the morning, his father carried mother inside the house, made her sit, wiped the blood off her body, poured water in her mouth, while hitting her back and went off to sleep. He heard his mother crying. He wiped the blood off her face. Her jaw was dislocated, and she could not speak. At around 4 am, his mother was no longer breathing. He tried to sleep but could not till the morning. He saw injuries at the back of her head and in her eyes. One side of her cheek was swollen. He asked for forgiveness from her for what his father did to her.
13. He was asked to go and look for a vehicle. When he went to Tai Mere's house, Kini had already taken his vehicle. Then his father went out and took a vehicle, wiped blood off her body, got assistance from two other people and put her inside the vehicle. She was no longer breathing. She was taken to the hospital at around 4 pm. He and his siblings went to his uncle's place. He saw her again only when she was about to be buried.
14. Under cross-examination, Tevita said that his father worked as a security guard at Port Denarau. He agreed that in 2022 he was living with his mother and his siblings when his father was away working in an island. He agreed that his father would come back and stay with them to take care of them because they had informed his father that his mother used to drink and return home early hours of the morning. He agreed that even though both of his parents were working, it was his father who had been solely responsible for their livelihood. At times, there was not enough food for everyone and they even went fishing and collected produce from the garden. He agreed that at times, when his mother comes home late, she and his father used to have arguments, telling her to think of her children and hurry home.
15. Tevita agreed that, on 28 October 2023, he had gone with his dad to catch fish from the pond because there was no food at home; his father had asked her mother to buy some groceries

when she knocks off work; his dad was awake waiting for his mother's return from work whilst he and his siblings were sleeping; he was awoken by the noise they were making whilst arguing.

16. Tervita said that the road where the vehicles stop is a bit far away from his house. He agreed that when his parents were arguing inside the house, his father had questioned her mother about the guy who had dropped her off that morning to which his mother responded saying: *"If I would have known that you will think that way, I should not have come"*.
17. Tevita denied her mother hitting her head on the cement block steps at the door when his father punched her. He agreed his father having asked her if she wanted to go to the hospital to which she only shook her head. He agreed that when his father poured some water into her mother's mouth and hit her from the back, he was trying to revive her mother.

#### **PW2-Ana Nariu**

18. Ana has been residing in Bila, Narewa close (20m) to Kelera's house. Kelera was her boyfriend's aunt. On 29 October 2023, after midnight, when she and her boyfriend were lying down in the room, she heard Bui (Kelera) screaming *"That's enough Waisea, I'm already injured"*. By the sound she heard about five minutes, she thought that Kelera was being beaten up with a stick. They were scared to go and check fearing that something would be done to them. Under cross-examination, Ana said that she did not have a phone to inform the police.

#### **PW3 -Viliame Koli**

19. Viliame is a part-time taxi driver residing at Navatulevu village. On 29 October 2023, at about 5.30 pm Waisea and Tuisawau approached him and asked if he could take a job for them. He accepted the job because it was an emergency call and went straight to their place to offer transport for them. He saw Kelera lying on the floor with injuries on her face, and her face was all swollen. She was unconscious. He helped Waisea and Qase in carrying

Kelera to the vehicle and rushed her straight to the hospital. While on their way, he could hear Kelera giving out her last breath. When they reached the hospital, they realized that Kelera had passed away. He agreed under cross-examination to having seen Waisea hugging Kelera and crying at the same time.

**PW4 -Dr. Sainiana Ratuki**

20. Dr Ratuki conducted the post-mortem examination of Kelera Sivo on 30 October 2023. She tendered the post-mortem examination report in evidence (PE1) and described the injuries found on Kelera's body.
21. The external examination of the head showed bilateral periorbital swelling and bruising with a 30mm x 3mm x 5mm deep. Shape laceration with a horizontal line 10mm below the right lower eyelid. And a second laceration measuring 35mm x 5mm x 5mm linear laceration with an oblique line 5mm above the right eyebrow. On examination of the sclera or the white part of the eyes showed bilateral conjunctivae ecchymosis or bleeding. Further examination of the face showed multiple contusions or bruises, more on the right side as compared to the left and the bruises appeared fresh, reddish purple in appearance. The external examination of the mouth showed three small lacerations over the middle inner aspect of the lower lip and one 3mm x 3mm x 2mm laceration over the upper lip with surrounding swelling and bruising. She opined that the multiple bruises seen over the face could have been caused due to a slap or a blow or being hit by a blunt object.
22. The abdomen did appear distended. The examination of the posterior trunk showed three tramline contusions. The first one was over the border of the right seventh rib with a horizontal line. The second with the oblique over the posterior 8<sup>th</sup> to 12<sup>th</sup> ribs, and the third was over the sacral region or the lower back. For these bruises to appear, it requires a cane, a stick or a rod in which the rod compresses the skin and then it pushes that area of skin down. Over the posterior of her back, she found three of these pattern-like bruises. The examination over the lower posterior trunk, which is the buttock, showed another three

tramline contusions with a horizontal line over the right hip and they were 40mm apart. So, overall, over her back, the deceased had received approximately six hits with a rod.

23. The external examination of the upper limbs showed widespread contusions over the bilateral boarder of the arm, with an 80mm long and 10mm wide line and 10mm apart tramline contusion over the boarder of the left forearm with widespread contusions over the middle aspect of the forearm. The deceased had also received another injury from a rod and these wounds appeared defensive in nature.
24. The external examination of the lower limbs showed bilateral contusions and abrasions of varying dimensions over the interior knees. Further examination of the left leg showed a 12mm long tramline contusion over the middle aspect of the distal thigh. Over the left inner thigh, there was 120mm long tramline contusion suggestive of the deceased being hit by a rod in the middle aspect of the thigh and over her knees.
25. The internal examination of the scalp revealed no significant injury, however, there was a widespread sub-scalpel and subgaleal hematoma identified to the upper neurosis of the bone and to the sub-contentious tissues between the skins over the whole scalp. Even though there were no contusions within the scalp, there were significant blood collections or contusions from the fat layer down to the closest layer over the bone, possibly caused either by punches or kicks or hard blows to the head with a considerable force.
26. The external appearance of the brain appeared normal, however, there was evidence of cerebral contusions over the surface of the brain that would have been caused by blows due to trauma. The internal tissue of the lungs showed pulmonary bruises or pulmonary contusions over the right lower lobe possibly caused by blunt force trauma. Thoracic cage showed consecutive rib fractures over the left 6<sup>th</sup> to 10<sup>th</sup> ribs along the medial auxiliary line. The uterus was distended on opening. The fundus revealed an intra-uterine foetus, an unborn offspring inside the uterus with amniotic second fluid. The fetus was normal in configuration and weighed 150g with a length of 190mm placing its age at approximately 17 – 18 weeks.

27. The cause of death - condition directly leading to death was severe traumatic head injury that would have been caused by severe external blunt force on the body with a blunt surface, like punches, blows to the head, cane hits to the back and chest, possibly by an iron rod. The consecutive rib fractures could have been caused by kicks to the chest. Antecedent causes were severe traumatic thoracic injury and multiple traumatic injuries. The doctor described those injuries, referring to the photographs of the photograph booklet.

### **The Case for Defence**

#### **DW1- Waisea Turagadrau**

28. Waisea is 40 years old now. In 2023, he lived in Narewa with his wife Kelera Sivo and six children. On 28 October 2023, at around 11 pm, he could see his wife come out from a vehicle and inform the driver, *"He's the one coming now."* He came closer to the car and asked her, *"Who was the man driving the car?"* She replied, *"If I had known that you'd think that way, I wouldn't have come"*.
29. In October 2023, they were not staying together. He was the one who looked after the children. Kelera was living with her parents in Narewa. He had advised his counsel about this. Whenever Kelera came home, she would come empty handed without bringing food or groceries for the children.
30. The argument was about the driver of that car. Two weeks before, the kids had seen a photo (identity) card of a man in her purse. That was the reason why they were arguing that night. They argued until they reached home from the driveway. The door was locked from inside. As he tried to open the door, Kelera turned to him. He could not control himself and punched her mouth. He could not control himself because of what he heard beside the car and because it had been a while since he was looking after the children.
31. He had been married to Kelera for 15 years. He loved her so much. However, in 2014, she eloped with another man and became pregnant from him with her second child. She returned



home when she was seven months pregnant. He accepted her because he thought of the child and requested her if she could stop the affair. In 2019, she started an affair again and eloped with another man from Vanualevu. She later asked for his forgiveness, and he accepted her again although she was five months pregnant with the Vaualevu man's child. Out of the six children, two of them were not his biological children.

32. During 2022- 2023 period, the marriage life was not good. Most of the time Kelera used to leave home, stay with her family and go out with her friends. He had to leave his job in Musket Cove and return home in May 2023 because no one was there to look after the children who wanted him to return home.
33. When she punched Kelera in front of the door, she fell on the corner of the steps and hit her on the back. When he opened the door, she ran away, making him angry. He started running after her because he knew she would run straight to the police. He got angry and could not hold his anger and punched her. She accidentally stepped into a hole outside the house and got stuck there.
34. He knew that he had punched her and kicked her badly. He punched her mouth and kicked her back. The children were sleeping inside the house at that time. He brought her back inside the house and when he saw the injuries on her face. He requested her if they could go to hospital. But she shook her head and refused to be taken to the hospital. She only asked if he could sponge her face with warm water. After that they slept and woke up early in the morning at around 6 am. She was still lying down; her face was swollen.
35. In the afternoon at about 3 pm, he was trying to call the police station to seek help since he did not have any money, but nothing happened. He felt really sorry for her. He was able to meet a driver at about 5 pm. Since Kelera was heavily injured, the driver agreed to take her to hospital.
36. Under cross-examination, Waisea said that he could not recall stating to police that he has only five kids. He agreed that he did not include Denarau as one of his children because he

was the only one who was not his biological child. He denied that Kelera had left for work from home the day the incident took place. He agreed he had assaulted Kelera on previous occasions when she misused the money that was supposed to be used for the family.

37. Waisea agreed that Kelera had arrived home after midnight and not at 11 pm on 28<sup>th</sup> October. He denied that he himself had found the photo in Kelera's bag. He agreed that he had inquired about the man in the photo two weeks prior to the incident. He denied that in his statement to police, he had only mentioned the photo card he had found in Kelera's bag two weeks prior to the incident and had not mentioned her not bringing food and her coming with a man in a car.
38. He admitted punching and kicking Kelera repeatedly and using a 2 x 2 timber and a coconut stem on her. He agreed that Kelera could not speak on that night because of the extent of the assault and the injuries that she had sustained. He agreed, asking Tevita if he should burn his mother. He agreed that his anger was based on mere suspicion that his wife was having an affair and that he had no proof. The suspicion was because most of the times, she was away from home.

**DW2 -Ratu Sireli Rokomatu**

39. Sireli has been living in Bila settlement at Narewa since childhood. She knew Kelera Sivo because she was his cousin, and they grew up together in the same village. Kelera's house was about 50 meters away from his house. Sireli said that Kelera's relationships with men often changed every now and then. He knew Waisea to be a very 'soft-hearted' man who was always protective of his children. When Kelera keeps away from home for 2 to 3 days, Waisea's children would come to him to ask for food.
40. Under cross-examination, Sireli agreed that he had never told the police about Waisea's children coming to his house to ask for food.

## Evaluation / Analysis

41. There is not much of a dispute that the Accused was engaged in a wilful and unlawful conduct (*actus reus*) that caused the death of the deceased (causation). The Defence appears to be raising two defences. The first one, albeit not raised in the Defence Counsel's submission, and only raised in evidence, is aimed at negating *mens rea* of Murder. The second one, expressly raised by the Defence, is based on the statutory defence of provocation defined in Sections 242 (1) and (2) of the Crimes Act.
42. In raising the first defence, the Defence appears to claim that the death was caused by the Accused not with the intention to kill. It was raised in evidence that the deceased hit her head on the concrete step at the door, suggesting that the necessary mental element or *mens rea* was lacking for him to be found guilty of Murder, although it may be sufficient to find him guilty of **(involuntary) Manslaughter**.
43. The second defence, which was expressly raised, is based on provocation that the Accused's wilful conduct was such that the unlawful killing on his part should be reduced from Murder to **(voluntary) Manslaughter** because the evidence raised a credible narrative within the framework of Sections 242 (1) and (2) of the Crimes Act.
44. The sharp distinction between voluntary manslaughter and involuntary manslaughter is often misconceived. It is sometimes argued that this distinction, which is recognised in common law, does not exist in Fiji because these terms are nowhere found in the Crimes Act. This misperception is manifested in the submission made by the Defence, which argues that the Accused lacked intention to kill because his conduct was triggered by sudden loss of self-control or provocation.
45. This case provides the court an opportunity to explain how these two different notions exist in Fiji although not expressly provided for in the Crimes Act. When the Defence asserts that the Accused did not intend to kill, it is in fact raising the defence of involuntary manslaughter

on the basis that, although the Accused was engaged in a wilful conduct resulting in the unlawful killing, he lacked necessary *mens rea* for Murder (negating *mens rea*). If they are successful in this defence that the Accused intended only to cause serious harm or he was reckless as to cause serious harm, the Court is entitled to reduce the conviction to one of manslaughter pursuant to Section 162(2) of the Criminal Procedure Act.

46. When the Defence raises the defence of provocation, what it asserts is that the Accused, although he entertained the necessary *mens rea* for Murder, the conviction should be reduced to voluntary manslaughter, because on evidence, a credible narrative suggesting the defence of provocation is available to meet the requirement of Sections 242(1) and (2) of the Crimes Act.
47. Whatever the type of manslaughter be, the burden is squarely on the Prosecution to prove the charge beyond a reasonable doubt. Unlike in the case of diminished responsibility under Section 243 of the Crimes Act, the Accused who avails the defence of provocation is not burdened to **prove** the requirements of Section 242(1) and (2) on the balance of probabilities. When a credible narrative of events is available on evidence suggesting the presence of defence of provocation, the Prosecution must disprove the defence and prove the elements of Murder beyond a reasonable doubt.
48. Bearing in mind the legal position discussed above, I shall proceed to analyse the evidence led in the trial.
49. There is no dispute as to the physical element or *actus reus* of Murder. Only the fault element of intent is contested. The Accused in his evidence did not indicate what his intention was when he attacked his wife. We do not know what ran in the Accused's mind at that time. Therefore, his mental state should be inferred from the circumstances surrounding his conduct. In this regard the evidence of Tevita, the only eyewitness, and that of the pathologist as well as the Accused is important.

50. According to Tevita, the Accused punched the deceased on her face and ribs whilst she was still inside the house. When the deceased ran outside, the Accused followed her and hit the back of her head with a steel rod. When the deceased fell, the Accused kicked her probably 10 times and punched her mouth. When she tried to stand up, the Accused hit her on her back and front with a coconut stem. He also hit her stomach with a cane knife. The Accused asked him: *should I burn your mother or not?* When she asked for help and asked the Accused if he could carry her inside the house, the Accused told her to try and bring herself inside on her own.
51. Tevita wiped the blood off the deceased's face. He saw the deceased's jaw dislocated, and that she could not speak. He saw the injuries at the back of her head and her eyes. One side of her cheek was swollen. The deceased was lying down with her injuries for a long time until she was taken to the hospital in the afternoon.
52. The Defence hardly challenged Tevita's evidence. The Accused in his evidence, admitted punching the deceased in front of the door and punching her mouth again and kicking her back outside the house. He admitted using a 2 x 2 timber on her. He said he knew that he had punched and kicked her badly. He agreed that the deceased could not speak on that night because of the extent of the assault and the injuries that she had sustained. He agreed, asking Tevita if he should burn his mother.
53. Tevita was only 13 years old at the time he gave evidence in Court. He is none other than the son of the Accused. He has no reason to lie and send his father to jail. The injuries found on the deceased at the post-mortem, as depicted in the photographs and the opinion of the pathologist are consistent with Tevita's evidence.
54. Ana Nariu (PW2) and Viliame Koli (PW3) also corroborated what Tevita said. Ana Nariu heard the deceased screaming, *"That's enough Waisea, I'm already injured"*. Koli saw the deceased lying on the floor unconscious with injuries on her face and her face all swollen. While on their way to the hospital he could hear the deceased having her last breath. When

they reached the hospital, he realized that Kelera had passed away. I accept that Tevita told the truth in Court.

55. The evidence of the Prosecution established that the Accused was engaged in wilful conduct to kill his wife with the intention to kill. The repetitive and prolonged punching, kicking on most vulnerable parts of the body, usage of weapons like timber and cane knife, the words he used *should I burn your mother or not?*, his failure to take the deceased to hospital at the earliest opportunity and the finding at the autopsy all point to the conclusion that the Accused intended to kill his wife.
56. The Accused said that the deceased fell on the corner of the steps and hit her back. He further said that she accidentally stepped into a hole outside the house and got stuck there. The Defence by introducing this evidence appears to have raised the issue of whether the Accused's conduct substantially contributed to the death of the deceased.
57. There is no plausible evidence that the deceased hit her head on the cement block and the fatal injuries were caused by the fall. Tevita denied the deceased hitting her head on the cement steps when his father punched the deceased. The pathologist was of the view that the cause of death, directly leading to death, was severe traumatic head injury that would have been caused by severe external blunt force like punches, blows to the head, cane hits to the back and chest, possibly by an iron rod.
58. The doctor's postmortem report is admitted, and her evidence was not challenged by the Defence, nor was there proposition put to her that a fall might have caused those head injuries. Tevita said his mother was no longer breathing by 4 a.m. Koli said that the deceased was already dead when she was admitted to hospital in the afternoon.
59. I am satisfied that the Prosecution proved the Accused's conduct directly contributed to the death of the deceased.

## Defence of Provocation

60. The Defence relied on the partial defence of provocation available to an accused charged with Murder. Sections 242(1), (2) and (3) provide for this defence as follows:

242(1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section would constitute murder, does the act which causes death **in the heat of passion caused by sudden provocation as defined in sub-section (2), and before there is time for the passion to cool, he or she is guilty of manslaughter only.**

(2) The term "provocation" means (except as stated in this definition to the contrary) **any wrongful act or insult of such a nature as to be likely when—**

**(a) done to an ordinary person; or**

**(b) done in the presence of an ordinary person to another person —**

**(i) who is under his or her immediate care; or**

**(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person —**

**to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.**

(3) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as stated in sub-section (2), the former is said to give to the latter provocation for an assault.

(4) An act which a person does in consequence of incitement given by another person in order to induce him or her to do the act and thereby to furnish an excuse for committing an assault is not provocation to that other person for an assault.

(5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who believes and has reasonable grounds for believing the arrest to be unlawful. [Emphasis added]

61. This defence is sourced from common law<sup>1</sup>. The scope of provocation was explained by Lord Devlin in Lee Chun Chuen v R<sup>2</sup> as follows:

<sup>1</sup> Codrokadroka v State [2008] FJCA 122; AAU0034.2006 (25 March 2008) Paragraphs [27] and [28]

<sup>2</sup> (1963) AC 220

Provocation in law consists mainly of three elements – the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation. The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of these three elements.

62. In Regina v Duffy<sup>3</sup>, the gist of the defence of provocation was summarised by Devlin J. in a single sentence in his summing-up, which was afterwards treated as a classic direction to the jury<sup>4</sup>:

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self- control, rendering the accused so subject to passion as to make him other for the moment not master of his mind.

63. In Codrokadroka v State<sup>5</sup> the Court of Appeal prescribed the approach that should be taken on provocation concerning Sections 203 and 204 of the Penal Code [which are akin to Sections 242(1), (2) and (3) of the Crimes Act] are as follows:

1. The judge should ask himself/herself whether provocation should be left to the assessors on the most favourable view of the defence case.
2. There should be a "credible narrative" on the evidence of provocative words or deeds of the deceased to the accused or to someone with whom he/she has a fraternal (or customary) relationship.
3. There should be a "credible narrative" of a resulting loss of self-control by the accused.
4. There should be a "credible narrative" of an attack on the deceased by the accused which is proportionate to the provocative words or deeds.
5. The source of the provocation can be one incident or several. To what extent a past history of abuse and provocation is relevant to explain a sudden loss of self-control depends on the facts of each case. However cumulative provocation is in principle relevant and admissible.
6. There must be an evidential link between the provocation offered and the assault inflicted.'

---

<sup>3</sup> [1949] 1 All E.R. 932

<sup>4</sup> Masicola v State [2021] FJCA 176 (29 April 2021)

<sup>5</sup> [2008] FJCA 122; AAU0034.2006 (25 March 2008)



64. Let me apply these legal principles to the case at hand.

**Was there a ‘credible narrative’ on the evidence of provocative words (insult) or deeds of the deceased to the accused?**

65. It appears that the Defence is relying on ‘cumulative provocation’ which the deceased is alleged to have offered the Accused over time culminating in the alleged final provocative act/words that led to the attack.
66. The Accused in his attempt to explain the history of provocation, blames the deceased for going around with men, neglecting her children. However, in his caution interview, he had never told that he got angry because either of these reasons. He never told the police that he got angry because she came empty-handed. He had only told the police that he was suspicious that the man who dropped her off that night was having an affair with his wife. The only historical background that provided the basis for his suspicion had been the photo ID he had found in her purse two weeks prior to the incident.
67. According Accused’s evidence, the deceased had eloped with two men during fifteen-year-long marriage despite that he had loved her so much. (However, he disputed his love towards his wife when he admitted punching her several times on previous occasions). She had become pregnant from these two men and when she returned home on each occasion, he had forgiven her and accepted her for the sake of the children. It is his evidence that out of the six children, two of them were not his biological children.
68. He had never told the police this story when he was interviewed soon after the incident. I do not find a credible narrative on the evidence of provocative words or deeds to establish the notion of ‘cumulative provocation’.
69. The Accused in his evidence, described the closest incident that had provoked him to kill his wife in the heat of passion. At around 11 pm, he had seen his wife being dropped off by a man near his house. He heard the deceased telling the driver, “*He’s the one coming now*”

came closer to the car and asked her, *"Who was the man driving the car?"* She replied, *"If I had known that you'd think that way, I wouldn't have come"*. He kept on asking about the driver but she did not tell who this driver was, making him angry. The argument was about the driver of that car. He suspected that the man who dropped his wife was the same man he had seen in the photo (identity) card the kids had found in her purse two weeks before. That was the reason, according to him, they were arguing about that night. He said he could not control himself and punched her mouth when she turned to him because of what he heard beside the car.

70. Would a reasonable<sup>6/</sup> ordinary man in Fiji think that his wife is having an affair with the driver merely because she was dropped off at home at night? Was her conduct (acts/words) of such a nature to be likely when done to an ordinary person to deprive him of the power of self-control and induce him to commit an assault of the kind which the Accused committed? I do not think so.
71. The Accused did not say that he saw the driver to conclude that it was the same man he had seen in the photo ID found in the deceased's purse two weeks before. He admitted that his anger was based on mere suspicion that his wife was having an affair and that he had no proof.
72. The words the Accused allegedly overheard as he approached the car *"He's the one coming now"* may have been said to inform the driver, (perhaps a taxi driver) that he could move his car as her husband is coming to pick her home in the dark. The words *"If I had known that you'd think that way I wouldn't have come"* would have meant to impart her displeasure at her husband's baseless suspicion.
73. The second attack took place when she ran away outside the house. The Accused said he got angry and could not hold his anger and punched her because he thought she would run straight to the police. Again, there was no reasonable basis for him to get provoked by the act of the deceased.

---

<sup>6</sup> 'Reasonable person' is the word used in common law

74. An ordinary man in Fiji would not get provoked on mere suspicions so as to deprive him of the power of self-control and induce him to commit an assault of the kind which the Accused committed. The attack on the deceased was highly disproportionate to the alleged provocative words and deeds.
75. The Defence relies on *State v Nasetava*<sup>7</sup> to support its contention that marital infidelity constitutes wrongful acts or insult envisaged in section 242(2) of the Crime Act. However, this judgment is now on appeal and the Court of Appeal having granted leave to the State to appeal in *State v Nasetava*<sup>8</sup> (Mataitoga RJA) observed as follows:

In my view that marital infidelity does not constitute wrongful act or insult in the circumstances of this case. In Fiji, the test is the ordinary man test, that is, whether the accused caused the death of the deceased in the heat of passion caused by sudden provocation having reacted to a wrongful act or insult of the deceased which was of such nature to be likely to deprive the ordinary the power of self-control. The facts in this case are such that the appellant came prepared to cause serious injury to his wife now deceased.

76. In *Lesu v State*<sup>9</sup> the Court of Appeal stated the following:

The fact that the deceased lived in defacto relationship with Kolora and had a child by him was known to the appellant. The appellant had accepted the situation. He went to the house where the deceased in the early hours of the morning when most people are in bed, sleeping. He was armed. There is no rational explanation why the appellant took the knife him, unless he intended to use it on the deceased, in the way he did. The deceased did not punch the appellant until he was struck the first blow with the knife, a perfectly natural and predictable response. Mr O'Driscoll, Counsel for the appellant, submitted that finding his wife with the appellant in bed when he had earlier arranged to spend the night with her constituted "such wrongful act or insult" as to constitute provocation. We cannot agree. We do not think in the circumstances of this case that the alleged provocation was such as would deprive a reasonable man of the power of self-control such as to induce him to commit the kind of violence which the appellant inflicted on the deceased. There was a large element of premeditation in what the appellant did.

---

<sup>7</sup> [2021] FJHC 413 No. HAC 310 of 2019 (20 December 2021)

<sup>8</sup> [2024] FJCA 77; AAU001.2022 (17 April 2024)

<sup>9</sup> [2003] FJCA 1 (AAU 003/2002)

77. In Masicola v State<sup>10</sup> the husband travelled from his residence to another suburb in Suva to kill her wife who was having sex with another man. He walked for several kilometers from Veikoba to Kaleli settlement in Nasinu with knife to kill his wife. The court did not accept the ‘slow-burning provocation’ argument discussed by the court in Codrokadroka v State<sup>11</sup>
78. The evidence in this case suggests that the Accused had obviously worked himself up about suspicions of the deceased’s marital infidelity. Furthermore, even if the suspicion was well-founded, there was no justification for him to be provoked when he had already accepted his wife twice with the full knowledge that she got pregnant by other men.
79. The defence of Provocation is not made out. The Prosecution disproved the defence and proved each element of Murder beyond a reasonable doubt. I find the Accused guilty of Murder as charged.
80. The Accused is convicted accordingly.



Aruna Aluthge  
Judge

21 May 2025

At Lautoka

Solicitors:

Director of Public Prosecution for State

Legal Aid Commission for Defence

---

<sup>10</sup> [2023] FJSC 27 (CAV 011/2021)

<sup>11</sup> [2015] FJSC 15.