

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 47 of 2010

STATE

V

NIKASIO TUPOU

Counsel : Ms. Juleen Fatlaki with Ms. Sujata Lodhia for the State
Mr. A. K. Singh for the Accused

Dates of Trial : 6, 8-9 & 12 November 2018

Summing Up : 13 November 2018

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box, the documents and production items tendered as prosecution and defence exhibits and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. 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 submissions and closing submissions made by both State Counsel and Defence Counsel 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.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in their evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.

- [16] However, if there is no acceptable explanation for the inconsistency or omission, which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistency or omission in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency or omission that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider the witness to be reliable.
- [17] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not to the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the

process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [25] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [26] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [27] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [28] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [30] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for deceased or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty

dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.

- [31] Let us now look at the charge contained in the Information.
- [32] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

Statement of Offence

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

Particulars of Offence

NIKASIO TUPOU on the 4th day of February 2010, at Samabula, in the Central Division, murdered Esita Kele.

- [33] Let me now explain to you the elements of the offence of Murder. Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act) reads as follows:

A person commits an indictable offence if—

- (a) the person engages in conduct; and*
- (b) the conduct causes the death of another person; and*
- (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.*

- [34] Therefore, in order to prove the count of Murder, the prosecution must establish beyond reasonable doubt that;
- (i) the accused;
 - (ii) on the specified day (in this case the 4th day of February 2010);
 - (iii) at Samabula, in the Central Division;
 - (iv) engaged in a conduct; and
 - (v) the said conduct caused the death of Esita Kele (the deceased); and
 - (vi) the accused intended to cause the death of the deceased; or
the accused was reckless as to causing the death of the deceased by his conduct.

- [35] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was

committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond reasonable doubt.

- [36] The fourth element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.
- [37] When dealing with the fifth element, whether the said conduct of the accused caused the death of the deceased you should remember that, at law, the act of the accused need not be the sole or principal cause, but the act should substantially contribute to the deceased's death. Therefore, if you are satisfied beyond reasonable doubt that the conduct of the accused substantially contributed to the death of the deceased, that is sufficient to satisfy the element that the 'conduct caused the death of the deceased'.
- [38] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause the death of the deceased or that the accused was reckless as to causing the death of the deceased. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of the accused from the facts and circumstances you would consider as proved.
- [39] In order for you to conclude that the accused intended to cause the death of the deceased, you should be sure that he meant to bring about the death or that he was aware that death will occur in the ordinary course of events as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the deceased.
- [40] In the event you find that the accused did not have the intention to cause the death of the deceased or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to causing the death of the deceased. An accused will be reckless with respect to causing the death of the deceased, if;
- a. He was aware of a substantial risk that death will occur due to his conduct; and
 - b. Having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
- [41] What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death was a probable consequence or the likely result of his conduct; and yet he decided to go ahead and engage in the conduct regardless of that consequence. The accused must foresee that death was a probable

consequence or the likely result of his conduct and after realising that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the death of the deceased. In order to constitute the offence of murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.

- [42] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of Murder.
- [43] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Murder.
- [44] As you are aware in this case the accused is taking up the defence of provocation. The basis of taking up the defence of provocation is one of sexual infidelity on the part of the deceased.
- [45] Section 242 of the Crimes Act (Killing with Provocation), reads as follows:

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

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

(a) done to an ordinary person; or

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

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

(ii) who is the husband, wife, parent, brother or sister, or child of the ordinary person— to deprive him or her of the power of self-control and to induce him or her to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.

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

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

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

- [46] Therefore, in order for you to consider the defence of provocation you must be satisfied from the evidence in the case that all three elements of provocation as set out in Section 242 of the Crimes Act have been established. The three elements are:

That the accused had caused the death of the person who gave him the provocation:

- (i) in the heat of passion,
- (ii) caused by sudden provocation as defined in sub-section (2) of Section 242 and
- (iii) before there was time for his passion to cool.

- [47] To repeat once more, the term sudden provocation as defined in sub-section (2) of Section 242 means:

any wrongful act or insult of such a nature as to be likely when—

(a) done to an ordinary person; or

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

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

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

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

- [48] As I have informed you before, the prosecution always bears the legal burden of proving every element of the offence of Murder. However, an accused who wishes to deny criminal responsibility for Murder by relying on provocation, bears what is known as an evidential burden in relation to that matter. This is stated in Section 59 of the Crimes Act.

- [49] Section 59 of the Crimes Act is reproduced below and reads as follows:

59. — (1) Subject to section 60, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of this Decree (other than section 28) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

(4) The exception, exemption, excuse, qualification or justification need not accompany the description of the offence.

(5) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(6) The question whether an evidential burden has been discharged is one of law.

(7) In this Decree (Now Act) —

"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

[50] Therefore, where the accused adduces evidence that suggests a reasonable possibility that the matter exists, it is incumbent on the prosecution to disprove that matter.

[51] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[52] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Admitted Facts*" without placing necessary evidence to prove them:

1. Nikasio Tupou (hereinafter referred to as "Accused") at the material time was 40 years of age, and resided with his mother and de-facto partner namely Esita Kele (hereinafter referred to as the 'Deceased') in their family home at 25 Mali Place, Samabula.
2. The Accused had been living in a de-factor relationship with the Deceased since October 2009.
3. The Deceased at the material time was pregnant.
4. The Accused stabbed the Deceased's stomach twice with a kitchen knife; and the said knife penetrated her stomach.

5. The Deceased fled from the Accused and he whilst in pursuit of her grabbed his cane knife and struck her with it a number of times.
6. The Deceased fled outside of the house and collapsed in the compound, a few meters away from their house.
7. The Accused's mother (Leba Laisa) having returned from picking up her grandson from school that afternoon found the Deceased's body lying outside the family home.
8. She entered the house and found the Accused lying on his bed with an electric chord coiled around his neck.
9. The Police arrived at the scene shortly after.
10. The Accused was arrested and escorted to the Samabula Police Station.

[53] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[54] The prosecution, in support of their case, led the evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola, Inspector Sakeasi Busele, a Medical Officer, Dr. James J.V. Kalougivaki and witness Elia Manoa. The prosecution also tendered the following production items as prosecution exhibits:

- Prosecution Exhibit **PE1A** - The caution interview statement of the accused (in the Itaukei language).
- Prosecution Exhibit **PE1B** - The English translation of the caution interview statement of the accused.
- Prosecution Exhibit **PE2** - Kitchen Knife.
- Prosecution Exhibit **PE3** - Cane Knife.
- Prosecution Exhibit **PE4** - Post Mortem Examination Report of the deceased.

[55] Evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola

- (i) The witness testified that he had been working with the Fiji Police Force for the past 35 years.*
- (ii) In February 2010, he was based at the Raiwaqa Police Station.*
- (iii) On 5 February 2010, he recalls conducting the caution interview of the accused, Nikasio Tupou. (At the time he held the rank of Detective Sergeant – D/SGT 201). This caution interview was conducted at the Samabula Police Station. Sergeant Busele (now Inspector) was present during the recording of the caution interview as the witnessing officer. The witness testified that Sergeant Busele was present throughout the recording of the caution interview.*
- (iv) The caution interview was conducted in the iTaukei language, because the accused wished for the caution interview to be conducted in the Fijian language.*
- (v) The witness testified that he had recorded the caution interview in question and answer format.*
- (vi) As the interviewing officer, he had signed on the caution interview statement. The accused also signed on the caution interview statement. The witness testified that the accused willingly signed the statement. The witnessing officer had also signed the caution interview statement.*
- (vii) The original (i-Taukei version) of the caution interview statement was tendered to Court as Prosecution Exhibit **PE1A**. The English translation of the said statement was tendered to Court as Prosecution Exhibit **PE1B**.*
- (viii) The witness testified that the caution interview was translated to the English language by himself. He also confirmed that the English translation was a true reproduction of the iTaukei version.*
- (ix) The recording of the caution interview had commenced at 11.18 hours on 5 February 2010. The recording of the interview had been suspended at 17.18 hours on the same day. The recording of the interview had recommenced at 10.30 hours on 6 February 2010, and concluded at 11.30 hours that day.*
- (x) The witness testified that the accused had been given all his rights during the recording of the caution interview. The accused had also been cautioned. Giving the accused of his rights and the cautionary words are all reflected in the caution interview statement.*
- (xi) The accused had also been given the usual breaks during the recording of the caution interview. These breaks are also reflected in the said caution interview.*

- (xii) *The witness testified that neither he nor any other officer present at any time, forced or threatened the accused to give his answers during the interview. He also testified that neither he nor any other officer present at any time made up (fabricate) any of the answers. The witness said that he recorded only the answers given by the accused.*
- (xiii) *The witness was cross examined at length by the Counsel for the Defence.*
- (xiv) *The witness testified that the caution interview statement was not read back to the accused. He said that the accused was asked whether he wishes to read the record of interview that he had given. However, the accused had said that it was not necessary to read the statement back to him*
- (xv) *The witness said that the caution interview had had been suspended for reconstruction of the scene. At the scene of the incident, the caution interview had continued in the presence of the accused, the witnessing officer and himself. At the scene, he had been standing and writing down the answers, holding a file.*
- (xvi) *It was suggested to the witness that the accused's caution interview statement had been fabricated. The witness categorically rejected this suggestion.*
- (xvii) *The following further questions were put to the witness in cross examination:*
- Q. *I put it to you that what is in the (whole) statement is not what the accused told you?*
- A. *No, Sir. It was what the accused told me.*
- Q. *I put it to you that the accused only came to know what was in the statement when he later came to attend Court?*
- A. *He didn't want to read the caution interview*
- Q. *I put it to you what the accused told you in the caution interview - the accused told you that on 4 February 2010, in the morning he was weeding grass in the garden. Is that correct?*
- A. *According to the caution interview he said he was weeding (question and answer 58 and 59).*
- Q. *And he said that after that he peeled the pineapple with the kitchen knife and left the knife in the bedroom. – that is what the accused says he told you. Is that correct?*
- A. *I recorded what he said in the caution interview.*

- Q. *He then told you after that he left to town to go Tailevu – is that correct?*
- A. *It is not in the caution interview.*
- Q. *He told you that the person who was supposed to pick him did not come to town and he had to return home?*
- A. *It is not in the caution interview.*
- Q. *He told you when he returned home, he saw the front door was closed – that is what he told you?*
- A. *That is not in the caution interview.*
- Q. *He then said, he went into the house from the back door?*
- A. *It is not in the caution interview.*
- Q. *He told you that he went to his bedroom and saw the deceased and another person on his bed?*
- A. *Could be correct, but it is not in the caution interview.*
- Q. *And he told you when he first saw them, both of them did not have any clothes on the top part of their body?*
- A. *(It is) not in the caution interview.*
- Q. *He said he saw them both kissing each other?*
- A. *(It is) not in the caution interview.*
- Q. *He said seeing them in that position, he got enraged and he lost his senses at the time.*
- A. *No, (It is) not in the caution interview.*
- Q. *The reason was he told you because the deceased was pregnant and he was expecting a child from her?*
- A. *No. It is not in the caution interview.*
- Q. *He said he loved his wife so much, and never expected her to be in that position at the time?*
- A. *(It is) not in the caution interview.*
- Q. *He told you that he had walked some distance to reach his home?*

- A. *It is not in the caution interview.*
- Q. *He told you when he entered the house, the temperature was very high?*
- A. *(It is) not in the caution interview.*
- Q. *He told you that the temperature and the fact that he had walked made the matters worst and he did not know what he was doing?*
- A. *(It is) not in the caution interview.*
- Q. *He said he recalled picking the knife from the bedroom that he left in the morning and stabbing the deceased because he did not know what had happened to him?*
- A. *(It is) not in the caution interview.*
- Q. *He told you he was very angry and could not control himself?*
- A. *No.*
- Q. *Later when he realised what had happened, he went to commit suicide by hanging himself?*
- A. *No.*
- Q. *Did he tell you the reason for all this was that he saw his loving partner, who was pregnant, on the bed with another person?*
- A. *No. The witness referred to question and answers 91 and 92.*
- Q. *I put it to you that what you are telling there is not correct. Accused never told you that?*
- A. *No. I just wrote down what he said.*
- Q. *I put it to you that the whole caution interview had been fabricated by the Police?*
- A. *No.*
- Q. *The accused had no knowledge about what you were writing in that statement?*
- A. *No. He has knowledge about what I was writing.*
- Q. *And you accepted earlier, that this caution interview was never read back to the accused?*

- A. *Yes. As he wished. When asked whether to read, he said No.*
- Q. *You will also confirm that because the caution interview was not read back to him, he did not have knowledge of what was written?*
- A. *He had knowledge. It was question and answer.*
- Q. *He never read or you never read back to him what was written in the statement?*
- A. *Yes.*

[56] Evidence of Inspector Sakeasi Busele

- (i) *The witness testified that he had been working with the Fiji Police Force for the past 29 years. He was promoted as an Inspector in 2015.*
- (ii) *In February 2010, he was based at the Totogo Police Station.*
- (iii) *On 5 February 2010, he recalls being the witnessing officer, during the recording of the caution interview of the accused. The caution interview was conducted by Sergeant Eroni (now ASP). The said interview was conducted at the Samabula Police Station.*
- (iv) *The caution interview was conducted in the iTaukei language. It was recorded by Sergeant Eroni in question and answer format. The witness too had signed the record of interview.*
- (v) *He confirmed that the caution interview was translated into the English language.*
- (vi) *During the recording of the interview, the accused, the interviewing officer and himself were present. He testified that he was present throughout the duration of the interview.*
- (vii) *The accused had been given his rights during the recording of the caution interview.*
- (viii) *During the interview, a total of 193 questions were asked and answered. The witness testified that it was accused who gave all the answers.*
- (ix) *The witness testified that neither he nor any other officer in his presence, forced or threatened the accused to give his answers during the interview. He also testified that neither he nor any other officer in his presence made up (fabricate) any of the answers.*
- (x) *Inspector Busele was cross examined at length by the Defence counsel. However, he too denied that the accused's caution interview statement was fabricated.*

(xi) *The witness testified that the accused did have knowledge of what was written in the caution interview.*

(xii) *In re-examination the witness clarified as follows:*

Q. *You said, the accused had knowledge of what was written in the caution interview. Why do you say so?*

A. *When he answered the question, it was written and read back to him at the same time.*

Q. *When the accused gives the answer, it was written on the record and then it was read back to him?*

A. *Yes*

Q. *So every question and answer was read back to him like that?*

A. *Yes.*

[57] Evidence of Dr. James J.V. Kalougivaki

(i) *The Doctor is a Forensic Pathologist and Head of the Forensic Science Service within the Fiji Police Force.*

(ii) *He has working at the Forensic Science Service for more than 6 years, conducting medico legal autopsies for more than 800 cases in Fiji, Vanuatu and Tuvalu.*

(iii) *He has been heading the Forensic Pathology Department for over 4 years.*

(iv) *He testified that he was present in Court as a substitute specialist witness for a post mortem examination of the deceased that was conducted by his former boss, Dr. Ramaswamy Pannu Swamy Goundar.*

(v) *The post mortem examination on the deceased had been conducted by Dr. Goundar, who was the former Head of the Forensic Pathology Unit within the Fiji Police Force. Dr. Goundar is now retired and currently based in Australia.*

(vi) *The post mortem report signed by Dr. Gounder was tendered to Court as **Prosecution Exhibit PE4.***

(vii) *The post mortem examination of the deceased was conducted at the CWM Hospital on 4 February 2010, at 19.00 hours.*

(viii) *The Doctor said that the estimated time of death, as found in the report, was 15.00 hours on 4 February 2010.*

(ix) *The Doctor explained in detail the external and internal injuries recorded on the body of the deceased.*

- (x) *The Doctor explained that injuries number 1, 2, 3, 4, 11 and 12 were injuries over the head and neck of the deceased (on the front, the side and back of the head and neck). These were all deep slash or cut wounds or injuries.*
- (xi) *Injury number 5 was a stab wound on the upper abdomen, while injury number 6 was a superficial cut injury noted over the right side of the chest.*
- (xii) *Injuries number 7, 8, 16-20, were all superficial cut injuries of varying degrees over the right upper limb of the deceased. Injuries 9 and 10 were superficial cut injuries over the left upper limb of the deceased.*
- (xiii) *Injuries 13 and 14, were superficial cut injuries over the upper back of the deceased, while injury number 15 was a superficial cut injury over the right shoulder.*
- (xiv) *The Doctor testified that injuries 1, 2, 3, 4, 11 and 12 were the most fatal or seriously fatal injuries.*
- (xv) *Based on the injuries recorded by Dr. Goundar in his report, Dr. Kalougivaki testified that the cause of death was due to severe multiple slash wounds or cut wounds to the head and neck.*
- (xvi) *The Doctor testified that since these are multiple injuries, if there was no resuscitation, it is highly likely that after having sustained these injuries, the deceased could have died within 30 minutes to 1 hour.*

[58] Evidence of Elia Manoa

- (i) *Currently the witness is serving time at the Minimum Correction Centre for the offence of Aggravated Robbery.*
- (ii) *He was married to the deceased, Esita Kele. They had been living together for 4 years.*
- (iii) *In the year 2009, after coming back from Taveuni, they had separated from each other. The reason he said was due to him being engaged in a lot of alcohol consumption.*
- (iv) *The witness testified that in October 2009, he had got to know that Esita was having an affair with the accused. When he had asked her, she had admitted to having an affair with the accused.*
- (v) *The deceased had informed that she had wanted to come back to him.*
- (vi) *He testified that prior to the deceased's death, the deceased and he were together at his place for three days. Thereafter, the deceased had left to pick her stuff from the accused's house.*

(vii) *He testified that prior to the deceased leaving to pick up her stuff she had received phone calls from the accused. The deceased had told him that she had got a phone call from the accused. The deceased had said she was going to collect her stuff from the accused's place and return to him.*

[59] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could give sworn evidence from the witness box and/or call witnesses on his behalf. He could also address Court by himself or his counsel. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. In this case, the accused opted to offer evidence under oath and also called a witness in support of his case.

Case for the Defence

[60] The accused gave evidence in support of his case. He also called witness Livai Naqera Junior. The defence also tendered to Court the Medical Examination Report of the accused, dated 5 February 2010, as Defence Exhibit **DE1**.

[61] Evidence of Nikasio Tupou

- (i) *The accused testified that in the year 2009 he was living at 25 Mali Place, Reservoir Road, Walu Bay. He was residing with his mum, daughter, nephew and son. It was his parents' house.*
- (ii) *He and the deceased, Esita were living together as husband and wife in a de-facto relationship. He had met Esita for the first time at a drinking party.*
- (iii) *He testified to the events which took place on 4 February 2010. He said, he wake up in the morning and worked around the compound, weeding cassava and cleaning around the compound.*
- (iv) *Then he came back and had a shower. Then the deceased brought some pineapple. She was peeling it. They both ate the pineapple and were talking and fondling around. This was in their room. He said that the kitchen knife the deceased was peeling the pineapple with was left in the room.*
- (v) *Then, he had told her that he is going to Tailevu and left home. This was after lunch. It was after 12.00 or 1.00 p.m.*
- (vi) *However, the child (the person), together with whom he was supposed to go to Tailevu had not turned up. Then he had gone back home.*
- (vii) *From Suva City he had gone by bus and got off near the bowser (service station) at Reservoir Road. He had then walked home. Before reaching home.*

he had walked about quarter mile or half a mile. The road from the service station to his house has a long and steep hill. That day it was very sunny and hot.

- (viii) When he had reached home, the door that he was supposed to enter was closed. So he went towards the kitchen door. He put his hand inside the window and tried to open the kitchen door from inside.
- (ix) When he entered, he went into the sitting room, and then went straight to the room. As he went in, he felt that there was somebody in the room. As he opened the curtain he saw the deceased lying on the bed with another man. They were lying down hugging each other. They were not wearing anything on the top part of their body. The witness said he was standing at the door of the room from where he saw this.
- (x) The witness testified that he felt very angry because of what he saw. When he entered the room, they saw him and they were surprised. He had shouted at them. When he tried to get hold of the man, he had jumped out the door and run away.
- (xi) The witness says that all he knows, is that he took out the knife that was there and used it inside the room. Later, he said he used the knife and injured the deceased with it. He said he did so, because he could not control himself after what he had seen and he was very angry.
- (xii) The witness testified that thereafter, they ran outside. "After I had used the knife, we went outside".
- (xiii) The witness said that he attacked the deceased because he could not control himself and that he was very angry.
- (xiv) He said he came to realise what happened when he saw the deceased's body lying outside. Thereafter, he tried to commit suicide by hanging himself. He took an electrical cord and tried to hang himself. He took the electrical cord and used the chair to stand on it and hang himself. However, when he was trying to hang himself, the electric cord had broken.
- (xv) The witness had been taken to hospital for medical examination (Samabula Health Centre). The Medical Examination Report of the accused, dated 5 February 2010, was tendered to Court as Defence Exhibit **DE1**.
- (xvi) The witness said that his caution interview statement was not read back to him. The Police had given the statement for him to sign and he had done so. He was not aware of what was written in the said statement.
- (xvii) The witness was cross-examined at length by the Prosecution. It was suggested to the witness that he was lying in Court to save himself.

[62] Evidence of Livai Naqera Junior

- (i) The witness is currently residing at Reservoir Road. He is employed by Pacific Energy as a Security Officer.*
- (ii) He testified that on 4 February 2010, too, he was residing at Reservoir Road. After having lunch that day, he had gone to see the accused's nephew, Mavoa Talei. He confirmed that the accused was residing at Mali Place, Reservoir Road at the time. The distance from his house to the accused's house was about 150 to 200 meters.*
- (iii) The witness testified, that on reaching the accused's house, he did not enter the main driveway. He went on the side of the compound where the drain is. When he went there, he met a man. The man he saw jumped out from the door that was on the side of the drain/near the drain. The man had jumped from Tupou's house. The witness had not recognized the man. However, he testified that the man was a Fijian.*
- (iv) After coming out the man had put on his T-shirt. That's when he reached the road. At the time he first saw the man, he was wearing a short pants. Then he put on his t-shirt when he was outside. The man had then gone down the road. The witness testified that the man had been in a rush and was walking in a fast manner.*
- (v) The witness then went to the accused's house to see his nephew. However, he did not enter the house. When he got closer to the house, he heard the accused and his wife arguing. When he heard them arguing he returned home.*
- (vi) Later the witness said that he heard the accused and his wife swearing at each other.*

Analysis

[63] The above is a brief summary of the evidence led at this trial. The prosecution in support of their case, led the evidence of Assistant Superintendent of Police (ASP), Eroni Ratavola, Inspector Sakeasi Busele, a Medical Officer, Dr. James J.V. Kalougivaki and witness Elia Manoa. The defence relied on the evidence of the accused himself and witness Livai Naqera Junior.

[64] In this case the prosecution is primarily relying on the admissions made by the accused in his caution interview statement.

[65] Any admission made by an accused in his caution statement is admissible and sufficient evidence to prove his guilt to a charge. However, there are some applicable principles

of law in relation to this evidence. The prosecution must prove that the caution interview statement was made by the accused voluntarily and fairly. The prosecution must establish these facts beyond reasonable doubt. The issue of voluntariness and fairness is important in deciding the truthfulness of the statement and what weight and probative value should be attached to the said statement made by the accused.

- [66] Whether the accused gave the statement voluntarily and fairly and whether the statement set out a set of events in relation to the offence, on which you can rely and accept, is a matter for you. Of course if you believe that the interview is false, that it was made up or fabricated by the police, you may think that you cannot put any weight on it. However, if you believe that the accused gave his caution interview statement without force or fabrication, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of the accused. However, the question of whether the said admissions are true and what weight you can put on the admissions made in the said statements is a matter of fact for you to decide.
- [67] The Defence states that the caution interview statement was fabricated. The prosecution says that the caution interview statement was not obtained under pressure or inducement and that the statement was not fabricated. You have heard from the police officers that there were no threats or force or any form of intimidation of any kind by anyone on the accused and the statement was freely and voluntarily given and that they correctly recorded what the accused said. I reiterate that the truthfulness of the statement and what weight you put on the said statement made to the police is entirely a matter for you.
- [68] The prosecution relies upon the evidence of the Medical Officer, Dr. James J.V. Kalougivaki. This witness was giving evidence on the post mortem examination conducted by Dr. Ramaswamy Ponnu Swamy Goundar who is now said to be retired and overseas. In the absence of the Doctor who conducted the post mortem examination, the law permits another Doctor or a substitute Doctor, to give evidence in Court based on the examination and the report prepared by the original Doctor. However, the substitute Doctor is only permitted to provide his own expert opinion based on the injuries and findings in the said post mortem report.
- [69] This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [70] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.

- [71] As I have informed you earlier, the burden of proving each ingredient of the charge of Murder rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [72] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [73] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. In this case, based on the said agreed facts, the identity of the accused, the date of offence and place of offence are not disputed. The conduct of the accused is also not disputed as it is stated in the Agreed Facts that the accused stabbed the deceased's stomach twice with a kitchen knife and the said knife penetrated her stomach. It is also agreed that after the deceased fled from the accused, that he whilst in pursuit of her grabbed his cane knife and struck her with it a number of times. The fact that the said conduct of the accused caused the death of the deceased is also not disputed. This is further established by way of the medical evidence that has been presented in Court.
- [74] The main issue for your consideration is whether the accused's version of the events is to be believed or not and whether the accused is entitled to take up the defence of provocation. As I have informed you before, in order for you to consider the defence of provocation you must be satisfied from the evidence in the case that all three elements of provocation as set out in Section 242 of the Crimes Act have been established. The three elements are:

That the accused had caused the death of the person who gave him the provocation

- (i) In the heat of passion,
 - (ii) caused by sudden provocation as defined in sub-section (2) of Section 242; and
 - (iii) before there was time for his passion to cool.
- [75] If you believe the accused's version of events, the accused can only be found guilty of Manslaughter and not Murder,
- [76] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge of Murder, since the prosecution has failed to prove its case, but only guilty of the lesser offence of Manslaughter. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution has proved the elements of the offence of Murder, beyond any reasonable doubt.

- [77] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence led on behalf of the accused. You must consider his evidence and the evidence of Livai Naqera Junior also for its consistency and also the probability of their version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter.
- [78] If you neither believe the evidence adduced by the defence nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter.
- [79] However, I must caution you that even if you reject the evidence of the defence as not truthful and also unreliable that does not mean the prosecution case is automatically proved in relation to the offence of Murder. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.
- [80] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you believe the evidence of the defence, then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
 - ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
 - iii. *If you reject the version of the defence, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution to establish the charge of Murder;*
 - iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Murder, but only guilty of the lesser offence of Manslaughter;*
 - v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Murder has been established beyond reasonable doubt. If so you must find the accused guilty of Murder. If not you must find the accused not guilty of Murder, but only guilty of the lesser offence of Manslaughter.*

[81] Any re directions the parties may request?

[82] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the charge against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[83] Your possible opinions should be as follows:


Murder- Guilty or Not Guilty

in the alternative,

Manslaughter- Guilty or Not Guilty

[84] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 13th Day of November 2018

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Messrs A. K. Singh Law, Nausori.