

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

**Criminal Case No. HAC 84 OF 2009**

**STATE**

**- V -**

- 1. JOJI ROKETE**
- 2. JOSUA WAKA**
- 3. SANJEEV MOHAN**
- 4. JONETANI ROKOU**

**Counsels Appearing:** Mr. J. Niudamu with Mr A. Paka for the State

Mr J. Savou. for the First Accused

Mr A. Singh for the Second Accused

Third Accused in person

Ms. L. Tabuakuro for the Fourth Accused

**Date of Hearing:** 10 – 20 February 2014

**Date of Summing Up:** 21 February 2014

---

**SUMMING UP**

---

[1] Ladies and Gentleman assessors; we have now come to the stage in the trial where it is my duty to sum up the evidence to you; and to direct you

on the law. You will then be required to deliberate together and each of you must give a separate opinion whether the accused are guilty or not guilty of the charges they face.

[2] Our functions have been and remain quite different throughout this trial. The law has been my area of responsibility and I must now give you directions as to the law which applies in this case. When I do so, you must accept those directions and follow them.

[3] The facts of this case are your responsibility. You will wish to take into account the arguments in the speeches you heard from Counsel but you are not bound to accept them. You are to make up your own minds. Equally, if in the course of my review of the evidence I appear to express any views concerning facts, or emphasize a particular aspect of the evidence, do not adopt those views unless you agree with them and if I do not mention something which you think is important you should have regard to it and give it such weight as you think fit. When it comes to the facts, it is your judgment alone that counts.

[4] In arriving at your conclusions you must consider only the evidence you heard in this case. You must disregard anything you heard from friends, relatives or through any media outlet about this case. You must ignore any suggestions or advice made to you by anyone, no matter how well meaning it may be.

[5] You must decide this case only on the evidence which has been placed before you that includes witnesses and exhibits which have been produced. There will be no more evidence. You are entitled to draw inferences that is to come to common sense conclusions based on the evidence which you accept, but you must not speculate about what evidence these may have been or allow yourselves to be drawn into speculation. In this regard Counsel for the second accused told you that there were no knives, guns etc and Counsel for the fourth accused said that there were no phone records. Neither should have said this. They know and I direct you now that you must judge this case on the evidence that is before you.

[6] In assessing the evidence, you are at liberty to accept the whole of a witness evidence or accept part of it and reject the other part or reject the whole. In deciding on the credibility of any witness you should take into account not only what you heard but what you saw. You must take into account the manner in which the witness gave evidence. Was he or she evasive? How did he or she stand up to cross-examination? You are to ask yourselves was the witness honest and reliable?

[7] As assessors you were chosen from the community. You, individually and collectively, represent a pool of common sense and experience of human affairs in our community which qualifies you to be judges of the facts in the trial. You are expected and indeed required to use that common sense and experience in your deliberations and in deciding upon any proposition put to you and in evaluating the evidence in this trial. You are to ask yourselves

whether it accords with common sense or is it contrary to common sense and experience.

[8] I ask you to please put aside any feelings of prejudice you may have against certain people and to put aside any sympathy you might feel for anyone connected with the trial. This court room has no place for sympathy or prejudices – you must arrive at your opinions calmly and dispassionately. In this regard you are to ignore the emotive submissions of State Counsel in his opening. He had no right to try to gain your sympathy by referring as he did to the death of Vinod. You are the judge of this case on the facts alone.

### **Onus and Burden of Proof**

[9] In this case, as in every case in Fiji, the prosecution must prove that the defendant is guilty. He does not have to prove his innocence. In a criminal trial the burden of proving the defendant's guilt is on the prosecution.

[10] How does the prosecution succeed in proving the defendant's guilt? The answer is – by making you sure of it. Nothing less will do. That is the principle often referred to as "beyond reasonable doubt". If after considering all the evidence you are sure that the defendant is guilty you must return a verdict of "Guilty". If you are not sure, your verdict must be "Not Guilty".

[11] Let me take you to the "information". It is sometimes referred to as the Indictment but quite simply it is the charge sheet that lists the charges, or

"counts" that each accused in this trial is facing. We can see that the four accused are charged with one count of robbery with violence on the 7th to 8th day of September 2009 at Yalalevu Ba . Each of the four accused has entered a plea of not guilty to this count. I will come back to the legal definition of robbery soon.

[12] The four accused are also charged with one count of murder also on the 7th to 8th September 2009, said by the Prosecution to have been committed in the course of the robbery. Again they have pleaded not guilty to that count as well, so you will need to tell me whether they are guilty or not guilty in your opinion.

[13] Finally they are charged also with unlawfully taking away the deceased's motor vehicle.. They have pleaded not guilty to that count as well so it will be necessary for you to give me an opinion on that count also.

[14] As you are aware, there are four accused persons in this trial, charged with all three offences. You must look at each offence separately. Just because you may find one accused guilty of one does not mean necessarily that he is guilty of another offence.

[15] Similarly, you must look at each accused separately. If you think one accused is guilty it does not mean that the others are also guilty. It is like having four separate trials against each of the accused. So for each count you will examine the case against each accused separately.

[16] Now having said that, it is the prosecution case that all four were acting together in this house invasion and they rely on the legal doctrine of “joint enterprise”. What joint enterprise means is this: where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as a joint plan or agreement to commit the offence, they are each guilty. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it (however great or small) so as to achieve that aim.

[17] Your approach to the case should therefore be as follows: if looking at the case of each accused in turn you are sure that with the intention I have mentioned he took some part in committing it with the others he is guilty.

That may not cause you any difficulty with the robbery, but with the murder additional legal considerations come into effect.

[18] Very unfortunately Vinod Sharma was killed during this robbery and the evidence is not clear as to who actually killed him, but the law says that that doesn't really matter. If all four are acting together by agreement to do the robbery and one of them goes beyond that plan and kills the houseowner, and if you are sure that killing, or inflicting very serious harm on the householder was a probable event in the robbery and whichever accused you are looking at realized that it was probable that could happen,

then by taking part in the robbery with that knowledge he is taken to have accepted the risk that his co offender would act in that way and he therefore becomes responsible for the act and is jointly guilty of the murder.

[19] Let me give you an example of this: Let us say that three men agree to rob R B Patel Supermarket during the night and they then do go to do the robbery. Mr A. stands outside, Mr B. drives the car and Mr C. goes inside, takes \$10,000.00 cash and in the process he is disturbed by the security guard, he strangles him and he dies.

A, B and C all are guilty of the robbery because they all play a part in the robbery it doesn't matter that A & B don't go inside and steal the money.

[20] But are they all guilty of the murder, if all the necessary elements of murder are proved? C certainly is because he strangled the deceased. A and B are also guilty if they knew that there was a probability that there would be a security guard and that he would be "neutralized" by having force applied to him to kill him.

[21] I stress that that is only an example. I will come back to this difficult doctrine after I have dealt with the elements of the crime and with the evidence.

[22] Robbery is simply the stealing of somebody's possessions while at the same time applying force or the threat of force. It is not in dispute that there was a robbery at 8 Bula St that night, a ring and phones were stolen and that force was applied in this theft. The State says violence can be inferred from the room being in disarray, the TV pushed back and most importantly the killing of the householder. There can be no more force or violence inflicted than that. You might find ladies and gentleman that all four being in agreement to rob, and all four going there to so rob that the elements of the offence are made out and that they are all guilty of the offence. But it is a matter for you.

[23] Unlawful use of a motor vehicle is just that. The State has to prove to you that the vehicle was taken and the persons taking it had no right to take it. Again I should not think you will have difficulty with that count.

[24] The offence of murder is the most serious and the most difficult from a legal point of view.

[25] Murder is committed when:

- (i) The accused did an unlawful act;
- (ii) That the act caused the death of the deceased;
- (iii) That at the time of the act the accused :
  - (i) Intended to kill the deceased; or
  - (ii) Intended to cause him very serious harm, or



(iii) That he knew what he was doing would cause death OR very serious harm but to went on to do it regardless.

[26] An unlawful act is simply an act not justified in law, for example punching, stabbing, strangling, suffocating are all unlawful acts.

[27] The second element the State must prove is that the unlawful act caused the death. In our case the pathologist has said that Vinod died from asphyxiation and suffocation and it would almost certainly have been caused by the gag around his nose and mouth. You might find that this cloth gag and the pressing of his mouth caused the death.

[28] The third element of murder to be proved by the State concerns the accused's intentions at the time of doing the unlawful act. As a matter of common sense, nobody can look into a person's brain to ascertain his intentions, however intentions can be inferred from his physical actions and the surrounding circumstances.

[29] The State is running their case of murder on intention to kill. They say that having found proved so that you are sure that there was an unlawful act which caused the death of Vinod, an intention to kill is present. They point to the caution interview of the first accused who says he held a cloth over the deceased's mouth and nose until he was motionless. If you agree with that and agree that the first accused actually said that (and he says he didn't, he says he had no intention to kill) then you will find the first

accused guilty of murder and also the three others too, If you find that the others knowing that there was a person present in the house, recognized the probability that this might happen to a householder disturbed and then joined the enterprise, taking that risk.

[30] If however, you find that there was no intention to kill then you are entitled to find the accused persons guilty of manslaughter. Manslaughter is a lesser offence than murder. There must still be an unlawful act which causes death but without the third element of intention to kill.

Your approach to the murder charge should be this:

- 1) Was there a common intention amongst the four to rob?
- 2) In the course of that robbery did somebody die as a result of an unlawful act?
- 3) Did one of the accused who did the act have an intention to kill?
- 4) Was that act a probable event in the agreement to rob?
- 5) Did the accused whose case you are looking at realize that the probability existed and take the risk to join in on the robbery anyway?

If your answers to these questions are yes then it is open to you to find each accused guilty of murder, however if you cannot find that there was an intention to kill it is open to you to return a verdict of manslaughter.

[31] If you find in respect of any of the accused that the killing was so remote and unexpected, it could never have been foreseen by the accused whose case you are looking at then you will find him not guilty of murder and not guilty of manslaughter. They say that whoever had (and it is not certain who) subdued and suffocated Vinod knew that that would cause serious harm to him but nevertheless carried on recklessly to apply force to his mouth. If you find that, then it is enough to satisfy the third element.

[32] I will now discuss the evidence with you. There is no dispute that there was a break-in at 8 Bula Street on the night of 7/8 September 2009. In the course of that home invasion Vinod Sharma died. Mr Sharma's two daughters told us first of his kindly nature and popularity in the district and secondly of the items that were missing from the house, including a black cordless phone, a mobile, a watch and a ring. PW2 bought the phone, PW1 and PW2 both identified it. The deceased's brother told us that he had looked through the windows on the 8 September and seen a body which he thought to be his brother's Vinod lying on the bed. He phoned the police. He also told us the car was missing and he understood that the police had found the car near Lautoka.

[33] Mrs Bibi said she saw the car leaving the compound at about 2.45am to 3.00am – it lights were flashing on and off and the car was going fast.

[34] Josua Nasokia was the big shy Fijian man who reluctantly told us that Rokete (1<sup>st</sup> accused) had given him a phone inside a plastic bag at 6.30pm

on the 8<sup>th</sup> September. Rokete told him to keep it and said he would pick it up later. The Police then came and he showed them where he had hidden it in the cane field. He was unable to identify the phone because it was in the bag and he hadn't seen it.

[35] Mr Tasvinder Singh is a van driver and he said that on the 7<sup>th</sup> September 2009 he got a call to go to Nailaga Village. It was in the night at about 1.00am. It was to pick up passengers in Nailaga and drop them off at Yalalevu. He did that. There were 4 men. It was J. Roko, a man who he identified as the fourth accused who called him. Roko was waiting when he got there with an Indian boy. A third boy came. They asked him for drugs and he gave them some. He took the 3 to Yalalevu and to AKP School. They were taken to the house of the man who was murdered and were talking amongst themselves. They told Tasvinder that they were going "to do some work". They asked him for a shifter and he gave them one. He identified the fourth accused in court as Jai Roko who had hired him. He dropped them and went back to town. The next day he was sitting with the van owner when a call came to report the death at Yalalevu. The next day J. Roko came to him. He thought he had come to give him the \$7.00 fare that they hadn't paid but he said he would give him \$200 but he wasn't to tell anybody. Tasvinder asked Roko how did he kill him and he replied that "he was a sick person and we tied a cloth around his neck and he died". He said not to tell anyone or you will be in trouble. In cross-examination he admitted that the Police had originally treated him as a suspect in the robbery. He agreed that he had been in possession of marijuana and had

smoked it and that he smoked it about once a month. He also agreed that he had never been charged by the Police with possession of drugs but denied that he was a known drug dealer in Ba town. He said the others smoked marijuana that night – everybody except the fourth accused J. Roko. He agreed that when he had heard of the death he had never gone to the Police with his suspicions. He said he never knew that something like this would happen, he thought when they said that they were going to do a robbery that they were probably joking.

[36] I must at this stage direct you ladies and gentleman that matters put to a witness which are denied are not evidence, it is only when a witness agrees with a proposition that something becomes evidence.

[37] We heard from a bus driver who told us that he drove the third accused, whom he identified, from Lautoka to the feeder road near Nailaga Village in his bus, at about 6.45pm on the evening of 7<sup>th</sup> September, 2009. In cross examination by the third accused, he denied that he had been told by the Police who to identify as his passengers.

[38] A further witness told us that he discovered Vinod's car in his street in Sakoor Place, Lautoka at about 4.15am on the 8<sup>th</sup> September 2009. It was the first time he had ever seen that car.

[39] From then on we heard from 14 Police witnesses in all who gave evidence as to the cautioned interviews made by the first, second, and third

accuseds, about their arresting witnesses who formally charged the accused and took statements from them in answer to that charge. We heard from the investigation officer, the officer who compiled the Crime office station diary, the officer who seized the stolen phone from the cane field which had been hidden by Josua Nokosia, the officer who went to re-apprehend the first accused after he had escaped from the Crime Office. We heard from the officer who took the deceased's body from the mortuary to the Lautoka Hospital for the post mortem examination and the final police witness was Inspector Iakobo who was the principal investigation officer of this case as well as being a witness to the cautioned interview of the first accused which he read into the record.

[40] I don't propose to go into detail about the police evidence. You heard it and you heard the same things from many witnesses and you heard the same matters put in cross examination to each of the witnesses. There are however important matters arising from that evidence that I must remind you of and direct you on.

[41] First of all I direct you on how to treat the cautioned interviews and the answers to charge of the first, second and third accuseds. Each of those interviews and each of the answers to the formal charge appear to contain admissions or confessions to the offences they have been charged with. If you are sure that the individual accuseds did indeed make those admissions then you may take them into account when formulating your opinions. All three accused however challenge those admissions. The first

accused says he was assaulted and slapped around the head and was thus forced to sign. In addition to that he says that the whole interview has been fabricated.

[42] The second accused says he was also assaulted at Ba Police Station and as a result forced to sign the admission. The third accused says that he was asthmatic and deprived of his asthma medicine meaning that he was not in the right frame of mind when making the admissions attributed to him in the interview and in the charge statement. If you conclude that these allegations may be true (and remember the Police deny any impropriety) and that the confessions were or may have been obtained by assault or improper treatment then you must disregard the admissions and answers. If however you are sure that each accused, whose case you are looking at made the admissions and that they were not obtained by improper treatment, you must nevertheless decide whether you are sure that the admissions are true. If whatever reason, you are not sure that the admissions are true, you must disregard them. If, on the other hand, you are sure that they are true, you may rely on them. Remember in this regard there are no confessions from the fourth accused. The evidence is that he was called in the interview but he said nothing to implicate himself in this affair. He merely told the same story that he told us in evidence.

[43] Mr Niudamu told you in his closing speech that I had already ruled these statements to be admissible. He had no right to say that. Those were different proceedings before this trial started. It is a matter for you to

decide and not me .Whether the accused were assaulted or not can only be decided by you. If you find they were assaulted and oppressed you will discard the interviews and their evidence, if you find that you prefer the Police evidence that everything was done properly then you can regard the interviews as evidence and if you find the answers true you may act on them.

[44] I remind you in the strongest possible terms of something I said to you during the trial. The contents of each accused's interview can only be used against that accused alone and not against any other accused that he might be talking about. To be specific about this, if the first, second and third accused say anything about the fourth accused then you are not permitted to use that as evidence against the fourth accused.

[45] As a related issue, and finally before I leave the question of the caution interviews, you will recall that when the statement of the third accused was read to you, and in the copy that you have, there is a reference he makes himself to being in prison with the fourth accused. Now first you cannot use that in any way against the fourth accused and secondly it is evidence about the third accused himself which you will ignore. His being in prison before is of no relevance whatsoever to any allegations he is facing on this case.

[46] As part of the prosecution case you heard evidence from three doctors. Dr Dragon of the Ba Medical Centre gave evidence of a routine examination he



made of the first, second and third accuseds at the request of the Police on the 15<sup>th</sup> September 2009. He said that his examination revealed no visible sign of injury on any one of the three. Bear in mind that these examinations were conducted within a day of the interviews being conducted. More specifically he found that the first accused had a dental problem and referred him to dentist. There was nothing to report on his examination of the second accused and to the third accused he found a small abrasion behind his ear and he made an incidental finding of mild asthma, a finding which he said had taken the third accused by surprise.

[47] Dr Joyce had been called to the Ba Police Station on the 12<sup>th</sup> September to examine the second accused who had been complaining of body pain. She found the patient to be conscious, there were no injuries, his vital signs were normal and he could sit properly. She recommended that he was fit to be interrogated. She denied she was acting under any duress by the Police at the time.

[48] The third medical witness was the Pathologist, Dr Tudravu who conducted a post mortem on the deceased at Lautoka hospital on the 9<sup>th</sup> September 2009. She found the cause of death to be asphyxia due to suffocation. She said that the bruising on the face and around the mouth led her to believe that the cloth found around his neck would have at one stage been around his nose and mouth contributing to the suffocation. You may or perhaps you may not find that the cloth around the nose and mouth and the

pressing on it by one or more of these accused was the unlawful act causing death.

[49] At the end of the prosecution case you heard me telling the accused what their rights are in defence. They could give sworn evidence (and be cross-examined) or they could choose to remain silent saying that the State had not proved their case against them to the required standard. No matter whether they gave evidence or remained silent they had the right to call witnesses in their defence.

[50] The first accused gave sworn evidence, which is his right. He told us that he did go to 8 Bula Street that night. He was acting alone, climbed up to the window and pulled the bars off the window himself. He removed the louvers and went inside. He found money and took it. He went further inside and saw a man lying on a bed in the sitting room, sleeping. The man stirred and looked around. The first accused ran towards him with a cloth. He poured chloroform on the cloth and put it over his nose. He held it over his nose for one minute until he was motionless. He was still breathing. He tied a piece of bed sheet around his mouth. He found a key and went outside and found it to be the correct key for the car. He went back inside and got the phone and some other items. He then went and started the car and left. When he had gone back inside he had taken the cloth off the man's mouth and could see he was still breathing. He drove the car to Lautoka and parked it in Waiyavi. He took the keys home and buried them in his garden. He produced them in evidence as proof. In his interview

with the Police where he gave 4 versions of the events only the first and second versions were correct. He told the Police he acted alone but the Police said he couldn't do it all by himself so they forced him to say he did it with others. They forced him to give the name of the second accused because he is his cousin and they are always seen together. He didn't have any intention to kill the deceased. The answers in the interview about others were fabricated by the Police and he was assaulted and he gave answers unwillingly. He told them he acted alone – he told them the truth but they didn't believe him. It was only the next day that he learned that the man had died.

[51] Well ladies and gentleman you will make what you will of that evidence. You can accept part of it, accept it all or reject it all. However, part of his evidence is confirmation of the State's case that he did the robbery and that he took the vehicle unlawfully. He did however contest the State's case that he murdered the deceased. He said he had no intention to kill but merely held a chloroform soaked cloth over his face to render him unconscious. If you believe that is true or may be true then you will find him not guilty of murder. If you do not believe the first accused and remember he doesn't have to prove anything to you, then it is still for the State to prove to you so that you are sure that he had an intention to kill and so did by forcefully blocking the deceased's nose and mouth. You will find this evidence in the caution interview if you think that those answers were obtained without assaults, threats or oppression, and if you prefer the answers in that interview in preference to his sworn testimony.

[52] So you may have little difficulty in finding him guilty of the robbery and taking of the car and if you believe his evidence in Court you will find him not guilty of murder but guilty of manslaughter if he did an act causing the death of the deceased but without intention to kill. If you think what he did didn't kill the deceased then he is not guilty of murder and not guilty of manslaughter.

**Second Accused:**

[53] The second accused told us that he never went anywhere on the night of 7/8 September. He was at home and slept there all night. The Police came to get him on the 11 September because somebody else (who he later said to be the first accused) had identified him as one of the robbers. They took him to Ba Police Station and threatened and assaulted him in the vehicle. When they got to the Police Station, they sat him on a chair, handcuffed him behind and started assaulting the back of his head and his back. There was a confrontation with the first accused who did not implicate him and he too was then assaulted. His handcuffs were removed, he was made to stand on the chair and he was handcuffed to netting above the door and left suspended by his wrists. At the same time, they were still punching him and hitting his legs with a baton. He lost consciousness and woke up alone in a room lying on the floor. An officer came in and used a spray to spray his eyes, still telling him to admit. He was taken to spend the night at Lautoka Police Station. The officers there kept telling him to confess. The next day back at Ba he was assaulted again. There were punches to

the back of his head and slaps. They were swearing at him. There was another confrontation with the first accused who denied that the second accused was involved so they punched the first accused until he said that second accused was involved. He (the first accused) was taken away and the second accused was again hung by handcuffs on his wrists and they punched his stomach. They stopped when he complained about his chest. He had body pain and an injury to his left ribs. He showed the Court what appeared to be a protruding rib bone. The handcuffs were removed and he was left to lie in a room while they called the doctor. The doctor (Dr. Joyce) came and examined him. She was there for 2 - 3 minutes and said he needed an x-ray. She made no notes. She just used a stethoscope and did nothing else. He was taken back to the room, threatened, shouted at, assaulted and slapped by the Strike Back team. They took his trousers off and put chilies on his anus. He couldn't take it anymore and just admitted whatever they told him. They asked the questions and they wrote the answers. They didn't allow him to phone a lawyer, contact Legal Aid or call in his family. There was no independent person present. He was there for three days and at the end he signed the notes of interview but he signed under duress. None of the admissions in the interview are true, he didn't go to that house and he had no intention to kill or cause harm to anybody. He never stole anything and didn't drive away in a motor car. The admissions were obtained through violence and threats and he signed it because of fear. They already had a lot of information about him before they started. They made a promise to him to withdraw the case as long as he didn't complain to anybody. Dr Dragon only spent 5 minutes examining

him. He gave him tablets for body pain. A month after the interview he was offered immunity if he would be a witness but he refused.

[54] So ladies and gentleman it is a matter for you whether you believe the second accused or not. I remind you that he does not have to prove anything to you but if you think that what he says is true or may be true then you will discard the caution interview and its confessions. If, on the other hand, you think he was not assaulted or threatened, then you might want to rely on his confession in the interview where his answers are a confession to the robbery with violence, a confession to the taking of Vinod's motor vehicle and a confession to taking part in subduing Vinod on the bed. If you find that he did voluntarily give the answer in Q. 172 that he "held the householder on the bed, holding his backside down" then it is evidence of his part in the joint enterprise of murder, as well as evidence of his being an accessory to the act that killed Vinod. If you believe he said that without being forced to and if you believe that the first accused intended to kill Vinod then you will find the second accused guilty of murder. If you think the first accused did not have that intention you will find the second accused guilty of manslaughter.

**Third Accused:**

[55] The third accused was also home on the night of the 7<sup>th</sup>/8<sup>th</sup> September with his family in Nadi, but was arrested at Nadi Police Station on the 12<sup>th</sup> September. He was kept there but the Strike Back team came and got him and took him up to Ba Police Station. He was threatened on the way and

told to admit a murder in Ba. He said he knew nothing about it and they said “today is your day”. At Ba he was assaulted and threatened with violence. He was intimidated and slapped on the face. They pulled his ear and pushed him around. He asked to see his wife who would bring a lawyer but that request was denied. In the assault his asthma started to develop and Kamal (his interviewing officer) withheld his pump from him. They told him to do as they say otherwise he would die. He was very frightened. He said he knew nothing but they did not believe him. He was taken to be interviewed by Kamal. He was slapped by P.C Suren. He then decided to co-operate so he could get his inhaler back. The interview was fabricated for the most part by P.C. Kamal but some of it was true. He was refused a visit by his wife. He slept the night in Tavua Police Station without a mattress and with no opportunity to bathe. They pulled his ear again. He confessed when formally charged to escape the bad treatment. The confessions are not true. He complained to the District Officer and to Dr Dragon. He complained to the Magistrate. He doesn't know anything about this offence and he had never seen his 3 co-accused before this trial started.

[56] The third accused called an alibi witness. An alibi witness gives evidence that the accused could not have been at the scene of the crime because he was somewhere else. By the procedure laid down for criminal hearings, a notice has to be filed by the person relying on the alibi, for the very reason that the prosecution is not taken by surprise. The third accused did in fact comply with that requirement and so he examined his witness who was his

father-in-law. The father-in-law said that on the night of the 7<sup>th</sup> September the third accused was at home with him looking after his young child because the wife was out at work in a restaurant. They drank grog from about 7pm to 9.30pm. So the defence is one or alibi. As the prosecution has to prove his guilt so that you are sure of it, he does not have to prove he was elsewhere at the time. On the contrary the prosecution must disprove the alibi. Even if you conclude that the alibi was false, that does not by itself entitle you to convict the accused. It is a matter which you may take into account, but you should bear in mind that an alibi is sometimes invented to bolster a genuine defence.

[57] Again ladies and gentleman, the third accused does not have to prove anything to you. The State must do that, but if you think what he says about his treatment at Ba Police Station is true or may be true then you will discard the caution interview and charge statement. However if you think that the statements were obtained voluntarily without abuse then they are evidence on which you can rely. If so you will see that there are admissions to joint enterprise in the robbery and there are admissions to knowing that somebody would be in the house. This you may think is evidence of a probability that something might happen to that somebody. It is all a matter for you.

[58] The fourth accused told us that on the 7<sup>th</sup> September he had met his girlfriend in Ba from about 5pm to 7pm. He then took a bus to Nailaga to see his de facto wife and his children. He saw when he got there that there



was a youth meeting going on at Bulou s house so he left his bag at Lusiana’s house and sat in the bus shelter. At about 10pm he saw the meeting winding up and went home. He and Bulou had an argument about his dinner not being there. She made something for him to eat. They talked and retired sometime after 11pm and he spent the night there. You heard a lot of evidence about his relationship with Bulou, his mother-in-law, his snoring etc; whether you think that is important is up to you – you are masters of the facts.

[59] On the 9<sup>th</sup> September the Police came to him and questioned him at Ba, but then released him. However a few days later, having heard they were still making enquiries of him, he surrendered himself to the Ba Police. The officers then aggressively told him to admit the affair because he had been implicated by 3 others, he said he knows nothing and he can’t admit something he didn’t do. He was threatened with assaults and he was interviewed under caution. He made no admissions in that interview; in fact he says that he told them exactly the same things that he has told us in his evidence. The Police went out and checked his alibi. When asked about Tasvindra Singh he said he doesn’t know him and he doesn’t know anybody called Avi. He has a scar on his face from an assault when he was working as a security guard in 2008. He is related to the first and second accused and only came to know the third accused through being charged with him in this case.

[60] The fourth accused called five witnesses in his defence – three of those witnesses gave evidence with relation to his alibi – Lusiana, Salanieta and his de-facto Bulou. They all confirmed that he was at the village on the night of 7<sup>th</sup> September and they all accounted for his movements up until about 11pm. Bulou said that he had stayed the night.

[61] As with the third accused his alibi evidence is for you to consider in his defence. Jonetani doesn't have to prove anything to you but if you don't believe the alibi then that doesn't necessarily make him guilty. But bear in mind that Jonetani has been consistent in his alibi even since he was arrested.

[62] The fourth accused's mother gave evidence about her son and his relationship with Bulou. She said he was a good boy and very kind to her and his brothers. The State, in rebuttal, suggested that he was not as good as she claimed putting to her that he had been in trouble with the Police before. She agreed.

[63] The last witness for the fourth accused was Subashni Lata who was once the girl friend of Tasvindra Singh who you remember had identified the fourth accused as one who had hired his vehicle to go to Yalalevu on the night of the 7<sup>th</sup> September. Subashni told us that she was concerned about Tasvindra's drug use and that he seemed to have a lot of money to throw around. Her biggest concern was the fact that the Police appeared to be protecting him, especially considering that they had found him in

possession of marijuana. He once told her that he had been asked by the Police to point out a person who was involved in the robbery/murder and he had pointed out the fourth accused.

[64] Now, ladies and gentleman you are entitled to accept the evidence of Subashni and give it whatever weight you think fit but I must ask you to examine it with care. There is no evidence before the Court that Tasvindra was a drug dealer and Subashni doesn't know that but she asks us to speculate. Nor is there any evidence that his drug habits were in any way connected to his identification of the fourth accused as the man who hired his van. There is no suggestion that he was so befuddled with drugs that he might have identified the wrong man and there is no suggestion that because of his relationship with the Police his identification of the fourth accused is not valid. It was never put to the Police officers. Of course you may accept her evidence and you are entitled to disagree with me on this point but you must ask yourselves how her evidence really assists us in the case against the fourth accused.

[65] Now that was the end of the evidence and before summarizing the legal concepts you are to accept there are a couple of legal directions I must give you. You must accept these.

[66] The case against the fourth accused particularly and against the others in part is based on what is called circumstantial evidence. Circumstantial evidence can be powerful evidence, indeed it can be as powerful as, or even

more powerful than direct evidence but it is important that you examine it with care – as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt or whether on the other hand it reveals any other circumstance which are or may be of sufficient reliability and strength to cast doubt upon or destroy the prosecution case. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence and mere speculation. Speculating on a case amounts to no more than guessing or making up theories without good evidence to support them and neither the prosecution, the defence nor you should do that.

[67] The last direction in law I must give you is an important one and that is in connection with evidence of identification. You will be aware that both the third accused and the fourth accused were identified in Court by the bus driver (PW 9) and Tasvindra Singh (PW 7) respectively. This is called in criminal procedure a “dock identification”. In neither case had there been an identification parade at the time in the Police Station. In both identifications in this Court the identification was spontaneous and uninvited by the Prosecution. In the case of the third accused the identification is but secondary to his confessions in the interview, if indeed you find those confessions to have been made without force or oppression. In the case of the fourth accused the identification is really the central plank of the prosecution’s case against him. I must warn you of the special need for caution before convicting either the third accused or the fourth

accused in reliance on the identification. A witness who is convinced in his own mind may, as a result, be a convincing witness, but may nevertheless be mistaken. You should therefore examine carefully the circumstances in which the identification was made. Had the witness ever seen that person before? If so, how often? Was there any special reason for remembering him? In the case of the fourth accused Tasvindra said that the accused whom he named as Jai Roko had called him that night. He had known him from having seen him with a boy from his village, he always saw them together. He had seen him twice a week for the previous four weeks, for as long as he had been driving. The fourth accused used to hire him to do jobs. Bear in mind that the fourth accused has a scar on his face and that the witness Tasundra never identified the fourth accused by the scar. Also bear in mind that there was never a proper identification parade in the Police Station to identify Jai Roko (the fourth accused) although the prosecution's case is not strictly one of identification but of recognition of someone he knew. I just ask you to exercise caution in accepting Tasundra's identification of the fourth accused especially when it is made for the first time in Court. You must be absolutely sure that he is identifying the correct person.

[68] Similarly with the third accused, the bus driver identified him in Court without going through a proper identification parade at the Police Station. Can you be sure the identification is reliable? Mr Philip, the bus driver says he saw him that night for three to four minutes. There were no obstacles to his sight. There was a light in the bus and light in the bus

stand. "I had a good look at him" he said. He said in evidence that he saw the third accused at the Police Station and pointed him out to the Police. Bear all of this in mind when looking at this identification and consider how easy it must be to identify one Indian boy in Court sitting with three iTaukei boys. It is all a matter for you.

[69] That is all the legal directions I will give you and I will summarise the most important for you. If you accept the caution interviews of the first, second and third accused (and remember they say those were forced out of them and fabricated) then I do not think you will have any difficulty with the robbery charge or the taking of the motor vehicle charge. It is the murder charge which may give you pause to reflect.

[70] So if you find that one of the group had an intention to kill and did kill, then the others who willingly join in that enterprise and in the knowledge that a householder would be present are aware of the probability that he might be killed, then they are all guilty of murder. If you are not sure about the intention to kill, then you can find them all guilty of manslaughter. Lastly if you find in the cases of the second and third accused that the killing was so remote they couldn't and didn't contemplate it then you will find them not guilty of murder and not guilty of manslaughter.

[71] The case against the fourth accused is different. The State bases their case against him on circumstantial evidence. We know that there was a robbery

and a death at 8 Bula Street that night. If you accept the caution interviews of the first, second and third accused then we know that the “job” was done by a group of four people. If you accept the evidence of Tasvindra Singh you might find that the fourth accused hired his van to take him with others to 8 Bula Street, borrowing a shifter from him. A shifter was used to remove the burglar bars. They said that they had work to do that night. Again accepting the evidence of Tasvindra Singh, the fourth accused came to him the next day and told him that “the job was done” and offered him \$200 to keep quiet. He also mentioned that the man had died because he was “sickly person and we tied a cloth around his neck and he died”. The State is asking you, on this circumstantial evidence to find that the fourth accused was a member of the group who did the robbery where Vinod was killed and he is therefore guilty of the robbery and the taking of the car. They claim in addition that as a member of the group agreeing to rob he is also guilty of the murder if you find that the first accused had the intention to kill or if that intention is not proved, then he is guilty also of manslaughter. You would have to find that the fourth accused knew that there was a probability that the householder, disturbed, would be killed. I remind you that in defence the fourth accused gives an alibi saying he was at the village that night and that Tasvindra Singh’s identification of him was tainted.

[72] Well ladies and gentleman that is all I wish to say to you. It is now time for you to retire. When you are ready with your opinions you will let the members of my staff know and I will reconvene the Court. When you do

return you will be asked individually what those opinions are.

[73] Your available opinions are:

**Count 1** – Guilty or not guilty.

**Count 2** – Guilty of murder.

Not guilty of murder but in the alternative guilty of manslaughter.

Not guilty of anything.

**Count 3** - Guilty

Not guilty.

[74] It would be better if you can be all agreed but that is not strictly necessary.

Just before you retire I will ask Counsel if there is anything they want me to add to or explain further in this summing up.

[75] Counsel?

**P.K. Madigan**

**Judge**

**At Lautoka**

**21 February, 2014**