

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 154 OF 2014

STATE

-v-

SULIASI NASARA

Counsel: Mr. J. Niudamu for the State
Ms. S. Dunn for Accused

Dates of Hearing: 29th May, 2017 – 31st May, 2017
Date of Summing Up: 02nd June, 2017

SUMMING UP

Madam Assessors and Gentleman Assessor,

1. It is now my duty to sum up the case to you. In doing so, I will be directing you on matters of law which you must accept and act upon. You must apply the law as I direct you in this case.
2. As far as the facts are concerned however, what evidence to accept, what witnesses to accept or reject, these are matters for you to decide for yourselves. So if I express any opinion on the facts, or if I appear to do so, you may reject what I say and form your own opinions. In other words, you are the judges of fact.
3. Counsel for the Prosecution and Defence have all made strong submissions to you as to how you should find the facts of this case. That was in accordance with their duties as counsel. However you are not bound by what counsel have said to you

about the facts of this case. You are the representatives of the community at this trial, and it is you who must decide which version of the evidence to accept.

4. You will not be asked to give reasons for your opinions, but merely your opinions themselves, and your opinions need not be unanimous although it would be desirable if you could agree on them. Your opinions are not binding on me, but I will give them great weight when I come to deliver my judgment.
5. On the issue of proof, I must direct you as a matter of law that the onus or burden of proof lies on the Prosecution to prove the case against the Accused. That burden remains on the Prosecution throughout the trial and never shifts. There is no obligation upon the Accused person to prove his innocence. Under our system of criminal justice, an Accused person is presumed to be innocent until he or she is proved guilty.
6. The standard of proof is one of proof beyond reasonable doubt. This means that before you can find the Accused guilty of the offence charged, you must be satisfied so that you are sure of his guilt. If you have a reasonable doubt about his guilt, then it is your duty to express an opinion that he is not guilty. It is only if you are satisfied so that you feel sure of the guilt of the Accused that you can express an opinion that he is guilty.
7. Your opinions must be based only on the evidence you have heard in this courtroom and upon nothing else. You must totally disregard what you have read or heard in the media or elsewhere about the case. Your duty is to apply the law to the evidence you have heard. You must also put aside emotions which might affect your objectivity. Concentrate on the law as applied to the evidence.
8. The evidence is what the witnesses said from the witness box, the documents, the things received as Prosecution or defence exhibits and any admissions made by the parties. Statements, arguments, questions and comments by the Counsel are not evidence. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening and closing submissions made by both Counsels are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.
9. Documentary evidence is important in this case. Prosecution tendered number of documents in evidence; for example, the cautioned interview, charge statement of the Accused and the medical report of the doctor.

10. Expert evidence is also important to be borne in mind. Usually, witnesses are not allowed to express opinions. They are allowed to give evidence on what they have seen, heard or felt by physical senses only. The only exception to this rule is the opinions of experts. Experts are those who are learned in a particular science, subject or a field with experience in the field. They can come as witnesses and make their opinions expressed on a particular fact to aid us to decide the issue or issues before Court on the basis of their learning, skill and experience.
11. The doctor and pathologist in this case, came before Court as expert witnesses. They, unlike any other witnesses, gave their opinions based on examination of the patient and the body of the deceased. If you believe that the medical report and the post mortem report contained contemporaneous recordings made by the doctor and pathologist respectively at the relevant time upon examination of the patient and the dead body, then you can act on such evidence.
12. However, expert evidence is not accepted blindly. You will have to decide the issue before you by yourself and you can make use of doctor's opinion if his reasons are convincing and acceptable to you; and, if such opinion is reached by considering all necessary matters that you think fit. In accepting doctor's opinion, you are bound to take into account the rest of the evidence led in the trial.
13. Accused is charged with two counts. You have been given a copy of the Information filed by the Director of Public Prosecution. Please refer to it.

FIRST COUNT

Statement of Offence

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

Particulars of Offence

SULIASI NASARA on the 16th day of November 2014, at Lautoka in the Western Division, murdered NITIN NAVINESH KUMAR.

SECOND COUNT

Statement of Offence

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

Particulars of Offence

SULIASI NASARA on the 16th day of November 2014, at Lautoka in the Western Division, robbed **NITIN NAVINESH KUMAR** of Nissan Vanette Van Registration Number CG 638 valued at \$3000 belonging to **Vijay Lakshmi** and at the time of the robbery used an offensive weapon namely, a wheel spanner.

14. The first count against the Accused is Murder. The Prosecution alleges that on the 16th day of November 2014 at Lautoka, the Accused murdered NITIN NAVINESH KUMAR.
15. Murder is defined in the Crimes Act. It is committed when a person causes the death of another person by an unlawful act with malice aforethought. Murder has three essential elements which the Prosecution must prove:
16. For the Accused to be found guilty of "murder" the Prosecution must prove beyond reasonable doubt, the following elements:
 - (i) that the Accused did a wilful act; and
 - (ii) that wilful act caused the death of the deceased; and
 - (iii) at the time of the wilful act, the Accused either:
 - (a) intended to cause the death of the deceased; or
 - (b) is reckless as to causing the death of the deceased.
17. On the first element of murder, a "willful act" is a voluntary act by the Accused. It is a feeling of strong determination to do something that he wanted to do. It is what he wanted to happen in a particular situation. This is the physical element of the offence of murder.
18. On the second element of murder, "the willful act must cause the death of the deceased". This simply meant that the Accused's willful act, substantially contributed to the death of the deceased.
19. The third element of murder concerned its fault element. There are two fault elements for murder. Counsel for Prosecution told us in his closing address that he ran the case on the basis of recklessness. However, if you look at the Amended Information which the DPP had filed, it merely says Suliasi Nasara muddled.... Nitin Navinesh Kumar. Therefore, I direct you on both fault elements. However, please bear in mind that Prosecution is required to satisfy only one fault element to prove the charge of Murder. I will therefore begin by discussing the first fault element, and then move on to the second fault element.
20. On the first fault element, the Prosecution must make you sure that when the Accused did "the wilful act", he "intended to cause the death of the deceased".

People usually don't write down what they are intending to do. So you must discern perpetrator's intention from the circumstances established by evidence. You decide intent by considering what the perpetrator did or did not. You should look at his behavior before, at the time of and after the act, the nature, number and duration of the attack. The gravity of injuries inflicted and the place of the body where the injuries were inflicted. You may also consider if he had any motive to kill the deceased. All these things may shed light on the intention at the crucial time when the injuries were caused to the victim.

21. As to the second fault element of murder, the Prosecution must make you sure that when the Accused did the wilful act, he was reckless as to causing the death of the deceased. A person is reckless with respect to a result, if he was aware of substantial risk that the result will occur and having regard to the circumstances known to him, it was unjustifiable to take the risk. The question whether taking a risk was unjustifiable is one of fact for you. Was the Accused aware of a substantial risk that the victim would die if he continually assaulted him? And having regard to the circumstances known to him, was it justifiable to take the risk of repeatedly assaulting him, at the material time? If you think, he was not justified in taking the risk, then he was reckless in causing her death. If you think he was not reckless, then he is not guilty of murder.
22. If you find all the elements of murder, as described above, are proved beyond reasonable doubt by the Prosecution, then you must find the Accused guilty as charged. If you find one of the above elements of murder not proved beyond reasonable doubt, then you must find the Accused not guilty as charged.
23. If you find the Accused not guilty of murder, you may need to consider the lesser offence of "Manslaughter". A person, as a matter of law, may be convicted of the lesser offence of "Manslaughter", although he was not formally charged with the same. The first and second element of "Manslaughter" are similar to that of "Murder",. The only difference between the two offences are their fault elements.
24. In "Manslaughter", the Prosecution must prove beyond reasonable doubt, the following elements:
 - (i) that the Accused did a willful act; and
 - (ii) that willful act caused the death of the deceased; and
 - (iii) at the time of the willful act, the Accused either;
 - (a) Intended the willful act to cause serious harm to the deceased; **or**

(b) was reckless as to causing serious harm to the deceased.

25. If you find the Accused guilty of "Manslaughter", you may find him guilty accordingly.
26. For an Accused to be found guilty of Aggravated Robbery the Prosecution must prove following elements beyond reasonable doubt.
 - i. The Accused;
 - ii. Committed robbery in company with one or more other persons; or
 - iii. Committed robbery and, at the time of robbery, had an offensive weapon with him.
27. "Robbery" means, the Accused, immediately before, at the time, or immediately after committing theft, uses force or threaten to use force on the complainant with intent to commit theft or to escape from the scene. Robbery is really an aggravated form of theft. The theft is aggravated because it is carried out by using force against the victim or by putting the victim in fear of violence. So the offence of robbery becomes aggravated robbery, if it is committed in the company with one or more other persons, or if at the time of robbery, the Accused has an offensive weapon with him.
28. Offensive weapon includes any article, made or adopted for use for causing injury to or incapacitating a person or any article the Accused intends to use or threatens to use to cause injury to a person.
29. "Theft" is dishonest appropriation of the property belonging to another with the intention of permanently depriving the other of that property.
30. The Prosecution relies on circumstantial evidence to prove that the Accused person was responsible for Nitin's death and that there is no other reasonable explanation for his death other than that the Accused killed him.
31. The law on circumstantial evidence is that if, on considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the Accused, and there is no other reasonable explanation for the circumstances which is consistent with the Accused's innocence, then you may convict the Accused of the offence charged.
32. There is a final legal matter I must direct you. In this case the Prosecution challenges the identification evidence given by Mohammed Ali and Salote. The Defence challenges their identification and says that the witnesses are mistaken. In

these circumstances I must warn you of the special need for caution before relying on the correctness of this identification.

33. The reason for this is the danger that a wrong identification will cause a miscarriage of justice and there have been cases where this has happened. It is not a question of a witness being untruthful but mistakenly believing the person seen at the crucial time was the Accused. With this genuine belief a mistaken witness can nevertheless be a convincing one. I am not saying that is necessarily the case here. I am explaining the reason for the special care with which you must approach this issue.
34. You must decide whether the evidence of identification is reliable and should be accepted or whether it is unsatisfactory and should be rejected or leaves you in doubt. To do this you must examine all the circumstances and determine the strength or quality of the identification. It is for you to assess the value of the evidence that has been given.
35. To do this you must closely examine the circumstances in which the identifications came to be made. Generally, this will include such matters as:
 - How long did the witness have the person under observation? Was it a significant period or just a fleeting glimpse?
 - At what distance?
 - In what light?
 - Was the view impeded or obstructed in any way?
 - Was the Accused a person known to the witness?
 - Had the witness ever seen the Accused before and, if so, how often?
 - How long elapsed between the original observation and any subsequent identification of the Accused as that person?
 - How was the subsequent identification made?
36. I will now deal with the summary of evidence in this case. In doing this I do not propose going through all the evidence. It should still be fresh in your minds. If I refer to only some aspects of a witness's evidence it does not mean that the rest is unimportant. You must weigh up and assess all the evidence in coming to your decision on this case.

Dr. Jona Nabaro

37. On the 19th of November 2014, doctor Jona examined Suliasi Nasara at 12.30 a.m. at the Lautoka Hospital upon a police report being filed. Cpl. Timoci Vuli was present during the examination. A laceration was noted in the inner aspect of

upper lip. There was no active bleeding or other obvious physical injuries, hematoma, laceration or contusion.

38. Doctor could not exactly recall whether he asked the patient how he received that injury. The incident had happened two days prior to the examination.
39. Under Cross-examination, doctor admitted that there was a possibility that the injuries incurred would have disappeared by the time of examination. Doctor could not exactly recall whether the history was relayed to him by the police officer or the patient. He basically based his summary and conclusion on the history relayed to him. If a different history was relayed, his summary and conclusion would have been different.

Vijay Lakshmi

40. Lakshmi is the mother of the deceased. She was residing in Kara Punja Road, Waiyavi, Lautoka with her son Nitin Navinesh Kumar. Nitin was driving CG 638 Nissan Vennat van of which she was the owner. On the 16th of November 2014, she was waiting for her son to come and pick her up at Hexagon Hotel in Nadi. Around 1.30 a.m., she received a call from Nitin and was told that he will do one job and come back to pick her up.
41. She received a call around 6.00 a.m. from the previous owner of the vehicle (Ashneel) and was told that her son had met with an accident. Then she called police officer Francis at Lautoka Police Station. When she was heading towards the Lautoka Police Station, she received a call from one Rehan from Suva and was told that her son had passed away. Police Officers confirmed the information.
42. She did not see her son again. At the Lautoka Police Station, she saw her van and the black and red banded radio fitted into the van.
43. Under cross-examination, Lakshmi said that she could not exactly recall the time she received the call from Ashneel. Upon receiving the information, she tried calling Nitin's phone few times, but it was switched off.

Mohammed Ali

44. Ali was working as a bowser attendant at Lale's Millenium Pacific Energy Service Station. On the 16th of November, 2014, around 3 a.m., one Fijian boy came to him seeking transport to go home. He didn't know the Fijian boy. It was the first time he saw him in that morning. Fijian boy introduced himself and told that he was working for a logging company. He arranged a driver, Akhil, his close friend, who

agreed to drop the passenger at Naikabula. Akhil was driving a white van. Fijian boy was wearing a hat and a blue t-shirt with a ¾ pants.

45. Ali saw that Fijian boy again at the Natabua Remand Centre when he was in prison for 2 weeks. Fijian boy came to him and asked whether he could recognize him but he still could not recollect him. Then the Fijian boy told him that he's the one who came to him on that particular night at the service station. Then he recollected that's he is the same guy whom he had met at the service station. He had seen the Fijian boy in the remand centre 6 months after the first meeting at the service station. In the second meeting, Fijian boy was in a conversation with him for about five minutes during day time at a distance of about 5 metres. Witness recognized the Accused in Court as the person who approached him at the remand centre.
46. Under cross-examination, witness Ali said that when iTaukei gentleman approached him on the 16th of November, it was bright at his work place with plenty lights around. Witness admitted that he did not mention to police that the boy whom he had met at the service station was Akhil although he knew him quite well. In his statement to police, he had referred to him as an Indian boy.

Mataiasi Buli Nakaroti

47. On the 16th of November 2014, Buli was residing at his home in Naikabula. Around 4.00 a.m., his mother woke him up and informed that she had heard a shouting outside and suspected that it was his brother. They went towards where she heard the shouting came from. No one was there. When they were coming back, they saw one white van coming out of Deva's compound. Upon entering the driveway, they saw someone lying on the road inside Deva's compound. They did not care about the van and went towards the person who was lying on the ground. He tried to wake him up and touched the person's head. He felt his hand was wet and on the phone light, he could see blood.
48. His mother called Deva. When Deva woke up, she informed the incident to Deva and asked if the injured person could be transported to the hospital. Then the injured person was transported to the Lautoka Hospital in Deva's taxi.

Salote Volita

49. Salote went to spend the weekend in Vunibaka Settlement in Naviyago at her sister's place. On 16th November 2014, She woke up early in the morning and, around 6.00 a.m., went to the road for transport. At the road, she saw two boys pushing a vehicle into the drain. After pushing the vehicle, they came closer to

where she was standing. She recognized one of them as Suliasi Nasara. When Suliasi saw her, he jumped on to the tramline, pulled his hat down, and went along the tramline towards town.

50. Salote was waiting for her brother to come and pick her. Then she went with his brother towards Vunato to pick one of his workmates. On their return, they stopped at KB Maharaj shop. As she was getting off the vehicle she saw Suliasi and informed her brother that the two iTaukei boys who pushed the vehicle into the drain are also present in the shop. When she was coming out of the shop, she saw her brother asking Suliasi about the incident. Suliasi was not informing anything to her brother.
51. Salote described the van as a white 7 seater bearing registration number CG 638. Salote knew Suliasi Nasara very well. She had spent 2 ½ years in Vakabuli village where Suliasi Nasara also resided about 10 walking steps away from her house. Suliasi Nasara is also her nephew. She identified Suliasi Nasara in Court and the van as depicted in the photographs. She showed us where she was standing on that day on the Kings Road.
52. Under cross examination she denied that around 6 'clock it was still a bit dark. She also denied that she could not recognize a person at that distance and was not in a position to see who pushed that vehicle into the drain. Just after boys went past her, she came towards the van and noted down its registration number.
53. In her statement given to police on the 19th of November 2014, she did not give the registration number because the police did not ask about it. Witness described whereabouts of Vakabuli village and Suliais's mother's name as Savaira and father's name as Livai.

Detective Inspector Terotuma Voi Ravai

54. In 2014, Ravai was in charge of the Forensic Unit in the Western Division. On the 16th day of November 2014, at about 9 o'clock in the morning, he went to the scene at Naikabula where someone was found lying unconscious. He took photographs, drew a rough sketch and compiled a report. Please refer to the sketch and photos you have been given.
55. IP Ravira then went from Naikabula to Vitogo where the van was found. It was just a 5 minutes' drive from Naikabula. Upon arriving at the scene, he saw one white Hiace van, bearing registration number CG 638, positioned off road on right right side of the King's road going towards Ba. He took photographs of this van. Referring to photographs, witness said under cross examination that, while

standing at that distance as far as the tree depicted in the photo, one would not be able to make out people's faces unless he knows the person.

56. He inspected the internal parts of the vehicle at the police station. No red stains were seen in the vehicle CG 638. Red stains found at Naikabula were quite close to Deva's house (8 Metres). The taxi that had taken the victim to the hospital also had red stains.

DC Jone Sauqaqa

57. On the 18th of November 2014, Jone received instruction to follow a case of murder at Naikabula. His team visited the scene and followed information from the scene and from vicinity. He found a white 7 seater van near Drasa Flats that belonged to the deceased at Naikabula. They also received information that Suliasi Nasara had taken the van there. Then they proceed down to Vakabuli Village to check upon Suliasi Nasara. Nasara was not there. His relatives told them that Nasara is somewhere in Vunato. From Vunato Settlement, Suliasi had moved to another house somewhere close to the end of Namoli Village.
58. Suliasi was arrested giving him his rights including the reason for arrest. At no time Suliasi was assaulted, threatened or offered any inducement. From Vunato, they escorted Suliai to Lautoka Police Station. Witness identified Suliasi Nasara in Court. Upon questioning, Suliasi revealed the place where he had left the clothes he was wearing that night. They went to Sulias's aunty's house at Vunato. While proceeding to Vunato, he saw a cut on Suliasi's inner lips. He questioned Suliasi inside the vehicle and was told that injuries were received while struggling with the deceased at Naikabula. He voluntarily picked the clothes he was wearing that night, from his aunt's bathroom.

Constable Colati

59. On the 19th of November 2014 Cpl. interviewed Suliasi under caution at the Lautoka Police Station in the presence of witnessing officer Sgt. Tuitai. Suliasi did not make any complaint. Accused was cooperative. He gave all answers voluntarily. His rights were afforded. He was not assaulted, intimidated or given any inducement to make a confession. At the conclusion of the interview on the 20th, the contents of the interview were read back and opportunity given to add, delete or alter. Witness tendered and read the caution statement marked as PE. 11.
60. Under cross examination, witness denied that Suliasi was assaulted and threatened at the time of this caution interview. He also denied that Suliasi was not given an opportunity to read and confirm the answers and that some of the

answers were fabricated by him. Witness admitted that photographs and the radio recovered that were shown to the Accused at the interview are not present in Court.

DC Samuela Namusu

61. On the 20th of November 2014, DC Samuela charged Suliasi Nasara at 1515 hrs. at the Lautoka Police station in the presence of the witnessing officer Stg. Harish. Suliasi was okay. He did not make any complaint before or at the commencement of the charge. Accused was cautioned before charging. Accused, having read the charge statement, signed. Accused was not assaulted, intimidated or given an inducement or promise. Witness read the charge statement in evidence which was marked as PE.12.
62. Under cross examination, witness confirmed that charge statement was signed straight after the charge was taken and printed out. He admitted that the copy that was disclosed to the defence does not have the name or the signature of the witnessing officer. He denied that it was only signed well after the charge was printed out. He also denied fabricating the answer '*I admit to killing*'.

R/ Inspector Asesela Tuitai

63. On the 19th of November, 2014, IP Tuitai received instructions to be the witnessing officer for interview of Suliasi conducted by Constable Colati. Interview was conducted under caution. He was present throughout the interview. No assault or threat done to the Accused. Accused did not complain of anything.
64. The interview was conducted fairly and the Accused gave the statement voluntary. Witness took over the investigation from Constable Mesulame and obtained some exhibits including a radio speaker, car radio, one handbag and one scarf. They were later handed over to the exhibit writer.
65. Under cross examination, witness said that interview concluded at 1510 hrs. (3.10 pm). The interview took place over two days (19th and 20th), on the completion of the first day when the interview was suspended, the interview was printed out and it was given to Suliasi. He read through and signed, then officers signed. Witness denied that caution statement was never printed out and given to Accused when the interview was suspended on 19th.
66. Witness was not able to say if the signature of the witnessing officer to the charge statement was placed after it was disclosed to the Defence. Witness also denied that contents of the charge statement were fabricated.

Doctor James Kalounivaki

67. Dr. James is a double degree holder in Bachelor in Medicine and Bachelor in Surgery. He has post-graduate qualifications in Pathology and had done more than 800 medico legal autopsies over a period of 6 years.
68. On 18th of November 2014, he conducted the post-mortem on the body of the deceased, and based on his findings, prepared a post-mortem examination report.
69. Deceased died in the Intensive Care Unit approximately five hours post hospitalization. Upon external examination, pathologist noted multiple injuries over the back of the head and the top part of the head. These were deep tears of the skin that exposed the skull and a little bit of brain tissues. Three deep tears and a fracture of the skull were noted over the top of the head. These injuries would have been caused basically due to blunt force trauma, by a blunt rod like solid object. It's highly possible those injuries to have been caused by a wheel spanner.
70. Upon internal examination he noted extensive bruising under the fat of the skin. So many fragments were also noted over the top part of the head and towards the back. Upon the removal of the top of the skull (calverium), pathologist noted extensive subarachnoid hemorrhage (bleeding within or underneath the second layer covering of the brain) and also pockets of subdural hemorrhage (bleeding underneath the first layer covering of the brain).
71. Fractures were also noted at the floor of the skull. Cause of death was extensive subarachnoid and subdural hemorrhage due to severe traumatic head injury caused by blunt force trauma. High energy force would have been required to cause such an extensive damage.
72. Under cross examination, the pathologist said that the injuries sustained by the deceased in itself has a low survival rate less than 15-20% even if he had been admitted to Intensive Care Unit.
73. That Ladies and Gentleman was the end of the Prosecution case. You then heard me explain several options to the Accused. I explained to him that he could remain silent or give sworn evidence and call witnesses on his behalf. He could also address Court. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests on Prosecution at all times.

74. Accused opted to remain silent. That is his right given under the Constitution. You must not draw any negative inference and think that he offered no evidence and opted to remain silent because he is guilty.

Analysis

75. Prosecution relies on the confession in the caution interview which is Prosecution Exhibit No. 11, and in charge statement which is Prosecution Exhibit No. 12. The Accused had admitted in answer to question 61 of the caution interview that he struck the wheel spanner on the deceased's head several times until he was found dead.
76. Prosecution must make you sure that these confessions contained truthful statements of the Accused. If you are satisfied that the Accused had made truthful statements, then you can act upon these statements.
77. Prosecution says that the Accused person was not subjected to any assault, duress, force, threat or coercion and that the caution interview and the charge statement were voluntary statements of the Accused. You heard what police officers said about that.
78. Defence on the other hand disputed the voluntariness of the above confessions and says that the Accused was subjected to assaults and threats and therefore those statements are unreliable. At the same time Defence alleges that the caution statement and charge statement had been fabricated by police officers.
79. When considering the above alleged confessions, I must direct you as follows. A confession, if accepted by you and court, it is strong evidence against its maker. However, in deciding whether or not you can rely on a confession, you will have to decide two questions. First, whether or not the Accused did in fact make the statements as alleged by the police. If your answer is no, then you have to disregard the statements. If your answer is yes, then you have to answer the second question. Are the confessions true? You will have to examine the circumstances surrounding the taking of the statements from the time of his arrest to when he was first produced in court. If you find that Accused gave his statements voluntarily and the police did not assault, threaten or make false promises to him, while in their custody, then you might give more weight and value to those statements.
80. What weight you choose to give the interview made by the Accused is a matter entirely for you. If you consider it to be unreliable either because the police assaulted and ill-treated the Accused, or it was fabricated by police or because the

Accused himself told lies to police, then you may think that you cannot put much weight on them at all. If however you consider them to be reliable records of what the Accused said to police, then you may think that they contain important statements of what allegedly occurred that morning.

81. In deciding whether the Accused had told the truth to police you can compare his statements with other types of evidence led in this trial.
82. As to other types of evidence, the State relies on what is often termed circumstantial evidence, nature of which I have already explained to you. That simply means that the Prosecution is relying upon evidence of various circumstances relating to the crime and the Accused, which Prosecution says, when taken together, will lead to the sure conclusion that it was the Accused who committed the crime.
83. Prosecution led following circumstantial evidence to prove its case:
84. Prosecution presented evidence to show that the Fijian boy who hired near Lale's Service Station at Lautoka a white van driven by an Indian boy is non-other than the Accused. By presenting this evidence, Prosecution tried to prove that, at 3 a.m. on the 19th November, 2014, prior to the incident, the Accused hired the van driven by the deceased at Lale's to go to Naikabula.
85. Prosecution also presented evidence to show us that, soon after the incident, a white van was driven out of Deva's compound at Naikabula where the deceased was lying. Mataiasi Buli said that around 4 a.m. in that crucial morning, his mother had heard a shouting and when they went towards where she heard the shouting came from they saw one white van coming out of Deva's compound.
86. Prosecution further presented evidence to show that, around 6 a.m. in the same morning, the Accused, with the help of another, pushed the van belonged to the deceased to a drain beside the King's road at Naviyago, Vitogo and abandoned it.
87. To prove the first piece of evidence (vide paragraph 85) Prosecution called Mohammed Ali, the bowser attendant. Ali said that the Fijian boy, who had come to him and hired the white in this crucial morning near Lale's Service Station, again came to him six months later at the Natabua prison and he later recognized this Fijian boy when he made a self- introduction referring to the first meeting at Lale's. Mohammed Ali identified the Accused in Court as the person whom he met at the prison.

88. Defence contended that Ali is not a reliable witness because he had never mentioned to police that he had met the Accused at the prison prior to giving evidence in court. You observed Ali giving evidence and had the benefit of reading the caution statement which the Prosecution says is a truthful statement of the Accused. Having considered all these evidence, you decide whether this witness is a reliable witness and what weight should be given to his evidence.
89. To prove the third point (vide paragraph 87), Prosecution called Salote Volita. Salote said that she clearly recognized the Accused when he was coming towards her after pushing the van to the drain. Defence challenged her evidence on the basis that Salote's identification was mistaken and also that she was not a reliable witness. To ascertain whether her identification was mistaken, you must apply the guidelines I have explained to you for visual identification because even honest witnesses could make mistakes.
90. Salote had seen this incident around 6 a.m. in a November. She said there was day light and it was not a bit dark. With the help of the photograph, Salote showed us the place where she was standing when the van was being pushed to the drain. She recognized the person who had pushed the van when he was coming towards her as Suliasi Nasara, her nephew whom she had known for almost 2 1/2 years when Sulisai' was living in Vakabuli. After a short while, she had seen the Accused again at KB Maharaj shop in the same morning. To ascertain whether Salote is a reliable witness you may refer to the caution statement if you believe it to be a truthful statement of the Accused.
91. When taken together all pieces of evidence, if you are satisfied that they all lead to the sure conclusion that it was the Accused who committed these crimes you can find him guilty. However, before you do that you have to be satisfied that Prosecution had proved all elements of each offence beyond reasonable doubt.
92. Therefore, before coming to your final conclusion in respect of the Murder count you have to be satisfied as to the second element of the offence namely Accused's willful act caused the death of the deceased. Pathologist told us that the injuries sustained by the deceased in itself had a low survival rate, less than 15-20%, even if he had been admitted at Intensive Care Unit. Deceased had succumbed to his injuries within an estimated time frame of five hours post hospitalization.
93. The Pathologist opined that the cause of death was extensive subarachnoid and subdural hemorrhage, basically severe traumatic head injury caused by blunt force trauma. You can be sure that the injuries caused to deceased's head had resulted in his death or that they had substantially contributed to his death.

94. Finally, you have to be satisfied the Prosecution had proved the mental element (3rd element) of Murder. As I have described, earlier they must prove that: at the time of the willful act, the Accused either;

- (a) intended to cause the death of the deceased; or
- (b) is reckless as to causing the death of the deceased

95. At this juncture, I thought it appropriate to analyse the facts on both mental elements. Please remember, either *mens rea*/ mental element, if proved, is sufficient to find a person guilty of Murder.

96. As I said before, people usually don't write down what they are intending to do. Therefore, you must discern Accused's intention from the circumstances established by evidence.

97. In his caution statement, the Accused had allegedly stated:

Q.56: *Then what did you do?*

A: *I kept sitting inside thinking that he was staying in that house, but he kept forcing me to get off. I told him if I get off then he too should also get off and by this time we were swearing to each other and as soon as he got off he came around to my side and punched me on my face and I pushed him back.*

Q.57: *Then what happened?*

A: *Then this guy picked a stone and whilst coming for me he told me in the Hindi language... "ao ya maichod ajj tum marjai".*

Q.58: *Do you know the meaning of the words he told you?*

A: *Yes, it means "come here motherfucker today you'll die".*

Q.60: *Then what happened after that?*

A: *When I saw him coming for me with the stone I also looked around for something and that was when I got hold of the wheel spanner from the side of the driver's door. He threw the stone at me and missed and when he came for me I struck his chest with the wheel spanner, then he tried to grab the wheel spanner from me and by this time we were moving towards the side of the house.*

Q.61: *Then what happened?*

A: *He tried but couldn't and tried to punch me, then I struck the wheel spanner again on his head, and I did this several times until he dropped to*

the ground and whilst he was on the ground motionless I struck his head again about three times with the wheel spanner.

Q.62: *Then what did you do after that person was lying motionless on the ground?*

A: *I came to where the van was parked and just threw the wheel spanner back inside the van and sat in the driver's seat for a while trying to get over what I had just done. Then I drove the van back down towards the main highway and went towards Naviyago.*

98. According to above answers Accused had allegedly given, he had used a wheel spanner, a kind of a solid blunt iron rod to attack the deceased. He had struck the wheel spanner several times until the deceased dropped to the ground. The strokes had landed on deceased's head, the most vulnerable part of the body. Whilst the deceased was on the ground motionless he had struck deceased's head again about three times with the wheel spanner.
99. The pathologist said that the deceased had received sever traumatic head injuries caused by blunt force trauma. He opined that a high energy force would have been used to cause such an extensive damage.
100. Ladies and gentleman if you believe these statements to be a truthful statement of the Accused, you, by carefully analyzing these pieces of evidence, decide whether Accused was activated by a murderous intention at the crucial time. If you are sure Accused had a murderous intention, then you can find him guilty as charged.
101. Even if you are not sure that he had that intention but if you are sure that he was reckless as to causing the death of the deceased, you can still find the Accused guilty of Murder. However, if you find that the Accused intended to cause the deceased only serious harm; or he was reckless as to causing serious harm to the deceased you can find the Accused guilty of the lesser offence of Manslaughter.
102. Before I conclude I must direct you on another important thing. You would appreciate that the Accused in his caution statement had stated that he attacked the deceased in self defence.
103. The Defence is challenging the voluntariness and truthfulness of these statements. Counsel for Defence specifically stated that Defence is not relying on the defence of self Defence.
104. I will now direct you as to how you should approach 'out of court mixed statements' containing both incriminating and exculpatory assertions. Accused, in

his caution statement, while admitting the commission of the acts, had stated that he acted in self defence. Exercising their right to remain silent, he elected not to give evidence and therefore his excuse in their caution statements was not supported by evidence under oath. Therefore, excuse does not have the same weight that you may attach to admissions in his caution statement. You have to consider the caution statement as a whole in deciding where the truth lay.

105. In any event, reliance on the above contents of the cautioned-interview by the Prosecution necessitates me to address issues of 'self-defence' albeit this defence was not specifically raised by the Defence. There is no burden on the Accused to prove that he was acting in self defence. The Prosecution must prove so that you are sure that defendant was not acting in lawful self defence.

106. Therefore I direct you as follows:

You have to ask yourselves these questions. Did the Accused honestly believe or may he honestly have believed that he needed to defend himself because he was under attack or imminent danger of attack? The issue is not whether the Accused was in fact under attack or in imminent danger of attack but whether he genuinely believed that he was. But, if you conclude that there was no such attack or danger of attack that is something you are entitled to consider when deciding whether the Accused has told the truth about his belief. If you are sure that the Accused held no such belief self defence does not arise.

107. If the Accused did genuinely believe or may genuinely have believed that he needed to defend himself, you must decide whether the force he used was reasonable. Reasonable force means force proportionate to the nature of the threat the Accused honestly believed was posed by the deceased. If the Accused went way beyond what was needed to defend himself from the force offered by the deceased, that is good evidence that the Accused acted unreasonably. But, in judging whether the Accused acted unreasonably, you should have regard to the fact that it is difficult for a person to measure precisely what is needed in response and, if the Accused did only what he honestly and instinctively thought was necessary, that is strong evidence that he responded reasonably.

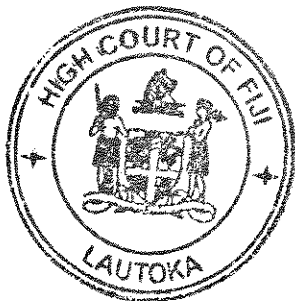
108. In light of this direction, you decide whether Accused had lawfully acted in self defence in the event you decide to act upon his statement.

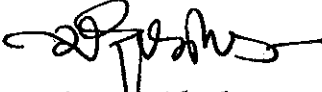
109. Accused allegedly stated in Q 61:

"He tried but couldn't and tried to punch me, then I struck the wheel spanner again on his head, and I did this several times until he dropped to the ground and

whilst he was on the ground motionless I struck his head again about three times with the wheel spanner.

110. Bearing in mind the weight you should attach to out of court exculpatory statements of an Accused not supported under oath, as I have directed, if you find the Accused had lawfully exercised his right to self defence you must find him not guilty of Murder. If the Accused had exceeded his right to self defence you must find the Accused guilty of Murder as charged.
111. Ladies and Gentleman Assessor, this concludes my summing up. Now you may retire and deliberate together and may form your individual opinions on the charges against the Accused. You must consider the two charges separately. When you have reached your separate opinions you will come back to Court and you will be asked to state your separate opinions.
112. Your possible opinions would be:
- a. Charge of Murder Accused guilty or not guilty? or
 - b. Lesser Charge of Manslaughter Accused guilty or not guilty
 - c. Charge of Aggravated Robbery Accused guilty or not guilty
113. You may now retire to consider your opinions.
114. Any redirections?




Aruna Aluthge
Judge

On this 02nd day of June, 2017
At Lautoka

Solicitors: Office of the Director of Public Prosecution for State
Legal Aid Commission for Accused.