

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC013 of 2017

STATE

vs.

- 1. NIKO BALEIWAIKI**
- 2. ERONI RAIVANI**

Counsel: Ms. S. Serukai for the State
Mr. E. Koroi for Accused 1
Ms. L. Manulevu with Ms. P. Mataika for Accused 2

Date of Hearing: 22nd, 25th to 29th March 2019 and 1st April 2019

Date of Summing Up: 08th April 2019

SUMMING UP

1. The hearing of this case has now reached to its conclusion. It is my duty to sum up the case to you. As I explained you before the commencement of the hearing, we have different functions. It is my task to ensure that the trial is conducted according to law. As part of that, I will direct you on the law that applies in this action. You must accept the law from me and apply all directions I give you on matters of law.

2. Your function is to determine the facts of the case, based on the evidence that has been placed before you in this courtroom. That involves deciding what evidence you accept or refuse. You will then apply the law, as I shall explain it to you, to the facts as you find them to be, and in that way arrive at your opinion.
3. I may comment on the facts if I think it will assist you when 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 facts. Hence, it is entirely upon you to accept or disregard any comment I make about the facts of this case, unless it coincides with your own independent opinion.
4. You must reach your opinion on evidence, and nothing but on the evidence itself. Evidence is what the witnesses said from the witness box and the documents tendered as exhibits. This summing up, statements, arguments, questions and comments made by the counsel of the parties are not evidence. The purposes of the opening address by the learned counsel for the prosecution is to outline the nature of evidence intended to be put before you. Therefore, the opening address of the prosecution is not evidence. The closing addresses of the counsel of the prosecution and the defence are not evidence either. They are their arguments, which you may properly take into account when you evaluate the evidence, but the extent to which you do so is entirely a matter for you.
5. If you heard, or read, or otherwise learned anything about this case outside of this courtroom, you must exclude that information or opinions from your consideration. You must have regard only to the testimony put before you in this courtroom during the course of this trial. Ensure that no external influence plays a part in your deliberation. You are allowed to talk, discuss and deliberate facts of this case only among yourselves. However, each one of you must reach your own opinion. You are required to give merely your opinion but not the reasons for your opinion. Your opinion need not be unanimous. I must advise you that I am not bound by your opinion, but I assure you that I will give the greatest possible weight on your opinions when I make my judgment.

6. Moreover, I must caution you that you should dismiss all emotions of sympathy or prejudice, whether it is sympathy for or prejudice against the accused or anyone else. No such emotion has any part to play in your decision, nor should you allow public opinion to influence you. You must approach your duty dispassionately; deciding the facts solely upon the whole of the evidence. It is your duty as judges of facts to decide the legal culpability as set down by law and not the emotional or moral culpability of the action.

Burden and Standard of Proof

7. I now draw your attention to the issue of burden and standard of proof. The accused are presumed to be innocent until they are proven guilty. The presumption of innocence is in force until you form your own opinion that the accused are guilty for the offence.
8. The burden of proof of the charge against the accused is on the prosecution. It is because the accused are presumed to be innocent until they are proven guilty. In other words there is no burden on the accused persons to prove their innocence, as their innocence is presumed by law.
9. The standard of proof in criminal trial is “proof beyond reasonable doubt”. It means that you must be satisfied in your mind that you are sure of the accused’s guilt. If there is a riddle in your mind as to the guilt of the accused after deliberating facts based on the evidence presented, that means the prosecution has failed to satisfy you the guilt of the accused beyond reasonable doubt. If you find any reasonable doubt as to the commission of the offence as charged or any other offence by the accused, such doubt should always be given in favour of the accused person.

Information and elements of the offences

10. The first, second and third accused are charged with one count of Murder, contrary to Section 46 and 237 of the Crimes Act and one count of Aggravated Robbery, contrary to

Section 311 (1) (a) of the Crimes Act. The particulars of the offences are before you, hence, I do not wish to reproduce them in the summing up.

11. Section 46 of the Crimes Act has defined the criminal liability of the offenders who commit an offence in the execution of a joint enterprise, where it states that:

“When two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”

12. I will explain the principle of joint enterprise and how you should approach these two offences in details in a while.

13. The main elements of the offence of Murder are that:

1. The accused person,
2. Have engaged in a conduct,
3. The said conduct caused the death of the deceased,
4. The accused intended to cause the death of the deceased by that conduct or reckless that the conducts cause the death of the deceased.

14. The prosecution alleges that the first accused was the person who actually assaulted the deceased and that caused the death of the deceased. The second and third accused persons were with him executing their common purpose of robbing the outboard engine of Jay Prasad, the deceased. The death of Jay Prasad was a probable consequence of the execution of their joint purpose of robbing the outboard engine of Jay Prasad.

15. The main elements of the offence of the Aggravated Robbery are that:
1. The three accused persons,
 2. In the company of each other,
 3. Committed the robbery on Jai Prasad.
16. The prosecution alleges that the three accused committed this offence of robbery in the company of each other. Hence, the prosecution's case is that the three accused committed this offence together. Where a criminal offence is committed by two or more persons, each of them may play a different part, but if they are acting together as part of a joint plan or agreement to commit the offence, they are each guilty.
17. Robbery is an aggravating form of theft. A theft becomes robbery, if the accused immediately before committing theft; or at the time of committing theft; or immediately after committing theft, use force or threaten to use force on another person with intent to commit theft or to escape from the scene. If the offence of robbery is committed by two or more people then it becomes an aggravated robbery.
18. A person commits theft if that person:
- i) Dishonestly,
 - ii) Appropriates the property belonging to another,
 - iii) With the intention of permanently depriving the other of that property.
19. The elements of 'dishonestly' and "the intention of permanently depriving the other of the property" are the state of mind of the three accused at the time of committing the offence. Inferences of the state of mind of the accused could be drawn from the conduct of the accused.

20. 'Appropriation of property' means taking possession or control of the property without the consent of the person to whom it belongs. At law, property belongs to a person if that person has possession or control of the property.
21. Accordingly, the prosecution has to prove beyond reasonable doubt that:
- i) The three accused,
 - ii) In the company of each other,
 - iii) Dishonestly appropriates Yamaha Outboard Engine belong to Jay Prasad,
 - iv) With the intention of permanently deprive it,
 - v) And used force on Jay Prasad immediately before or after stealing the said item.
22. You have seen that only Niko Baleiwairiki and Eroni Raivani are in the hearing and Mr. Waisea Motonivalu, the first name accused is not present during the hearing. You do not need to consider the absence of Mr. Waisea Motonivalu and only focus on the issues relating to second and third accused.

Evidence of the Prosecution

23. Let me now remind you briefly the summary of the evidence presented by the prosecution and the defence during the course of the hearing. This is a quite a lengthy hearing and lasted for more than a week. However, I trust that you can properly and correctly recall all of the evidence adduced during the hearing.
24. The first witness and the second witness of the prosecution gave evidence regarding the arrest of the second accused. Cpl. Seviloni and IP Esili Nadolo had left the Nausori Police Station around 10.00 p.m. on the 4th of January 2017. According to Cpl. Seviloni, the arresting team was consisted with IP Esili and Cpl. Tawake, who was the driver of the twin cab vehicle which they used to travel to Lokia village. However, IP Esili said there was

another officer namely Sgt. Elia in their team. They have reached Lokia village at around 10.30 p.m. and Cpl. Sevuloni had led the team to the house of the second accused. Cpl. Sevuloni is from the same village and knows the second accused since the birth of the second accused. When they reached to the house of the second accused, Cpl. Sevuloni had gone into it, leaving IP Esili outside the house. There were few people in the house including the second accused, his father and *Turaga-in-koro* of the village. They were drinking grog. Having entered into the house, Cpl. Sevuloni had informed the father of the second accused that they wanted to take second accused to the police station in order to question him in relation to this murder case. The father of the second accused had then told the second accused to go and get his clothes changed. The second accused then changed his clothes and came out. Cpl. Sevuloni had then explained him the reasons for his arrest and his other constitutional rights and made the arrest. The second accused was co-operative and came with him. They have not handcuffed the second accused as he was co-operative and did not resist.

25. They had to walk for about five minutes to the vehicle from the house. Once they got into the vehicle, they had to wait for about 10 to 15 minutes, for the other two teams who went to arrest other two suspects. The second accused was seated in the back seat with Cpl. Sevuloni and IP Esili was seated on the front passenger seat. According to IP Esili, the 2nd accused seated on the back seat between Sgt. Eliko and Cpl. Sevuloni. Cpl. Sevuloni said that they waited for the other teams at the Lokia bus stand-alone the Koronivia road, IP Esili said that they waited near Lokia landing for the other two teams.
26. Having waited for about 10 to 15 minutes for the other teams, they have then straight away gone to the Police Station. They have returned to the police station at about 11.20 p.m. You have heard that both Cpl. Sevuloni and IP Esili denied that they went to Colo-i-suva near the police post of Sawani and parked the vehicle there. Both of them further denied that they have assaulted, swore, and intimidated the second accused, telling him to admit the offence; otherwise they will throw him from the cliff.

27. Cpl. Isikeli Rokodreu in his evidence said that he went with the team of police officers who arrested the first accused Waisea Motonivalu on the 4th of January 2017. During the arrest of the first accused Waisea Motonivalu he has not made any contact or interactions with the second accused Mr. Niko Baleiwairiki. After the arrest, he conducted the caution interview of Mr. Waisea Motonivalu inside the office of the crime officer in the crime office of the police station. The caution interview of the second accused took place behind the office of the crime officer at the crime office. Cpl. Isikeli denied that he told the second accused to admit the offence without wasting the time of the police during the recording of his caution interview.

28. Detective Sergeant Manoa Raqio is the officer who conducted the charging of the second accused. According to the evidence given by D.S. Raqio, he has given all the applicable constitutional rights to the second accused before and during the recording of the charging statement. It was done in the crime office and the second accused appeared normal and co-operative.

29. Cpl. Viliame Maivasu is the Investigation Officer and also the Interviewing Officer who conducted the caution interview of the second accused. He has commenced the caution interview of the second accused at 11.30 p.m. on the 4th of January 2017. The reasons for commencing the caution interview at such a late time of the day is to formalize the certain administrative questions before the accused was locked up in the police cell. The caution interview was suspended at 12.55 a.m. and then he had escorted the accused to the Nakasi Police Station where the second accused was locked up in the police cell. The caution interview was then recommenced on the following day that was on the 5th of January 2017, at 12.05 p.m. Before the recommencement of the caution interview, the second accused was taken to the Nausori Medical Centre for a medical examination. You can find the report of the said medical examination in the agreed bundle of documents of the second accused which is filed as one of the exhibits of the prosecution.

30. You may recall that Cpl. Maivasu explained about the breaks given to the second accused during the recording of the caution interview on the 5th and 6th of January 2017. The second accused was locked up in the cell block of the Wainibokasi Police Station in the night of the 5th of January 2017 as the police wanted to separate him with other two suspects. On the 6th of January 2017, the second accused was taken for reconstruction. Cpl. Maivasu had taken only the second accused to the reconstruction. He was accompanied by the witnessing officer and another officer who video recorded the reconstruction.
31. Cpl. Maivasu explained that the second accused was given all his rights during the recording of the caution interview. The recording of the caution interview took place at the crime office of the Nausori Police Station. It is an open space with one office for the crime officer. The caution interview is taken place behind the office of the crime officer. The caution interview was recorded in the official computer. It was a desktop computer. Cpl. Maivasu was seated in front of the computer, while the second accused was seated just opposite to him. He had typed the questions in the computer and then asked it from the second accused. The answers given by the second accused was then typed. The witnessing officer was seated at the right hand side of Cpl. Maivasu. The second accused was not able to see what he was typing in the computer. He has taken the print out of the caution interview at the end of the each day and given the second accused to read it. Once he read it, the printed pages were signed by the second accused, the witnessing officer and Cpl. Maivasu. The interview that took place on the 4th and 5th of January 2017 were printed out on the 5th of January 2017. At the end of the caution interview on the 6th of January 2017, the second accused was given time to read the printed copies of the caution interview and then he signed on it together with the interviewing officer and the witnessing officer.
32. Cpl. Maivasu said the second accused appeared well and accommodative during the recording of the caution interview. The accused had sometimes talked freely, making jokes to the interviewing officer. Cpl. Maivasu said during the cross examination by the learned counsel for the second accused, that whatever the police officers are doing in the police station need to be recorded in the station diary. However, he said that he has no records of

such to prove the time of the commencement of the caution interview, the breaks given during the caution interview and also the movements of the accused during the recording of the caution interview. The second accused was not given any dinner in the night of 4th of January 2017 as he was brought into the police station after the normal dinner time for the people in the police custody. However, he was given his breakfast at the Nakasi Police Station. During the cross examination, Cpl. Maivasu agreed with the learned counsel for the second accused that he has no record to confirm that the second accused was given his breakfast in the morning of 5th of January 2017.

33. At the question 220 of the caution interview, the second accused was given an opportunity to alter, add or delete anything he wishes. The second accused then altered some facts which he previously stated. The alteration was then recorded as the answer to question 220 of the interview.
34. Cpl. Maivasu was the Investigation Officer of this matter as well. He tendered the medical reports pertaining to the second accused and also the post-mortem report of the deceased Mr. Jai Prasad as prosecution's exhibits. Moreover, he tendered the agreed bundle of documents for the second accused and also for the third accused as the exhibits of the prosecution. Among those agreed bundle of documents, you might find the receipts issued by the Merchant Finance Ltd, pertaining to the outboard engine owned by Jai Prasad. Cpl. Maivasu was not involved in the team that went and recovered the outboard engine. However, he knew about it as the investigation team had regular briefing on the progress of the investigation as it was a complicated crime investigation.
35. You may recall that Cpl. Maivasu was asked by the learned counsel for the defence that what evidence he had in order to charge the two accused to this offence. The statement given by one Ulaiasi Tuikoro led the investigators to arrest the two accused and then they made their respective statements in their respective caution interviews admitting the committing of the offence. These are evidences that the investigation team have in order to charge these accused persons to this offence. Cpl. Maivasu further said that there is no

finger print or DNA evidence obtained from the crime scene, which implicate the second accused to this crime.

36. Detective Sergeant Viliame Nagatalevu has conducted the caution interview of the third accused Eroni Raivani. It was commenced on the 5th of January 2017 at 1.14 .a.m. The reason for the commencement of the caution interview at such an early hour of the day is to ask certain administrative questions and record the reasons of the arrest of the third accused. The caution interview was then recommenced at 10.40 a.m. You may recall that the learned counsel for the third accused questioned DS Nagatalevu regarding the time of the recommencement of the caution interview. According to the medical examination report of the third accused, which is included in the agreed bundle of document for the third accused, the third accused was medically examined by the doctor at 10.43 a.m. on the 5th of January 2017 at the Nausori Health Centre. It was concluded at 10.50 a.m.
37. According to DS Nagatalevu, the third accused appeared normal and co-operative during the recording of the caution interview. The caution interview was recorded in a lap top and at the end of each page; the interview was printed and given to the accused to read it. Once he read and confirmed it, the accused, the interviewing officer and the witnessing officer have signed on it.
38. During the cross examination by the learned counsel for the third accused, DS Nagatalevu explained that he has told the third accused in question 48 of the caution interview that at the end of recording of the interview, the accused would be given printed copy of the interview to read and sign. The learned counsel then suggested to DS Nagatalevu that the answers recorded under the certain questions (102-146, 150-155, 186, 187, 202, 217-223, 226-229, 230-234) are made up stories of the interviewing officer as the third accused had given him a different versions of event, which DS Nagatalevu denied and stated that he accurately recorded whatever the answers given by the third accused in relation to those questions. The third accused was seated at the opposite side of the interviewing officer during the recording of the caution interview. Therefore, the third accused was not able to

see what he was typing in the laptop. DS Nagatalevu has recorded the statement made by Ulaiasi Tuikoro as well.

39. The charging officer of the third accused is Lasaro Mataitoga. He has recorded the charging statement of the third accused on the 6th of January 2017. It was recorded at the crime office of the Nausori Police Station. The accused appeared normal and co-operative during the recording of the charging statement. Cpl. Mataitoga said that he recorded whatever the accused told him and did not fabricate anything in the charging statement.

40. The last witness of the prosecution is Ulaiasi Tuikoro. He had started to drink with few of his friends at home during the evening of the 31st of December 2016. They have consumed a bottle of rum. Once the bottle of rum is finished, they all have gone to Penilope's house, where they joined the drinking party to drink home-brew. The first accused Waisea Motonivalu, Second accused Niko Baleiwairiki and the third accused Eroni Raivani were also in the drinking party. They have consumed two buckets of home brew. Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani left the drinking party without letting the others know. Nearly one hour after they left, Ulaiasi Tuikoro and seven others also left the drinking party and walked towards Lokia village. On their way to Lokia village, they met Eroni Raivani, Waisea Motonivalu and Niko Baleiwairiki at the junction of Lokia village and Turaki settlement. They have confronted the three of them asking the reason for leaving the drinking party without informing. Eroni Raivani had told Ulaiasi Tuikoro that the three of them came for the out-boat engine of Jai Prasad. Eroni Raivani had further told Ulaiasi Tuikoro that they have left it in the bush. At that time Niko Baleiwairiki and Waisea Motonivalu had started to walk towards Lokia village. Ulaiasi Tuikoro also walked towards the village. Ulaiasi Tuikoro said that he did not meet Eroni Raivani alone. Eroni Raivani was not vomiting at that time. He vomited when they approached the village.

Evidence of the second accused

41. At the conclusion of the prosecution case, the two accused were explained about their rights in defence. The third accused exercised his right to remain silent. The accused does

not have to give evidence. You must not assume that the third accused is guilty because he has not given evidence. The fact that he has not given evidence proves nothing. It does nothing to establish his guilt.

42. Meanwhile, the second accused opted to give evidence on oath. I will now summarize the evidence given by the second accused.

43. The second accused in his evidence said that he had been drinking grog and home-brew at Penilope's house in the night of 31st of December 2016 and it went on till early morning of 1st of January 2017. Before he joined the drinking party, he had gone to the farm in order to collect firewood. While collecting firewood, he had injured his hand. The hand was swollen due to the said injury. While they were drinking, Waisea Motonivalu asked Niko Baleiwairiki to come with him. He then followed Waisea Motonivalu. They had gone to Jay Prasad's house. Jay Prasad was his father's best friend. Waisea Motonivalu knocked the door and went into the house, when Jay Prasad opened the door. The second accused was waiting outside, about three meters away from the house. When Waisea Motonivalu went into the house, he heard sounds coming from inside the house. It was like someone was running and sounds of thuds. He heard Jay Prasad was screaming. He felt scared and left the place. He had then waited for a while at the bus stop and then went home. During the cross examination by the learned counsel for the prosecution, the second accused denies the allegation.

44. On the 4th of January 2017, Cpl. Sevuloni came and arrested him while he was at home. The police officer put handcuffs on his hand when he came out of his home. He was put into a twin cab and taken to Sawani area. There were three police officers inside the twin cab and four other officers travelled in the back tray of the twin cab. At Sawani, he was threatened by the police officers, saying that if he does not admit the offence, he would be thrown down to the hill. He was intimidated, slapped, and threatened. After that he was taken to the Nausori Police Station. In the same night he was then taken to Wainibokasi Police Station and put into the cell, where he spent the night. He had no bedding to sleep. There was no caution interview done in that night. The following morning, that was the 5th

of January 2017, he was taken back to Nausori Police Station. He had no dinner and also breakfast. He was weak and frightened when the recording of his caution interview was commenced. The second accused said that certain questions in the caution interview were never asked and he never answered to them. They were 98-109, 111-121, 135, 171-175, 178-196, 203 - 214. He said that he answered to the question 220. According to the second accused he only signed the caution interview on the day he was produced in the Magistrate's Court.

45. During the recording of the caution interview, Cpl. Isikeli came and threatened him. Cpl. Isikeli had backslapped him. It caused bleedings in his nose.
46. You may recall that the second accused cannot recall about the two medical examinations that he was taken for on the 4th and 7th of January 2017 respectively. He did not know that he could complain to the doctor about his situation.

Defence of the third accused

47. You have heard that the learned counsel for the third accused have put certain questions to the interviewing officer DS Nagatalevu, during her cross examinations. She asked the interviewing officer whether the third accused actually told that he went to Jay Prasad's house alone in order to drink. He left the drinking party alone. While he was drinking with Jay Prasad at his house, Waisea Motonivalu and Niko Baleiwairiki came. Jay Prasad refused to take them into the house. Then Waisea Motonivalu punched him and Jay Prasad ran out of the house. Waisea Motonivalu followed him and punched him. Then Waisea Motonivalu came and threatened the third accused to remove the outboard engine, otherwise he would do the same as he did to Jay Prasad. Third accused was afraid and then removed the outboard engine. When he came out with the engine, he saw Waisea Motonivalu was still punching Jay Prasad. He then left the Engine and fled the scene. The interviewing officer denies this version and said whatever the answers given by the third accused during the recording of the caution interview, has been correctly recorded in the caution interview. You have to keep it in mind that the questions posed by the learned

counsel during the hearing are not evidence, unless the witness affirmed or adopted them in their respective answers.

48. This is the summary of the evidence presented during the cause of this hearing. However, I might have missed some. It is not because they are not important. You have heard every items of evidence. What I did only to draw your attention to the main items of evidence and help you in reminding yourselves of the evidence.

Agreed Facts

49. I now take your attention to the agreed facts and agreed bundle of documents which are the facts and documents that the prosecution and the defence have not disputed. Hence, you are entitled to consider them as facts proven by the prosecution beyond reasonable doubts.

Analysis and Directions

50. The prosecution alleges that the first accused Waisea Motonivalu, the second accused Niko Baleiwairiki and the third accused Eroni Raivani made a plan to rob the outboard engine of Jay Prasad while they were drinking at Penolope's place in the early morning of the 1st of January 2017. They then left the drinking party and went to the house of Jay Prasad. Eroni Raivani had gone and observed what was Jay Prasad doing inside the house. They found that Jay Prasad was still awake and drinking beer in the house. Waisea Motonivalu then asked Eroni Raivani to go and knock the door, which Eroni Raivani did. Once Jay Prasad opened the door, Waisea Motonivalu went and asked him cigarette. Waisea Motonivalu then punched Jay Prasad. Jay Prasad had then ran out of the house and he was followed by Waisea Motonivalu. Waisea Motonivalu grabbed the Jay Prasad and dragged him to the nearby duruka plantation. Waisea Motonivalu then punched and stomped on the Jay Prasad. Waisea Motonivalu told Niko Baleiwairiki and Eroni Raivani to go inside the house and get the outboard engine. They then went inside and found that the outboard engine was chained to the floor. While they were trying to unfasten the outboard engine, Waisea Motonivalu came in and told Niko Baleiwairiki to go to Jay Prasad. Niko

Baleiwairiki went out and stayed close to Jay Prasad who was lying on the ground. Niko Baleiwairiki kept on punching Jay Prasad on his face, when he tried to shout or asked for help. Niko Baleiwairiki went back into the house and managed to take the engine out. They then hid the engine and went. On their way back, they met Ulaiasi Tuikoro. According to the agreed facts, the defence does not dispute the cause of death of Jay Prasad.

51. The second accused Niko Baleiwairiki admitted in his evidence that he went to the deceased house with Waisea Motonivalu as Waisea Motonivalu asked him to come. He waited outside when Waisea Motonivalu went inside the house. He then heard sound like someone was running and thuds and the screaming of Jay Prasad. Niko Baleiwairiki then left the scene as he was afraid.
52. According to the prosecution case, Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani had formed a common intention to prosecute an unlawful act, which was to rob the outboard engine of Jay Prasad. In the execution of the said unlawful plan, Waisea Motonivalu had gone beyond as planned and assaulted Jay Prasad and killed him. Meanwhile, they managed to rob the outboard engine from Jay Prasad as well. Therefore, the prosecution alleges that Niko Baleiwairiki and Eroni Raivani are liable to the killing of Jay Prasad, even though Niko Baleiwairiki had only punched on the face of the deceased and Eroni Raivani had not taken part in any way of assaulting Jay Prasad.

Joint Enterprise

53. As a matter of law I must now direct you on the law of joint enterprise. The law says that where two or more persons form a common intention, to do something unlawful together, and while doing something to further that purpose, an offence is committed of such a nature that its commission was a probable consequence of that purpose, each of those who had formed the common intention and had taken part in furtherance of that intention, is deemed to have committed the offence.

54. Let me give you an example. When several men decide to break into a house armed with dangerous weapons, and they are disturbed by a policeman who is killed because one of the men uses his weapon, each of the accused is guilty of the murder of the policeman even if only one person used the weapon. This is because, when several people decide to commit burglary with dangerous weapons, the fact that the weapons might be used, and someone is killed as a result, is a probable consequence of the common intention to commit burglary with weapons. However, if the use of weapons was not contemplated by the others, and they did not know that the main offender was carrying a weapon, then there is no joint enterprise, and the secondary parties cannot be guilty of the murder.
55. The question is to determine whether there was such a common intention in this case, shared by each of the three accused, and whether the deaths of Jay Prasad was a probable consequence of the execution of the said common intention. This is the matter that you have to decide in respect of the first count, on the basis of the evidence in this case. Accordingly, the prosecution has to prove beyond reasonable doubt that:
- i) The three accused, namely Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani made a plan to rob the outboard engine of Jay Prasad,
 - ii) In order to execute the said plan, they have gone to the house of Jay Prasad,
 - iii) While executing the said plan, Waisea Motonivalu assaulted Jay Prasad,
 - iv) Jay Prasad died due to the said assaults,
 - v) Niko Baleiwairiki and Eroni Raivani knew that the killing of Jay Prasad would be a probable consequence of the execution of their common plan of robbing the outboard engine of Jay Prasad.

56. In respect of the second count of Aggravated Robbery, the prosecution has to prove beyond reasonable doubt that:

- i) The three accused, namely Waisea Motonivalu, Niko Baleiwairiki and Eroni Raivani made a plan to rob the outboard engine of the Jay Prasad,
- ii) They have executed the said plan,
- iii) And robbed the outboard engine of Jay Prasad.

57. In order to prove the case against the two accused, the prosecution presented the evidence in the form of direct, circumstances and documentary evidence.

Direct Evidence

58. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw or felt the accused was committing the offence; or if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the accused himself having admitted it, these would all be good examples of direct evidence against the accused.

59. In this case, the prosecution relies on the respective caution interviews made by Niko Baleiwairiki and Eroni Raivani to the police during the investigation of this crime. Niko Baleiwairiki and Eroni Raivani had made admissions in committing these offences in their respective caution interviews. I will explain the laws in relation to the caution interviews and the way that you have to take them into consideration in evidence in a while.

Documentary Evidence

60. The evidence presented in the form of documents are considered as documentary evidence. In this case, the prosecution tendered the two sets of documents as agreed bundle of

documents for Niko Baleiwairiki and agreed bundle of documents for Eroni Raivani. Apart from that, the prosecution tendered certain documents as evidence.

Caution Interviews of the Second and Third Accused Persons

61. The four main contentious documents are the two caution interviews and the two charging statements of the second and third accused persons. The prosecution claims that those two caution interviews and two charging statements contain the statements made by the second and third accused admitting their respective responsibilities to these crimes. In contrary, the two accused persons claim that the statements contain in those two caution interviews and the two charging statements were fabricated and made up by the Police Officers.
62. The prosecution presented the evidence regarding the recording of the respective caution interviews and charging statements of the two accused persons. The prosecution contends that the two accused persons in fact made the admissions that have been recorded in the two respective caution interviews and also in the two respective charging statements and those admissions are true.
63. The prosecution says that the second and third accused persons were very corporative and willingly gave their respective answers in the caution interviews. Cpl. Sevuloni, IP Esili, Cpl. Isikeli and Cpl Maivasu in their respective evidence said that they never forced, assaulted, threatened or intimidated second accused during the arrest and also during the recording of the caution interview and his charging statement.
64. In respect of the third accused, the interviewing officer DS Nagatalevu said that he recorded everything that the third accused said during the recording of the caution interview and the charging statement.
65. Meanwhile the second accused claims that he was assaulted, intimidated and threatened by the police officers who made his arrest on the 4th of January 2017. He was afraid of those assaults and threatening during the recording of his caution interview. He was not given

proper meals and was hungry and weak when the recording of his caution interview was recommenced on the 5th of January 2017. Moreover, the second accused said that most of the answers which incriminate him to these offences were not given by him. They were fabricated by the interviewing officer.

66. The third accused claims that most of the answers that have been recorded in the caution interview were fabricated. They are not his answers. You may recall that the learned counsel for the third accused cross examined the interviewing officer regarding the time of the recommencement of the caution interview on the 5th of January 2017. According to the evidence of the interviewing officer and also the caution interview, it was recommenced at 10.40 a.m. on the 5th of January 2017. However, the medical examination of the third accused has also commenced at 10.43 a.m. on the 5th of January 2017. The medical examination report of the third accused and its contents are admitted as one of the agreed facts by the prosecution and the defence. Moreover, the Interviewing Officer said in his evidence that when he completed a page in the laptop, he printed it out and gave it to the third accused to read and sign on it. However, at question 48 of the caution interview, it states that the Interviewing Officer had advised the third accused that he would print out the record of the interview at the conclusion of the recording and then he can read and sign in it.
67. In order to determine whether you can safely rely upon the admissions made by the accused persons in their respective caution interviews and the charging statements, you must decide two issues.
68. Firstly, did the accused person in fact make the admissions? Having considered the evidence presented during the course of the hearing, if you are not satisfied or not sure of that the accused has actually made the confessions in his caution interviews, you must ignore the admission made in the caution interview.
69. Secondly, if you are satisfied, that the accused has made the admission in his caution interview, then it is for you to decide whether the contents of the caution interview are

truthful, and what weight you give them as evidence. It is for you to decide whether you consider the whole of the caution interview or part of it or none of it as truthful, reliable and credible. You must consider all other evidence adduced during the course of the hearing in deciding the truthfulness, credibility and the reliability of the confessions and its acceptability.

70. In doing that, you should consider the evidence of the Interviewing Officers, Charging Officers, Arresting Officers and the second and third accused persons. If you conclude that the alleged threat was made or may have been made to the second accused, it would have been quite improper. You could not rely upon a confession whose reliability is put in doubt by such a threat. In that event you must put the interview of the second accused to one side and place no reliance upon it.
71. In respect of the third accused, if you find that the caution interview has not recommenced at the time as stated in the record of the caution interview on the 05/01/17, you must look for any explanation given by the prosecution witnesses for that. Moreover, whether the interviewing officer had printed out each page at the conclusion of typing of each page, or has he printed out the whole record of the interview at the conclusion of the recording of the interview as stated in question 48. That would assist you to determine the reliability and credibility of the evidence of DS Nagatalevu.
72. You must be mindful that you can only act upon a confession which you are sure is true. In deciding whether the accused made a true confession, you are entitled to have regard to the other evidence in the case.

Admissibility of the caution interview against the co-accused persons

73. If you accept all the caution interviews and the charging statements of the second and third accused or few of them or any of them or one of them, then you must carefully listen to this direction.

74. The caution interview of the accused person is only admissible against the maker of the statements. What the second accused person said in his caution statements is evidence against him only. If the second accused has implicated or mentioned about the first accused Waisea Motonivalu or third accused Eroni Raivani in his caution interview, that cannot be used as evidence against the first accused, Waisea Motonivalu or the third accused, Eroni Raivani. The same principle applies in respect of the caution interview of the third accused person. When you come to consider the case against the one particular accused, you must disregard everything he said in his caution statements against other two accused persons. The caution statements of the accused person can only be used against him. For an example, if Niko Baleiwairiki in his caution interview has stated about any conduct or acts of first accused Waisea Motonivalu or the third accused Eroni Raivani, that cannot be used against either Waisea Motonivalu or Eroni Raivani. Likewise, if Eroni Raivani has stated about any conduct or acts done by Waisea Motonivalu or Niko Baleiwairiki in his caution interview, that cannot be used against them. The same directions apply to the respective charging statements of the second and third accused persons. You must bear this direction in your mind and carefully consider the respective caution interviews and the charging statements of the two accused if you accept them as truthful, reliable and credible.

Circumstantial Evidence

75. It is often the case that direct evidence of all the elements of a crime are not available. The prosecution has to rely upon circumstantial evidence to prove certain elements. In this case, the prosecution relies upon certain circumstantial evidence as well. That simply means that the prosecution is relying upon evidence of various circumstances related to the crime and the accused, which the prosecution says, when taken together with other evidence will lead to the sure conclusion that it was the accused who committed this crime.
76. Circumstantial evidence can be powerful evidence, indeed, it can be as powerful as, or even more powerful than, direct evidence, but it is important that you examine it with care, as with all evidence, and consider whether the evidence upon which the prosecution relies in proof of its case is reliable and whether it does prove guilt, or whether on the other hand

it reveals any other circumstances which are or may be of sufficient to cast doubt upon or destroy the prosecution case.

77. Finally, you should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence or on mere speculation. Speculating in a case amounts to no more than guessing, or making up theories without good evidence to support them.
78. I now draw your attention to some of the circumstantial evidence that the prosecution relies upon. The evidence of Ulaiasi Tuikoro can be considered as circumstantial evidence. He has not seen the occurrence of these crimes. However, he gave evidence stating that the three accused left the drinking party without informing others at the early hours of the 1st of January 2017. Nearly one hour after they left, Ulaiasi Tuikoro had met them again at the junction of Lokia village and Turaki settlement.
79. Moreover, there is no direct evidence that Waisea Motonivalu had punched the deceased Jay Prasad and then chased him after, when Jay Prasad ran out of the house. Furthermore, there is no direct evidence suggesting that Waisea Motonivalu then punched and stomped Jay Prasad and those assaults had caused the death of Jay Prasad. You may find that Niko Baleiwairiki and Eroni Raivani in their respective caution interviews have explained the alleged conducts of Waisea Motonivalu. However, as I explained it before those facts cannot be used in order to establish the alleged conducts of Waisea Motonivalu.
80. You may recall that Niko Baleiwairiki in his evidence said that he saw Waisea Motonivalu went inside the house of Jay Prasad while he was waiting outside of the house. He had then heard sounds like someone was running and thuds from inside the house. He had further heard the shouting of Jay Prasad. This evidence can be taken as circumstantial evidence.
81. Ladies and Gentleman, it is your duty to examine the evidence presented by the prosecution and decides whether you accept them or not. Drawing of inference is a process by which you find from evidence which you regard as reliable, then you are driven to a further conclusion of another fact.

82. Let me give you an example of drawing or forming an inference or a conclusion, which does not arise out of the facts of this case, but will illustrate the need of care in judging whether the facts proved supports the inference of guilt. If my finger print is found in the living room of my neighbour's home, it is a sound inference that at some stage I have been in his living room. It would not, however, support an inference that I was the burglar who stole his DVD recorder from his living room. If you accept my neighbour's evidence that I have never been invited into his home, then, in the absence of some acceptable explanation from me, you might infer that at some stage I had been in my neighbour's home uninvited. You may or may not be driven to the further conclusion that I was the burglar. But, if you also accept that there was a second fingerprint of mine found at the point of entry or, that in my shed there was a DVD recorder found, which my neighbour recognizes as the one stolen from his living room, you, would, no doubt, conclude for sure that I was the burglar. You will notice how the inference of guilt becomes more compelling, depending upon the nature and number of the facts and incidents proved.
83. What conclusion or inference you reach from the evidence is entirely for you to decide. However, in considering what inference you should draw or what conclusion you should reach, it is important to be mindful that speculation has no part in this process. The inference must be the only and certain rational conclusion or inference of the guilt of the accused persons. If the evidence that you accepted or considered as reliable suggests you some other probable inferences or conclusions, which show the innocence of the accused or create a doubt as to the guilt of the accused, you are then not entitled to draw any inference or form any conclusion of guilt of the accused person.

Evaluation of Evidence

84. As I said before, it is your duty to determine whether the prosecution has established beyond reasonable doubt that these two accused are guilty to the two offences as charged. In order to do that you have to evaluate the evidence presented by the prosecution and the defence and determine the reliability and credibility of evidence given by the witnesses.

Reliability of Evidence

85. You must be satisfied that you can rely on the evidence as true, reliable, and credible evidence. In order to do that, you have to be satisfied that evidence is free from mistakes, errors and inaccuracies. If you find the evidence is free from such mistakes, errors and inaccuracies, you can take the evidence into consideration as reliable evidence.

Credibility of Evidence

86. The assessment of credibility of evidence does not concern with unintended inaccuracy, mistakes or errors. It is focused on the lies or inaccurate facts that are intentional and motivated attempts to deceive. The credibility depends on the individual who gives evidence, his motivations, his relationship to and the reaction to the particular situation.
87. Evaluation of the reliability and credibility of evidence will assist you to determine what evidence you may accept and what part of the evidence you may refuse. In doing that, 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 is correctly recalling the facts about which he or she has testified.
88. In assessing evidence of the witnesses, you must consider whether the witness had the opportunity to see, hear and or feel what the witness is talking in the evidence. You should then consider whether the evidence presented by the witness is probable or improbable considering the circumstances of the case. Apart from that you are required to consider the consistency of the witness not only with his own evidence but also with other evidence presented in the case.
89. It is your duty to consider the demeanour of the witnesses, how they react to being cross examined and re-examined and were they evasive, in order to decide the credibility of the witness and the evidence. In doing that you have to keep in your mind that some witnesses

are not used to giving evidence in court and may find the different environment in the court house distracting.

90. Moreover, you must bear in your mind that a witness may tell the truth about one matter and lie about another; he may be accurate in saying one thing and not accurate in another thing.

Brown's Rule

91. You may recall that the second accused in his evidence said that Cpl. Isikeli backslapped him, causing the bleedings in his nose, during the recording of the caution interview. However, the learned counsel for the second accused never asked or proposed about such an incident to Cpl. Isikeli or the Interviewing officer Sgt. Maivasu when they gave evidence. In order to determine this issue whether Cpl. Isikeli had actually assaulted the second accused as he claimed, you can take into consideration the medical examination report made on the 7th of January 2017, which is tendered as an agreed document by the parties.
92. It is a rule of evidence in criminal trials that if one party is going to present a different version of events from the other, witnesses for the opposing party who are in a position to comment on that version should be given an opportunity to comment on them. The failure to such questions could be used to draw an inference that the accused did not give that account of events to his counsel. That in turn, may have a bearing on whether you accept what the accused said on that particular point or event. However, before you draw such an inference you should consider other possible explanations for the failure of counsel to put questions about such different versions.
93. In preparation of the trial, usually the counsel would be given instructions by his client, that is, what his client has to say about the matter in written form or in oral form or both. The counsel then uses that information to ask questions from the witnesses of the opposing side. However, communication between individuals is seldom perfect; misunderstandings

may occur. The counsel may miss something that his client has told him. Amidst the pressures of a trial, counsel may simply forget to put questions on an important matter. You should consider whether there are other reasonable explanations for the failure to ask the above stated two witnesses of the prosecution about such different versions. You should not draw any adverse inference against the accused's credibility unless there is no other reasonable explanation for such failure.

Inconsistencies

94. You have heard that Cpl. Sevuloni said that they had waited for other two teams which went to arrest other two suspects for ten to fifteen minutes at the bus stop of the Lokia village along the Koronivia road. IP Esili said that they waited at Lokia landing for the other two teams after they arrested Niko Baleiwairiki on the 4th of January 2017. Moreover, Cpl. Sevuloni said that there were only three officers in the vehicle including himself, when they were escorting the second accused to the Nausori Police Station after he was arrested. Meantime, IP Esili said that there were four police officers including himself inside the vehicle, while they were escorting the second accused to the police station. The 2nd accused in his evidence said there were 4 people inside the vehicle including himself.

95. If you find any such inconsistency or omission in the evidence given by a witness with the evidence given by another witnesses, it is necessary to decide firstly, whether it is significant and whether it affects adversely to the reliability and credibility of the issue that you are considering. If it is significant, you will next need to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment of the reliability of such witness.

96. In doing so, you must take into consideration that most of the humans do not have a photographic memory. Memory is fallible. A person could not be able to remember each and every piece of detail.

Evidence of Defence

97. I now kindly draw your attention to the evidence adduced by the second accused. The second accused elected to give evidence on oath. The sound accused is not obliged to give evidence. He is not obliged to call any other witnesses. He does not have to prove his innocence. However, the second accused decided to give evidence. Therefore, you have to take into consideration the evidence adduced by him when determining the issues of fact of this case.
98. Accordingly, it is for you to decide whether you believe the evidence given by the second accused. If you consider that the account given by the second accused is or may be true, then the accused must be acquitted.
99. If you neither believe nor disbelieve the version of the second accused, yet, it creates a reasonable doubt in your mind about the prosecution's case. You must then acquit the second accused from this charge.
100. Even if you reject the version of the second accused that does not mean that the prosecution has established that the second accused guilty for these offences. Still you have to satisfy that the prosecution has established on its own evidence beyond reasonable doubt that the second accused has committed these offences as charged in the information.

Final Directions

101. Having considered all the evidence presented during the course of the hearing, if you believe and satisfy that the prosecution has failed to prove beyond reasonable doubt that

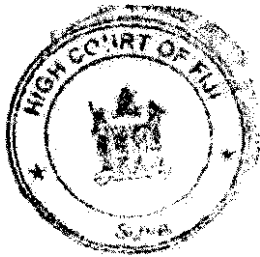
the second accused has committed the offence as charged under count one, you must find the second accused not guilty for the offence of Murder as charged.

102. If you believe and satisfy that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence as charged under count one, you must find the second accused guilty for the offence of Murder as charged.
103. If you believe and satisfy that the prosecution has failed to prove beyond reasonable doubt that the third accused has committed the offence as charged under count one, you must find the third accused not guilty for the offence of Murder as charged.
104. If you believe and satisfy that the prosecution has proven beyond reasonable doubt that the third accused has committed the offence as charged under count one, you must find the third accused guilty for the offence of Murder as charged.
105. Likewise if you believe and satisfy that the prosecution has failed to prove beyond reasonable doubt that the second accused has committed the offence as charged under count two, you must find the second accused not guilty for the offence of Aggravated Robbery as charged.
106. If you believe and satisfy that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence as charged under count two, you must find the second accused guilty for the offence of Aggravated Robbery as charged.
107. If you believe and satisfy that the prosecution has failed to prove beyond reasonable doubt that the third accused has committed the offence as charged under count two, you must find the third accused not guilty for the offence of Aggravated Robbery as charged.
108. If you believe and satisfy that the prosecution has proven beyond reasonable doubt that the second accused has committed the offence as charged under count two, you must find the second accused guilty for the offence of Aggravated Robbery as charged.

Conclusion

109. Madam and Gentleman assessors, I now conclude my summing up. It is time for you to retire and deliberate in order to form your individual opinions. You will be asked individually for your opinion and will not require to give reasons for your opinion. When you have reached to your opinion, you may please inform the clerks, so that the court could reconvene.

110. Learned counsel of the prosecution and the accused, do you have any redirections to the assessors?



A handwritten signature in black ink, appearing to be "R.D.R.T. Rajasinghe".

R.D.R.T. Rajasinghe
Judge

At Suva
08th April 2019

Solicitors
Office of the Director of Public Prosecutions for the State.
Koroi Law for the 1st Accused.
Office of the Legal Aid Commission for the 2nd Accused.