IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU0021 OF 2020
[Suva High Court No: HAA 51 of 2018]

BETWEEN : **MARVIN RAY KETENILAGI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Mataitoga, RJA**
Qetaki, JA
Andrée Wiltens, JA

Counsel : **Appellant in Person**
Ms Semisi, K for the Respondent

Date of Hearing : **6th and 11th September, 2024**

Date of Judgment : **27 September, 2024**

JUDGMENT

Mataitoga, RJA

[1] I have reviewed the judgment of Qetaki JA in draft. I concur with the reasons and conclusion, therein.

Qetaki, JA

Background

[2] This is an appeal against the conviction of the appellant by the High Court at Suva where the appellant had been indicted on one count of manslaughter contrary to section 239 (a) and (b) and (c) (ii) of the Crimes Act 2009.

[3] According to the particulars of offence, the appellant had on 25th January 2018 at Suva in the Central Division, assaulted Shiri Chand which caused the death of the said Shiri Chand and at the time of the assault he was reckless as to the risk that his conduct would cause serious harm to Shiri Chand.

[4] After the summing – up, two assessors had opined that the appellant was guilty of manslaughter whilst one assessor had opined that the appellant was guilty of the lesser offence of assault occasioning actual bodily harm. The learned trial judge agreed with the majority of the assessors, and accordingly convicted the appellant on 21st February 2020, and sentenced him on 26 February 2020 to 6 years of imprisonment with a non-parole period of 4 years.

[5] The appellant had filed a timely application for leave to appeal against his conviction and sentence in the Court of Appeal. He filed amended grounds of appeal and written submissions at the leave stage before a single judge of appeal, with the assistance of counsel. The learned single judge, having considered the 7 grounds of appeal against conviction, one ground against sentence, and an application for bail, refused leave to appeal against conviction and sentence, and also refused the application for bail pending the appeal.

[6] Also on 20/12/21, the appellant filed a Notice to Renew Application to Appeal against Conviction, submitting 7 Grounds of appeal against conviction, and with the prayer that: 1. Leave to appeal be granted; 2. The conviction for manslaughter be set aside and

substituted with conviction for assault causing actual bodily harm; 3. The appellant to be freshly sentenced for the offence of assault causing actual bodily harm; 4. The appellant be allowed to add, delete or amend any grounds of appeal after receipt of the High Court Records; 5. Any other orders the Honourable Court deems just.

The Facts

[7] The learned trial judge had summarized the prosecution evidence as follows in the sentencing order:

> *"[2] Shiri Chand was a 56-year-old male with a pre-existing heart condition. His arteries were clogged and he had previously suffered from a heart attack. On 25 January 2018 at around 3:30am, the offender saw Mr Chand at Regal lane- a no through road between the Suva Handicraft Centre and the Westpac building in the city. Mr Chand was in a company of a male child inside a taxi when the offender got into an argument with him for bringing a child out at that time of the night and at that particular location. Mr Chand was a taxi driver and separated from his spouse at the time. He was looking after his friends' child when the friend went to work.*
>
> *[3] The offender was 39 years old at the time. He is now 41 years of age. He was a medical doctor until he was terminated from his employment after he was charged in this case. He was married with three children but is separated from his spouse. His teenage children are living with their mother and schooling in Labasa.*
>
> *[4] On the night the incident occurred the offender was on his way to the bus stand to return home after clubbing with his friends. He drank substantial alcohol that night but in his evidence he said that he was capable of making decisions despite being drunk.*
>
> *[5] The attack on the victim was unprovoked. The offender claimed that the victim became abusive and aggressive when he questioned him regarding the presence of a child with him at that time of the night and at that particular location where the incident occurred. This claim was contrary to the evidence of the witness who said that it was the offender who was abusive and aggressive, not the victim. It seems the offender relentlessly pursued the victim because he was not willing to accept the presence of a child with an adult male at that time of the night. He did not want to accept that the victim was the guardian of the child. The confrontation ended into a violent attack on the victim.*

[6] It is clear that both the victim and the child was traumatized by the actions of the offender. Both were distressed to a point that they could not speak. The victim was chased and punched in the chest and jaw He tried to deflect the attack by running away but the offender pursued him until some itaukei youths come to his rescue and chased the offender away. By the time the attack stopped the victim was restless, shaken and weak. He lost consciousness shortly after the attack while driving his vehicle to the police station with a police officer and the child inside the vehicle. He was taken to the hospital in a police vehicle and administered a CPR at the emergency ward. The CPR was called off at around 4:50am by the supervising doctor as there was no sign of life.

[7] Post mortem examination revealed multiple traumatic injuries to the victim's jaw, chest, knees and liver. These injuries significantly contributed the victim's primary cause of death, which was a severe coronary artery disease. The medical evidence was that the multiple traumatic injuries led to the victim's heart not to function properly leading to his death. The defendant was convicted for hastening or accelerating the victim's death by using physical violence."

[8] The appellant's evidence was summed - up by the learned trial judge at paragraphs [31] and [32] of summing-up, as follows:

"[31] The Accused in his evidence admits being involved in an argument with the deceased on the night in question. He said he was drunk but capable of making decisions. He said he got into an argument out of concern for the safety of the young child who had accompanied the deceased at that time of the night and at that particular location. He said that the deceased was the aggressor and swore at his other. He said he punched the deceased on the jaw and may have shoved him and ran after him when he falsely accused him of theft. He said he did not know about the deceased's medical condition.

[32] The defence case is that it was not the assault of the Accused that significantly caused the death of Mr Chand. The defence says the Accused is not guilty of manslaughter. The defence says that, if the Accused is guilty of anything, he is guilty of the alternative offence of assault occasioning actual bodily harm. You may consider an alternative offence even if the Accused is not charged with the offence in the Information."

Renewal Grounds of Appeal (Filed on 20/12/21)

[9] The grounds of appeal are set out below:

Ground 1 - *That the learned trial judge erred in law and in fact he failed to properly and adequately direct the assessors and also bear in mind that there were material contradiction or inconsistencies in the version of evidence of prosecution witnesses.*

Ground 2 - *That the learned trial judge erred in law and in fact when he concluded in his judgment that "it was the conduct of the accused that hastened or accelerated the death of the victim and that the accused realised the possibility of serious harm to the victim when he assaulted him" despite having no evidence that the victim had symptoms of heart attack soon after the alleged assault by the appellant.*

Ground 3 - *That the learned trial judge erred in law and in fact when he failed to comprehend and failed to direct the assessors that the Pathologist evidence in court contravenes her findings during the autopsy examination, thus these discrepancies in her evidence tarnishes the credibility of the witnesses.*

Ground 4 - *That the learned trial judge erred in law and in fact when he failed to judiciously and adequately investigate the cause of death, since the Pathologist opined in her evidence that the two punches by the appellant were non-fatal and that the entirety of evidence does not reconcile with the probable cause of death.*

Ground 5 *- That the learned trial judge erred in law and in fact when he failed to direct the assessors and he himself failed to comprehend that the evidence of PC Rokouso is devoid of belief and unreasonable when he said that he was seated at the back seat of the car and manoeuvred it towards Renwick Road, then to Ellery Street at the empty Carpenters Car Park.*

Ground 6 *- That the learned trial judge erred in law and in fact when he failed to direct the assessors and he himself failed to comprehend that there is contradicting evidence in regards to the actual time of incident.*

Ground 7*- That the learned trial judge erred in law and in fact when he directed the assessors that "you heard that the accused was heavily intoxicated at the time of the alleged act", despite no prima facie evidence of intoxication by way of breath analysis report or medical evidence to substantiate his directions to the assessors.*

The Law

[10] An appeal against conviction may be made with leave of Court, pursuant to section 21(1)(b) of the Court of Appeal Act 1949. The test for leave to appeal is *"reasonable prospect of success":* **Caucau v State** [2018] FJCA 171; AAU 0029.2016 (4 October 2018); **Navuki v State** [2018] 172; AAU0038.2016 (4 October 2018); **State v Vakarau v State** [2018] FJCA 173; AAU0052.2017 (4 October 2018), and **Sadrugu v State** [2019] FJCA 87; AAU0057.2015 (6 June 2019 and others.

[11] Section 23 on determination of appeal in ordinary cases:

"(1) The Court of Appeal-

(a) on any such appeal against conviction shall allow the appeal if they think the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the Court before whom the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;

(b) ……..

Provided that the Court may, notwithstanding that they are of opinion that the point raised in the appeal against conviction or against acquittal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has occurred.

(2)Subject to the provisions of this Act, the Court of Appeal shall-

(a) if they allow an appeal against conviction, either quash the conviction or direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial."

Before a Single Judge

[12] The application for leave to appeal was heard on 10 December 2021, and the learned single judge's Ruling was delivered on 13 December 2021.

[13] On Ground 1: It was held:

"[13] Instead of the inconsistencies, the slightly different versions of the appellant's attack on the deceased in the evidence of those eye-witnesses demonstrate that they were speaking the truth and stated the incident as they saw. They were disinterested witnesses. In any event, the alleged contradictions and inconsistencies do not really go to the root of the prosecution case as to discredit the evidence of the eye witnesses…."

[14] On Grounds 2, 3, and 4, after analysing the grounds, he concluded:

"[25] The appellant's complaint that the pathologist's evidence contravenes her findings during the autopsy cannot be examined at this stage for want of such material and I cannot agree with his criticism of the trial judge that he had failed to investigate the cause of death given the

pathologist's evidence that the injuries were not severe or non-fatal in the sense that they did not affect the vital organs except the liver. The doctor had stated that there was a high chance that the multiple traumatic injuries led to the deceased's heart not to function properly leading to his death."

[26] Therefore, on the material available at this stage I am unable to say at this stage that these grounds of appeal have a reasonable prospect of success. If, however, the appellant wishes to have this issue further examined with the benefit of the medical report and medical evidence along with other evidence as to whether it was the appellant's conduct that hastened or accelerated the death of the victim and that he had realized the possibility of serious harm to the victim when he assaulted him or on the contrary, whether he only intentionally or recklessly applied force on the deceased without the consent, causing hurt or injury to the victim making him liable only for the offence of committing an assault occasioning actual bodily harm, he will have to take up the appeal before the full court."

[15] On Grounds 5, 6 and 7, the learned single judge held that these grounds are founded on pure factual matters and should have been fully canvassed during the trial. He did not see the possibility of any such complaints, even if true, having the effect of altering the verdict of manslaughter entered against the appellant. He added that, the matters should have been raised by way of re-directions, citing relevant cases, and the deliberate failure to do so would disentitle the appellant even to raise them in appeal with any credibility.

Discussion

[16] The appellant had filed written submissions, which he relied on at the hearing on the 11th of September 2024. When the case was first called as scheduled on 6th September, his counsel advised the Court that he had received instructions that the appellant wished to represent himself at the hearing. As the appellant needed time to prepare for his appeal, the hearing was adjourned to the 11th September at 2:30pm.The respondent, however, had relied on the written submissions made earlier at the leave stage dated 17 November 2021.

[17] **Ground 1** - In this ground, the appellant alleges that the learned trial judge failed to properly direct the assessors that there were material contradictions or inconsistencies in

the version of evidence of prosecution witnesses. The appellant contends that the crux of the prosecution's case was based on the assault by the appellant on the deceased, that on a careful consideration of the prosecution witnesses' evidence, there appear to be material unexplained contradictions, omissions or inconsistencies. The appellant submitted that those unexplained contradictions, omissions and inconsistencies of the prosecution witnesses *"touches the root of the charge against the appellant."*

[18] The ground involves a consideration of the evidence of the prosecution witnesses, especially, in light of the prosecution's case that that the conduct of the appellant was one of recklessness, alleging that the appellant was reckless when he punched the deceased, who was suffering from a heart disease. In his arguments , the appellant states that the contradictions, omissions and inconsistencies are, as follows:

(A) Evidence of PW1, Mr Atama Volitivuravura is summarised in paragraph [20] of the summing-up, as follows:

> *"The first prosecution witness was Atama Volitivuravura. The witness was a security guard based at the Post Fiji car park in the city. He heard somebody shouting. The noise came from the direction of the TFL building. When he came to TFL building he saw the Accused standing beside a parked taxi at the Regal Lane. As he approached the taxi, he saw a child of Indian descent sitting in the front passenger seat. He heard the accused shouting at the deceased and accusing him of abducting the child. The child was dressed crying t, shaking and couldn't talk to the witness. At the same time the Accused approached the witness and told him to do something about the child by shouting at him. The witness tried to calm the Accused down and brought him towards the TFL building. The witness said the Accused smelt heavily of liquor, his speech was slow, he was staggering and his eyes was red. When the witness told the Accused this was a police case, The Accused got abusive, used vulgar language on him and challenged him for a fight. He saw the deceased was frightened and shaken. While the Accused was shouting at the witness another security guard by the name of Semi arrived at the scene. He requested Semi to look after the child while he went to the Central Police Station to report the incident."*

(B) Evidence of PW2, Mr Semi Veimateyaki is summarised in paragraph [21] of the summing up, as follows:

'The second witness for the prosecution was Mr Semi Veimateyaki. He was a security guard at the TFL building. He was having a conversation with his friends Vuli and Koroi at the walkway of the TFL building when he heard somebody shouting and yelling. When he walked towards the commotion, he saw the Accused, the deceased and Atama. He saw the Accused was trying to assault the deceased but Atama was stopping him. Semi heard the Accused yell to the deceased for bringing the child to the location at that time of the night. He saw the Accused throw two punches at the deceased – the first landed on the chest and the second landed on his jaw. He said the punch on the chest was a hard punch. The deceased was frightened or scared and weak. After punching the deceased, the Accused chased him and while being chased the deceased fell down to the ground twice. The deceased appeared weak after the fall. Semi went back to his guard room when he saw Atama return to the scene from the police station."

(C) Evidence of PW3, Mr Jone Koroi is summarised in paragraph [22] of the summing-up, as follows:

"The third witness for the prosecution was Mr Jone Koroi. Jone was in the company of Semi and Vuli when he heard somebody yelling and screaming. When he went to enquire, he saw the Accused involved in a scuffle with the deceased, he saw the Accused holding and pulling the deceased. He saw the Accused punch the deceased in the chest once. The Accused was heavily drunk while the deceased was frightened or scared. After punching the deceased the Accused chased him. The deceased ran towards the Handicraft Centre and threw stones at the Accused to defend him from attacking him."

(D) Evidence of PW4, Digitaki Vuli is summarised in paragraph [23] of the summing-up, as follows:

"The fourth witness for the prosecution was Digitaki Vuli. He attended to the commotion with Semi and Jone Koroi. He saw the Accused chasing the deceased around a taxi with a child sitting and crying inside the taxi. The accused heavily smelt of alcohol and was drunk. Vuli saw the deceased was tired while running around the taxi. Vuli was focussing on the distressed child. He saw the Accused punch the deceased on the jaw. It was a hard punch. He saw the deceased had short breath and was unstable. The deceased run towards a passage between the buildings."

(E) Evidence of PW5, Koroi Tukai is summarised in paragraph [24] of the summing – up, as follows:

"The fifth witness for the prosecution was Koroi Tukai, a security guard at the handicraft Center. He saw the deceased being chased by the accused

the deceased was scared, frightened and asking for help. While the deceased was running away from the accused he fell twice to the ground. The deceased was staggering. The deceased ran towards a BBQ stall owner Jone Vakarisi for help and he threw stones at the accused in order to deflect him."

(F) Evidence of PW6, PC Rokouso is summarised in paragraph[25] of the summing-up, as follows:

"The sixth witness of the prosecution is PC Rokouso. When he arrived at the scene of the alleged incident he saw the accused outside a parked taxi and a distressed child inside the taxi. The accused was angry and aggressive while the deceased was distressed-face and body shaking. The officer told the accused to go to Totogo Police Station while he accompanied the deceased and the child to the station in the taxi. While on their way to the station, the deceased lost control of the vehicle at the Vodafone Triangle. The officer was sitting behind the deceased. He saw the deceased's hands were off the steering wheel and he was breathing heavily. The officer pulled the deceased's legs back and pushed him forward and gave him two knocks on his back in the form of CPR The deceased responded once with his breath .The officer managed to take control of the vehicle and stop it. The called for assistance and transported the deceased to the CWM hospital in a police vehicle. When they arrived at the hospital at around 4am the deceased was unconscious. He handed the deceased to a nurse at the emergency ward and returned to his station."

(G) Evidence of PW8, Dr Salote is summarised in paragraph [27] of the summing-up.

"The eighth witness was Dr Salote who attended to the deceased at the emergency ward. When the deceased arrived at the hospital he was unresponsive and without any pulse. She said the patient had an irregular heartbeat which could have been caused by lack of blood supply to the heart or by some form of stress on the heart as a result of an impact. They immediately administered a CPR but the patient did not respond. She called off the CPR at around 4.50am as there were no signs of life."

(H) Evidence of PW9, Dr Mate is summarised in paragraph [28] of the summing-up, as follows:

"The last witness for the prosecution was a forensic pathologist, Dr Mate. After conducting post mortem, Dr Mate compiled a report that is in evidence before you. It is not in dispute that the primary cause of death was a severe coronary artery disease that is, narrowing of blood vessels that pump blood into the heart. In other words, Mr Chand had blocked arteries. The primary cause of death was significantly contributed by two other pre-existing conditions that is, fat build up within the walls of the blood vessels and a previous heart attack, and a fresh antecedent cause

was multiple traumatic injuries to the jaw and chest, both knees and the liver. Dr Mate said this injuries could have been caused by use of moderate force. The injuries were not severe in the sense that they did not affect the vital organs except the liver. Dr Mate said that there was a high chance that the multi traumatic injuries led to Mr Chand's heart not to function properly leading to his death."

Were there inconsistencies in evidences of prosecution witnesses; if so the effects?

[19] In support of this ground the appellant submits the following:

"26. The first witness neither saw any punching or chasing despite being first person on the scene. Second witness saw two punches, one on the face and one on the chest. Third witness saw one punch only on the chest and he saw the victim run away but didn't see him falling. Fourth witness saw one punch on the jaw and saw victim run but did not see him falling. Fifth witness saw the victim falling twice but did not see any punching. The first and third witness did not see the victim throwing stones at the assailant, whereas, second, fourth and fifth gave evidence to that effect.

27. They all have different versions of one incident and why each differ from another is SCR (3) 280)"capable of materially undermining their testimony. Significantly, they gave no explanation for their uncertain evidence and opposing versions."

[20] The applicable test in assessing contradictions, inconsistencies and omissions was laid down in the case of **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015) as follows:

*"[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. "Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see **R v O'Neill** [1969] Crim. L.R 260). But, the weight to be attached to any inconsistencies or omissions depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see **Bharwada Bhoginbhai Hiribhai v State of Gujrat** [1983] AIR 753, 1983 SCR (3) 280)".*

[21] The legal test and the principle or guideline established, is not contested. However, it the evidence, and its interpretation, evaluation and assessment, in the environment and circumstances of this case that is critical. According to the appellant, the discrepancies in

regards to the evidence of assault goes to the root of the matter and shake the basic version of the witnesses and therefore, the ground has reasonable prospect of success.

[22] The learned single judge's observations and the respondent's submissions are observed that, prosecution witnesses PW1 to PW5, had all witnessed the incident having arrived there at different times, possibly from different directions; they were not all present from the initial stages and each one had their own dimension, depending on when and how they were drawn to the commotion. They had not all observed the entirety of the episode that had unfolded from the beginning to the end but spoken to the phases of the incident of what each had seen. What emerges collectively from their prosecution witnesses' evidence, is that the appellant had been seen shouting and accusing the deceased who looked frightened and shaken. The appellant had been seen throwing two punches; one on the chest and another on the jaw of the deceased. The appellant had chased the deceased around his taxi and the latter had been seen to be unstable falling to the ground twice during the chase.

[23] In any event, all the alleged contradictions and inconsistencies do not really go to the root of the prosecution the case as to discredit the evidence of the eye witness. See **Bharwada Boginbhai Hirjibhai v State Gujrat** (supra); **Nadim v State** (supra), and **Turogo v State** [2016] FJCA 117; AAU0008.2013 (30 September 2016).

[24] Though the witnesses may differ in their perspectives, the weight of the evidence clearly supported that the appellant had punched the deceased twice to the jaw and chest, and chased the deceased causing him distress and fall to the ground twice. Even the appellant accepted in his own testimony that he had assaulted the deceased .The fact that the appellant had unlawfully caused physical harm to the deceased, including punches to the deceased's jaw and chest, was not seriously disputed at trial. The main planks of the defence case at the trial appear to have been (1) that the appellant was not reckless as to causing serious harm to the deceased when he punched him in the head and, (2) the evidence did not support that, the admitted assault accelerated the deceased's death by reason of the deceased's pre-existing medical condition.

[25] The appellant asserts that, the claimed inconsistencies go to the root of the matter because the medical evidence was that multiple traumatic injuries to the jaw, chest, both knees and liver, were an antecedent cause of death. The respondent submits that , the short answer to the appellant's complaint is that the assessors, and trial judge, would have been fully aware of the minor variations in the eye witness accounts and were nevertheless satisfied to the criminal standard that the appellant unlawfully assaulted the deceased causing him multiple traumatic injuries which hastened his death. Put another way, any such inconsistencies as there may have been were not materially important.

[26] In my evaluation and assessment, the evidence of PW1 to PW5 is material and goes to the root of the matter to be decided in this appeal. The prosecution's case is that the appellant was reckless and had hastened the death of the victim now deceased .Given the findings of the pathologist, what physical injuries did the appellant's punches to the jaw and the chest contribute to hastening the deceased's death? The credibility of the prosecution witnesses needed to be assessed well, as others had also physically applied force to the deceased's body after the deceased had driven his taxi away from the crime scene.

[27] In consideration of the medical evidence by Dr Salote, and the evidence of the pathologist, Dr Moce, one has to also take account of the appellant's admission, that he had punched the deceased on the jaw, and chest. The medical evidence did establish that there were multiple injuries to the chest, including other important findings, which will be discussed fully when the other grounds are considered, especially, the grounds pertaining to the medical evidence that was accepted by the learned trial judge. The issue arising from my consideration of this ground, is, whether, the prosecution, had established or proven beyond reasonable doubt, that the multiple injuries to the deceased's, jaw, chest, knees and liver, were caused by the conduct of the appellant, under the circumstances. Further, if so, whether, such injuries hastened the death of the deceased. This ground has merit.

[28] **Ground 2-**In this ground, the appellant is disputing the learned trial judge's findings in paragraph [2] of his judgment delivered on 21 February 2020, stating:

"I am satisfied beyond reasonable doubt that the Accused voluntarily engaged in acts of physical violence on the victim who was suffering from a heart disease and that it was the conduct of the Accused that hastened or accelerated the death of the victim and that the Accused realised the possibility of serious harm to the victim when he assaulted him."

[29] The appellant submits that the inference by the learned trial judge has to be viewed with other factors, for example, the victims' conduct after the assault, the pathologist's evidence on the cause of death, whether it supported the inference as to the cause of the hastened or accelerated death of the deceased, whether there was possibility of serious harm to victim when he was assaulted. Lastly, the causation issue, whether the acts of the appellant has an impact on the chain of causation leading to the death of the victim.

[30] The appellant submitted that, the learned trial judge did not consider the following-

(a) Prosecution witnesses PW3 and PW5 stated during sworn testimonies that the victim ran and picked up stones and threw it at the appellant, after the appellant punched him.

(b) PW6 revealed that the victim after the assault, drove the taxi out of Regal Lane, along Renwick Road and turning towards Pratt Street when he had lost control and collapsed at the lights at Pratt Street, hen PW6 manoeuvred the taxi to Ellery Street.

(c) There were no evidence of any heart issues prior to the victim driving the vehicle off Regal lane.

(d) None of the prosecution witnesses attest to the victim suffering from heart problems during the incident involving the appellant.

(e) The deceased ran and threw stones back at the appellant, and drove his taxi thereafter. If heart attack at the Pratt Street lights, the symptoms, ought to have been noticeable before he drove away from Regal Lane. The appellant submits:

"*34. Even though, the witnesses who saw the punching has not given any evidence to suggest that the punches were hard enough to cause heart attack to a person having heart disease. They have not given any evidence to suggest any symptoms of heart disease they could notice on the deceased when he was punched or chased by the appellant. PW3 and PW4 saw the deceased pick stones and threw it on the appellant after the alleged assault.PW6, stated that the deceased drove his taxi, when he was struck by the heart attack."*

Nature of this complaint and significance of Pathologists opinion

[31] The respondent submits that, at the heart of this complaint are the dual complaints that the trial judge erred in concluding the appellants assaults on the deceased hastened his death, and (b) that the appellant realised that his assault on the deceased risked causing him serious harm. It submits that there are problems associated with these complaints in that:

(i) It was properly open to the trial judge, on the totality of the evidence, to be satisfied to the criminal standard that it was the appellant's unlawful conduct which had hastened death, and ;

(ii) That the appellant appreciated that, by assaulting the deceased in the manner he did, he risked causing serious harm to the deceased. It is to be noted that the appellant is not challenging the trial judge's impeccable legal directions on causation where he stated:

"13. A person is also deemed to have caused another person's death, if the conduct hastened or accelerated the death of a person suffering under any disease or medical condition which apart from such act would have caused death.in this case it is not in dispute that Mr Chand had a pre-existing heart disease and that the primary cause of death was the pre-existing heart disease. It is for you to decide whether it was the assault of the Accused that hastened or accelerated the death of Mr Chand who was suffering from a heart disease. ***It is not necessary for the prosecution to prove that the Accused was aware of Mr Chand's pre-existing medical condition*** *when he engaged in the alleged conduct that accelerated Mr Chand's death and it does not matter if Mr Chand would have died in any event due to his pre-existing medical condition."*

[32] Also, that the appellant does not appear to take issue with the pathologist's evidence that the multiple traumatic injuries were an antecedent cause of the deceased's death. The gist of the causation complaint appears to be that the pathologist was adequately questioned as to how those multiple traumatic injuries were sustained. The answer to that is that the pathologist was not in a position to testify as to, how the multiple injuries were sustained. There was ample eye witness's evidence in that regard.

[33] Further, in the respondent's submission, the significance of the pathologist's evidence is that it provided a foundation for the trial judges finding that multiple traumatic injuries inflicted on the deceased had contributed to hastening death. It is difficult to argue against this sensibly on the correctness of this finding. There is no evidence to contradict the pathologist's conclusion. The respondent submits what the appellant is not entitled to do, at this late stage, is to introduce hearsay expert evidence, as he seeks to do in his written submissions.

[34] The respondent submits, the summing up did not reflect that the appellant had given this account of calculated risk assessment at the trial. There is a logical disconnect between the appellants belated assertion that he assessed the deceased to be fit and healthy (by virtue of PSV licensing condition) and the professed lack of foresight of serious harm. The point is that he must have be aware that punching an elderly man (or, indeed, any man) in the head risk causing that person serious harm irrespective of any prior health conditions. And, as the learned trial judge explained, it was not necessary for the prosecution to prove that the appellant knew of the deceased's heart condition in order to establish that he was reckless as to causing serious harm to the deceased.

[35] In view of the submissions and the evidence, there are a number of factors that are relevant to this ground, noting that the learned trial judge is satisfied beyond reasonable doubt that: the Accused voluntarily engaged in acts of physical violence on the victim; the victim was suffering from heart disease; the conduct of the Accused had hastened or accelerated the death of the victim, and that the Accused realised the possibility of serious harm to

the victim when he assaulted him. The issue is, whether the learned trial judge's satisfaction beyond reasonable doubt, is based on a proper evaluation and assessment of the evidence before him, and whether he had plausible reasons and justifications for being so satisfied.

[36] With respect to voluntarily engaging in physical violence on the victim, the appellant admitted that he punched the deceased to the jaw and chest. The appellant appears to disputes the effects of the punches. He also disputes and challenged the evidence of PW1 to PW5 for the contradiction, inconsistencies and omissions (see discussions on Ground 1). On whether he "*voluntary engaged*" as found by the learned trial judge, although the issue of provocation was not raised, it is in evidence that the deceased swore at the appellant's mother, and accused him of theft. On the victim suffering from a heart disease, that is in evidence, however, the appellant is disputing the connection between his punches, to the cause of death. He has raised in Ground 6, the issue of "*time*". He has also raised the issue of causation. The appellant had admitted having punched the deceased on two occasions. He disputes the effects of those punches. He also questions the connectedness between his acts and the death.

[37] The learned trial judge had not given any explanation in his judgment on his reasons and justification for holding the view expressed in paragraph [2] of the judgment. While one may look to the Summing-Up for the reasons and justification, as the summing up is an integral part of a judgment, the learned trial judge had failed to give proper or adequate reasons as the basis of his satisfaction, and also in view of the fact the, the assessors were split on their opinions, one had found the appellant guilty of a lesser offence. See also the discussion on grounds 3, 4, and 6 below.

[38] The role of the pathologist is to determine the cause of death. The eye witnesses are to establish what actually took place as seen by them. The role of the trial judge is to assess, evaluate and weigh the evidence. It is logical that the pathologist's role comes in after death. He/she cannot be expected to determine, who did what, in terms of contributing to what has eventually resulted in death. In the context of this case, the appellant had

admitted responsibility for the two punches. There is evidence of the deceased falling to his knees, and also evidence of CPR resuscitation, in the chain of events from Regal Lane in the central city, to the hospital. In terms of causation, given the circumstances of the case and the evidence available to the Court, it would be possible to assign some responsibility for the injuries to what in fact transpired after the deceased had driven his car off from Regal Lane for Totogo police station, Suva. It is in evidence that CPR was administered by PW6, and on Dr Salote's evidence, at the hospital. The charge is concerned with "*hastened*" the death of the deceased. What is a reasonable time line, given the deceased's pre-existing condition, would death be expected to occur, if the injuries attributed to the appellant was the only injury suffered by the deceased? It will obviously differ according to the facts of each case and the circumstances, and there is no evidence in this case on when would it take, for the deceased to have died, taking account only of the acts of the appellant, and the existing condition of the deceased.

[39] On the likely cause of injuries, the pathologist Dr Moce stated,

> *"In my opinion its trauma or any force applied to the area can cause these fractures. And, which can result from any, can usually be seen in motor vehicle accidents, can be seen in cases of CPR resuscitation, when we do CPR efforts it can also be seen in cases of assault and as well as falling from considerable height."*
> *Because of the injury seen it attributed to the CPR because of the white (wide) area affected, in this case a punch could be like hidden or sought of masked because of the extent of injuries that resulted from the CPR."*

[40] The pathologist, appeared to have agreed with the suggestion of the defence counsel, that the deceased did not die because of the heart attack, but agreed that the death was from a severe coronary artery disease, which is built up of fat in the blood vessel, a disease in the heart and that this disease, does not happen in one or two days, but built up in years. Evidence given in questions and Answers, between Toganivalu (counsel for appellant at trial) and Dr Mate the pathologist, confirms this. This ground has merit.

[41] **Ground 3, 4 & 6-**The grounds are related and the appellant had grouped them together. In ground 3, the appellant challenges the trial judge's failure to direct the assessors on the

inconsistencies in the evidence of the pathologist. These are highlighted below, in the order submitted by the appellant:

(i) The pathologist said that the injuries noted on the victim could have been caused by use of moderate force. Injuries were not severe in sense that they did not affect the vital organs except the liver. He/she said there was a high chance that the multiple traumatic injuries led top r Chand's heart not functioning properly leading to his death.

(ii) The above, contradicts his findings during the autopsy examination. In his post mortem report, he reported that the thoracic cage showed fracture of the right third to seventh coastal cartilage and fractures of the left third to the fifth coastal cartilage joining the ribs to the sternum, intercostal haemorrhage noted on the left mid thorax and right lower thorax. The sternum showed transverse fracture of the sternum at the level of fourth intercostal space between the fourth and fifth ribs.

[42] The appellant submits that the most serious injuries were the fracture of coastal cartilage ribs 3rd,to 7th of the right and 3rd to 5th of the left of the left cartilage joining the rib to the sternum showed traverse fracture of the sternum at the level of4th and 5th ribs. This indicate that the pathologist's evidence that the injuries were not severe clearly contravenes his autopsy findings, as recorded in the learned judge's summing up. Further, that the injuries noted on the post mortem report does not reconcile with the evidence in the court. The appellant submits that as the pathologist's report was part of the prosecution evidence, so it was at the disposal of the learned trial judge to conduct a thorough examination of the same and had he done the analysis, the learned trial judge could have clearly picked up the discrepancies in the pathologist's evidence/ discrepancies during the autopsy examination. It was the fundamental task of a trial judge to ensure a fair trial: **Sate v Li Jun** [2008] FJSC 18, CAV0017.2007S (13 October 2008), where the Supreme Court stated at paragraph 54 that the duty of a trial judge in common law jurisdiction was

explained in the joint judgment of Gaudron A-CJ, Gummow, Kirby and Hayne JJ in **RPS v The Queen** [2000] HCA 3; (2000) 199 CLR 620, 637:

> *"It is as well to say something more general about the difficult task trial judges have in giving juries proper instructions. The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case…."*

[43] There were other issues on the pathologist evidence, however, the appellant submits that, while conducting the autopsy, the pathologist recognised that the use of force contributed significantly to the demise of the victim. In the death certificate she noted that one of the antecedent causes of death was multiple traumatic injuries. However, the pathologist also clearly stated in evidence, that the two punches by the appellant were non-fatal. Confirming the fact that the trauma could be caused by assault or even CPR or vehicle accident or falling (at 430 of Record).

[44] With respect to ground 6, the appellant submits that there is an unexplained time lapse of 30 minutes from the scene of the incident to the hospital. This time lapse was not judiciously and adequately investigated by the learned trial judge, and in that sense, the accused/appellant was not given a fair trial.

[45] The respondent, in reply to the three joint grounds, submits as follows. That Ground 3 overlaps with Grounds 1 and 2 and does not advance the appeal any further. In seeking to relitigate the expert evidence, the appellant overlooks the fundamental point that the evidence supports findings that he inflicted traumatic injuries on the deceased and those injuries hastened his death. The assertion that the fractures of the deceased's ribs are unexplained is simply wrong in light of the ample evidence that the appellant punched the deceased hard in the chest. There is no merit in ground 3.

[46] Further, the respondent submits, it is difficult to understand the gist of the appellant's complaint in Ground 4. For example, it is not clear, what evidential basis, or what defence, he is referring to in paragraph [59] .There was no evidential basis to support that someone

other than the appellant inflicted traumatic injuries to the deceased at the material time. More importantly, this does not appear to have been the appellants case at trial. Mere speculation does not support the appellants complaint that he was deprived of a fair trial. On Ground 6, it leads nowhere. Any discrepancies regarding the time line of the incident were plainly immaterial to the key issues in the case. There is no merit in the ground.

[47] In my assessment of the evidence and the submissions of the appellant and the respondent with respect to Grounds 3,4 and 6, the issues raised by the appellant , are noteworthy and not to be taken lightly or brushed off, especially, in view of the fact that the learned trial judge had not provided proper and adequate reasons, or justification in his judgement, demonstrating that he has not evaluated and or assessed the evidence of the pathologist as to the cause of death, and how the act of the appellant had hastened death , in all the circumstances of this case. The question is, whether, in view of the evidence of the pathologist, has it been proven beyond reasonable doubt that the acts of the accused had contributed to hasten the death of the deceased? The ground has merit.

Ground 5

[48] The appellant, for a variety of reasons (see pages 67 to 72 of written submissions), submits that the evidence of PW6 is not credible and reliable, but somehow, the learned trial judge believed in his testimony. He contends that, if the learned trial judge had been more vigilant, he would not have believed PW6's evidence as credible and reliable. He pointed to several illustrations in his submissions .The respondent submits that the ground is a complete red herring and questions, how, in the appellant's submission, PW6's evidence has arguably given rise to a miscarriage of justice. The respondent also questions this ground's contribution to further the argument/case for the appellant. In the absence of adequate reasons in the judgment of the learned trial judge, and acknowledging the summing up, the ground is taken as a challenge to the learned trial judge's treatment of the evidence before the High Court.

Ground 7

[49] The appellant is challenging the description of the degree or level of his intoxication by the learned trial judge who said while summing –up on this aspect that the accused was heavily intoxicated. The appellant submits that such a description or the use of the words "*heavily intoxicated*" is not based on evidence before the court. The evidence as submitted by the appellant, is as follows:

> *"74. PW1 said that the appellant was smelt heavily of liquor, his speech was slow, he was staggering and his eyes were red.PW2 did not give any evidence on smelt of liquor from the appellant or staggering and red `eye`s.PW3 said that the accused was heavily drunk.PW4 also said the appellant heavily smelt of alcohol and was drunk.PW5 did not say anything about the smell of liquor or the appellant being drunk. The appellant admitted he was drunk but capable of making decision.*
>
> *75. PW1 said that the appellant approached him and ask him to do something about the child in the taxi at that odd hour of the night. None of the prosecution witness rejected that there was a child in the taxi; this clearly implies that the appellant despite drinking knew what he was doing.*
> *76. The appellant was medically examined on 25/01/2018 around 630 hours, this medical examination was done to determine whether he was fit to be interviewed. The medical report does not note that the appellant was drunk or intoxicated as indicated by the learned trial judge."*

Whether the characterisation of appellants drunken state materially influenced assessors and caused miscarriage of justice

[50] The appellant submits that apart from him smelling of liquor, there was no other prima facie evidence by way of breath analysis report or medical evidence to support the learned trial judge's opinion on the accused's state of drunkenness when he gave directions to the assessors. That such opinion and expression by the learned judge when summing-up amounts to a grave error as it acts to bolster one party's case (i.e., the prosecution case), when he should be making an assessment based on evidence, which is fair, objective and balanced. On that point, in **Tamaibeka & Katonivualiku v State** unreported, Criminal Appeal No. AAU0015 of 1997S, 8 January 1999, this Court said at paragraph 29:

"A judge is entitled to comment robustly on either the case for the prosecution or the case for the defence in the course of summing up. It is appropriate that he puts to the assessors clearly any defects he sees in either case. But that must be done in a way that is fair, objective and balanced. If it is not, the independent judgment of the assessors may be prejudiced. If all the issues are put in a manner favourable to one party and unfavourable to the other, the assessors may feel bound to follow the view expressed by the judge."

[51] The appellant submits that the choice of words, and the manner in which the trial judge used to describe the appellant's physical condition at the time of the offence could give an impression that since the appellant was "*heavily intoxicated"* he could be reckless in his conduct and thus was guilty of manslaughter. The judge's direction, was unfair to the appellant.

[52] The respondent submits that, there was ample evidence to justify the characterisation of his state of intoxication. Scientific evidence was not necessary. It will be noted that the judge was careful to make it clear that the appellant's case was not that he was so intoxicated that he didn't know what he was doing. It was common ground at trial that the appellant knew very well what he was doing. The prosecution case, fairly put, was that the appellant fully appreciated the risk he took when he decided to launch what seems an unprovoked attack against the deceased.

[53] The respondent says it is pertinent, that, the appellant makes no complaint about the trial judges' legal direction on the element of recklessness, at paragraph [14] of the summing-up, where he states:

"If you feel sure that it was the Accused's assault that hastened or accelerated Mr Chand's death, then go on to decide whether the Accused was reckless as to a risk his conduct will cause serious harm to Mr Chand. The element of recklessness is made but if you feel sure the Accused realized that his conduct might cause serious harm to Mr Chand yet he went ahead and acted as he did. What was in the mind of a person is not always capable of direct proof because a person's state of mind can only be known for sure by the person concerned. However, ordinary experience shows that a person's intention or knowledge can be inferred by his conduct in any given circumstances. An inference is a logical deduction from proved facts, whether the Accused realized the consequences of his conduct on the night in question is a matter for you to decide. For that you may look at what the Accused did and said and the reactions of the victim to the circumstances created by the Accused."

[54] In this context, there is no danger that the assessors, or the trial judge leapt to an impermissible conclusion that the appellant was reckless merely by reason of his intoxication.

[55] In my assessment, noting the evidence and the submissions of the appellant and the respondent, no matter the characterisation as to the level of intoxication or drunkenness of the appellant, it does not materially affect the issue at hand, as, it is established that, he threw two punches at the deceased .He also admitted that. What is in issue is whether his acts, significantly contributed to hastening the death of the deceased. The appellant admitted he was drunk but was conscious of his decisions. It is in evidence also that he was drinking /socialising from early evening to late at night.

Conclusion

[56] Having assessed the grounds of appeal, the submissions of the parties, and taking account of the evidence adduced at the trial, in its totality, I hold that the learned trial judge had not properly or adequately assessed, evaluated and weighed the evidence before the High Court when he found the accused/appellant guilty of manslaughter. I hold that the totality of the evidence before the Court, after careful consideration, assessment and evaluation, cast doubts on the prosecution's case. Given the above analysis of the grounds, and reasons, I hold that the conviction of the appellant/accused of the offence and charge of Manslaughter contrary to section 239(a) and (b) and (c)(ii) of the Crimes Act 2009, is not supported by the evidence. That conviction is set aside, and, the appellant is convicted for the offence of Assault Occasioning Actual Bodily Harm, contrary to Section 275 of the Crimes Act 2009. The appeal is allowed.

Andrée Wiltens, JA

[57] I agree with the decision and the reasons for it.

Orders of Court:

1. *Leave to appeal granted.*
2. *Appeal is allowed.*
2. *Conviction for Manslaughter is set aside and substituted.*
3. *Accused/Appellant Convicted of Assault Occasioning Actual Bodily Harm.*

The Hon. Mr Justice Isikeli Mataitoga
RESIDENT JUSTICE OF APPEAL

The Hon. Mr Justice Alipate Qetaki
JUSTICE OF APPEAL

The Hon. Mr Justice Gus Andrée Wiltens
JUSTICE OF APPEAL