

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 152 of 2017

BETWEEN : **STATE**

AND : **RIZWAN HAZRAT ALI**

Counsel : *Mr. A. Singh for the State*
Mr. I. Khan with Mr. S. Heritage for the Accused

Hearing on : *28th – 31st of July 2020 & 5th of August 2020*
Summing up on : *12th of August 2020*

SUMMING UP

Ladies and gentleman assessors;

1. It is now my duty to sum up the case to you. I will now direct you on the law that applies in this case. You must accept my directions on law and apply those directions when you evaluate the evidence in this case in order to determine whether the accused is guilty or not guilty. You should ignore any opinion of mine on the facts of this case unless it coincides with your own reasoning. You are the Judges of facts.
2. As the representatives of the society, your role is to assist this legal system to serve justice. In doing so, you are guided by two equally important principals of prudence. To wit;
 - i) If a person has committed an offence, he should be meted out with an adequate punishment.

In other words, if you are sure that the accused has committed the alleged offence, then it is your duty to find him guilty. If an offender escapes scot free, he'll be ridiculing this legal system. You have a duty to not to let that happen.

ii) An innocent person should never be convicted.

There is a saying that it is better to let 100 offenders go free than to convict one innocent person. That is, unless you are very sure that the accused have committed the alleged offence, you should not find them guilty.

If any of the said principles are violated, it would amount to a failure of the system, thus you have failed in your duty to the society. Having reminded you of your duty let me proceed.

3. Evidence in this case is what the witnesses said from the witness box inside this court room and the admissions made. As I have stated you in my opening address, your opinion should be based only on the evidence presented inside this court room. If you have heard, read or otherwise come to know anything about this case outside this court room, you must disregard that information.
4. A few things you heard inside this court room are not evidence. This summing up is not evidence. The arguments, questions and comments by the counsel for the prosecution or for the defense are not evidence. A suggestion made by a counsel during the examination of a witness is not evidence unless the witness accepted that suggestion. The arguments and comments made by counsel in their addresses are not evidence. You may take into account those questions, suggestions, arguments and comments when you evaluate the evidence only to the extent you would consider them appropriate.
5. You must not let any external factor influence your judgment. You must not speculate about what evidence there might have been. You must approach the evidence with detachment and objectivity and should not be guided by emotion. You should put aside all feelings of sympathy for or prejudice against, the accused or anyone else. Your emotions should not influence your decision.
6. You and you alone must decide what evidence you accept and what evidence you do not accept. You have seen the witnesses give evidence before this court, their behavior when they testified and how they responded during cross-examination. Applying your day to day life experience and your common sense as representatives of the society, consider the evidence of each witness and decide

how much of it you believe. You may believe all, a part or none of any witness' evidence.

7. When you assess the testimony of a witness, you should bear in mind that a witness may find this court environment stressful and distracting. Witnesses have the same weaknesses you and I may have with regard to remembering facts and also the difficulties in relating those facts they remember in this environment. Sometimes a witness may have other concerns when giving evidence. A witness may be worried that the evidence would incriminate him/her or reveal a safely guarded secret. Or else he/she might honestly forget things or make mistakes regarding what he/she remembers.
8. In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his/her evidence. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. You may also find inconsistencies between the evidence given by different witnesses. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you should not expect a witness to have a photographic memory or every detail to be the same from one account to the next.
9. However, if there is no acceptable explanation for the inconsistency 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 inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by the witness is a matter for you to decide.
10. Therefore, if there is an inconsistency 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 the witness' evidence is inaccurate; or you may accept the reason the witness provided for the inconsistency and consider him to be reliable as a witness.
11. You may also consider the ability and the opportunity a witness had, to see, hear or perceive in any other way what the witness said in evidence. You may ask

yourself whether the evidence of a witness seem reliable when compared with other evidence you accept. These are only examples. It is up to you, how you assess the evidence and what weight you give to a witness' testimony.

12. Based on the evidence you decide to accept, you may decide that certain facts are proved. You may also draw inferences based on those facts you consider as directly proved. You should decide what happened in this case, taking into account those proved facts and reasonable inferences. However, when you draw an inference you should bear in mind that, that inference is the only reasonable inference to draw from the proved facts. If there are two or more reasonable inferences to draw, one or more against the accused, as well as one or more in his favor, based on the same set of proved facts, then you should draw the most favorable inference to the accused.
13. As a matter of law you should remember that the burden of proof always lies on the prosecution. An accused are presumed to be innocent until proven guilty. This means that it is the prosecution who should prove that the accused are guilty and the accused are not required to prove that they are innocent. The prosecution should prove the guilt of the accused beyond reasonable doubt in order for you to find them guilty. That is, you must be sure of the accused person's guilt.
14. In order to prove that the accused are guilty, the prosecution should prove all the elements of the offence against the accused beyond reasonable doubt. If you have a reasonable doubt on whether the prosecution has proved a particular element of the offence against the accused, then you must give the benefit of that doubt to the accused and find the accused not guilty. A reasonable doubt is not a mere imaginary doubt but a doubt based on reason. I will explain you the elements of the offence in detail in a short while.
15. You are not required to decide every point the learned counsel in this case have raised. You should only deal with the offence the accused are charged with and matters that will enable you to decide whether or not the charge is proved against the accused.
16. You will not be asked to give reasons for your opinion. In forming your opinion, it is always desirable that you reach a unanimous opinion. But it is not mandatory.
17. Let us look at the Information. The Director of Public Prosecutions has charged the accused of the following offence;

Statement of Offence

Murder: Contrary to section 237 of the Crimes Act of 2009.

Particulars of Offence

Rizwan Hazrat Ali on the 12th of June, 2017 at Sigatoka in the Western Division, murdered **Sela Macanawai Degei**.

18. Now I will deal with the essential elements of the offence. Section 237 of the Crimes Act reads as;
237. 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.
19. Accordingly, in this case, to prove the offence of Murder the prosecution must prove the following elements beyond a reasonable doubt.
- a) The accused
 - b) Engaged in a conduct
 - c) That conduct caused the death of Sela Macanawai Degei
 - d) Accused intended to cause the death of Sela Macanawai Degei,
or
Accused was reckless as to causing the death of Sela Macanawai Degei by that conduct.
20. The first element of the offence is concerned with the identity of the person who is alleged to have committed the offence. It is undisputed that the accused and the deceased had a fight and as a result of that fight the deceased died. Though the way the said incident occurred is disputed, the identity of the accused is not challenged.
21. To engage in a conduct is to do an act which is a product of the will of the accused. The accused disputes that he stabbed the deceased. In considering this element you should be satisfied beyond reasonable doubt that the accused stabbed the deceased and also that is a product of the will of the accused and it was not accidental. Simply put, in order to prove the second element, the

prosecution has to prove beyond reasonable doubt that the act of stabbing is deliberate and not accidental.

22. When you deal with the issue whether the conduct of the accused caused the death of the deceased you should remember that, in law, the act of the accused need not be the sole or principal cause, but the act should significantly contribute to the death. Therefore, if you are satisfied beyond reasonable doubt that the accused's conduct significantly contributed to the death of the deceased, that is sufficient to satisfy the third element above.
23. With regard to the fourth element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt either, 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 fourth element. It is not possible to have direct evidence regarding a person'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 an accused from the facts and circumstances you would consider as proved.
24. 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.
25. In the event you find that the accused did not have the intention to kill 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. The accused was reckless with respect of causing the death of the deceased, if;
 - a) He was aware of a substantial risk that the death will occur due to his conduct; and
 - b) Having regard to the circumstances known to him, it was unjustifiable for him to take the risk.
26. What you have to consider with regard to this particular state of mind is whether the accused did foresee or realize 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. Accused must foresee that death was a probable consequence or the likely result of his conduct and after realizing 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.

27. If you have a reasonable doubt that the accused intended to cause the death of the deceased then you should consider the offence of Manslaughter as set out in section 239 of the Crimes Act. Section 239 reads as;

239. 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—
(i) intends that the conduct will cause serious harm; or
(ii) is reckless as to a risk that the conduct will cause serious harm to the other person

28. The difference between the offense of Murder and the offence of Manslaughter is that;

Murder-	The accused intended to cause the or was reckless as to causing the death of the deceased, and
Manslaughter-	The accused intended that conduct will cause serious harm or was reckless as to a risk that the conduct will cause serious harm to the deceased

29. If you are sure that all the necessary elements of the offence of murder or manslaughter have been proved beyond reasonable doubt, then you must consider the defense of right of self-defense as set out in section 42 of the Crimes Act.

30. Section 42 of the Crimes Act reads;

42.— (1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.

(2) A person carries out conduct in self defence if and only if he or she believes the conduct is necessary:

(a) to defend himself or herself or another person; or
—and the conduct is a reasonable response in the circumstances as he or she perceives them.

31. If the accused has acted in self-defense within the limits of his rights, he has not committed any offence. To qualify for this defense, the accused should have believed that his conduct was necessary to defend himself and his conduct was a reasonable response as to the circumstances. If you are satisfied that the accused acted within his rights of self-defense, and under the particular circumstances his response was reasonable, you should find the accused not guilty of any offence.
32. If you are of the view that the accused acted in self-defense, but his response is unreasonable and/or excessive under the given circumstances, then the law is that the right of self-defense will not apply.
33. In analyzing the evidence, you must keep in mind that statement made by a witness outside this court is not evidence. But when a certain portion of his statement is pointed out and admitted as true, then that part of the statement becomes evidence. If there is an inconsistency between such and the rest of the evidence, you should consider that as an inconsistency and analyze it as for the directions given before and give it an appropriate weight.
34. The following were recorded as admitted facts. They would not require any further proof. You must consider them as correct and accurate.
 - i) Sela Macanawai Degei (hereinafter referred to “Deceased”) (was 24 years old), Rizwan Hazrat Ali (hereinafter referred to “Accused”) (was 32 years old, digger operator) were employed by Khan’s Brother Technical Bulldozing Works.
 - ii) Khan’s Brother Technical Bulldozing Works is situated at Sovi, Nadroga.
 - iii) The accused was medically examined on the 12 June 2017 at the Sigatoka Hospital. He received injury on his right hand as per the medical report.
 - iv) On the 13th of June 2017, Semi Maseura (52 years old. Carpenter) identified the body of the deceased as Sela Macanawai Degei. Semi Maseura is the uncle of the deceased.

- v) The police conducted an investigation and arrested the accused. The accused was interviewed under caution.
- vi) The accused was charged for the offence of Murder contrary to section 237 of the Crimes Act 2009.

Summary of evidence

35. The 1st witness for the prosecution or the PW1 was Retired police officer Mr. Terotuma Voi Ravai. He states that;

- i) In 2017 he was working attached to the Lautoka Police Station as an Inspector of Police. He was in charge of the forensics in the Western Division.
- ii) He recalls the 12th of June 2017. On that day he was informed of a murder at Sigatoka and was instructed by his superior to visit the scene and to attend to the forensics.
- iii) Accordingly he has visited the scene around the mid-day and having observed the scene has photographed it. A booklet of the same is marked and produced as PE1 and the said photographs were marked from PE1 (a) to PE1 (o).
- iv) In addition he has prepared two sketch plans and a distance chart and the said documents were marked and produced as PE2 (a) to PE2 (c).
- v) In answering cross examination the witness states, though PE2 (a), (b) and (c) were dated 14th of June 2017, he drew them on the 12th of June 2017.
- vi) He has visited the crime scene after about 3 hours from the incident. He has visited the scene with Cpl. Josateki and Constable Pita.

36. The 2nd witness, Ms. Teresia Elina Bulou was the main witness for the prosecution. Presently she is 20 years old. She is a cousin of the deceased. Her evidence was that;

- i) She has studied up to form 5 in school and thereafter has attended the Nadroga Technical College for 2 years, studying automotive. In June 2017, she was at Khan's Brothers as an attachee, familiarizing with the work.
- ii) Her cousin Sela, the deceased had arranged her to work at Khan's and she was staying with him, during that time.
- iii) On the morning of the 12th of June 2017, she has gone to work, with Sela. She has informed Sela of something which Rizwan the accused, had done to her and Sela was angry about it. First Sela has taken her to Rizwan's house as he wanted to see Rizwan. Rizwan's wife has come with them to

see Rizwan at the garage. When they came to the garage, Sela has gone towards Rizwan.

- iv) Rizwan was next to the fuel drum and Sela went and shouted at him. When Sela shouted at him Rizwan was just staring at Sela. Then Sela has started throwing punches on Rizwan. Rizwan was trying to avoid the punches and was covering his head with his hands. Then Rizwan also has thrown punches on Sela and whilst punching, stabbed Sela. She has seen the knife for the first time in Rizwan's T-shirt pocket, when he was avoiding Sela's punches. She has seen the handle of the knife. It was sharp side down inside his pocket. She made out that was a knife when Rizwan threw it to the edge of the drum after stabbing Sela.
- v) She saw the knife first, in Rizwan's pocket and then saw it again when Rizwan threw it away. In between, she has not seen the knife at any time. Later she says that she saw Rizwan, taking out the knife and stabbing Sela while throwing the punches at Sela. It should be noted that it is inconsistent with her earlier evidence. Further, she goes on to state that she saw Rizwan cutting his hand before throwing away the knife and saw the knife when he cut his hand with it. This is also much inconsistent with her earlier evidence.
- vi) After Rizwan threw the knife away, Saula, another work mate of theirs has come there. Then Rizwan has started yelling in pain then. She identifies the shown knife to be similar to what she saw that day, with Rizwan and marks and produces it as PE3. She has not seen the PE3 before that day.

37. In answering the cross-examination, the witness states that;

- i) Prior to giving evidence, she has given statements to the police on 2 occasions; to wit, 12th of June 2017 and 13th of October 2017.
- ii) 1st statement was given after about 3 hours from the incident. Accordingly on that day she has gone with Sela to Rizwan's house and Rizwan's wife has come with them to the work place. At the work place, Rizwan's wife has called Rizwan and the witness had been with her. Then Sela approached Rizwan, pulled him by the neck of the T-shirt and when Rizwan bowed down, Sela has punched him. Rizwan was holding a spanner when Sela approached him. Then they have punched each other for a while and Sela has fallen down holding his stomach. At that time she has seen Rizwan's hand covered with blood.
- iii) The 2nd statement was given on the 13th of October after 4 months from the incident. In giving this statement, three police officers have come in search of her to her school and taken her to the police station to record

her statement again. One lady officer has recorded the statement and there has been another officer when recording it. They have not given any reason for recording it again. The 2nd statement was given on the recollection of events after 4 months from the incident. It should be noted that the name of the officer who recorded the same is not given. It is stated to be a self-recorded statement. It is common knowledge that any person other than a police officer cannot record a statement by his/ her own. Therefore, it indicates that whoever the person that recorded it does not want it to be disclosed.

- iv) Referring to the 2nd statement the witness states that she had a better recollection then, than when she made the 1st statement. It should be noted that in the 2nd statement the date of the incident is given as the 5th of June 2017, whereas all the other evidence directs it to have happened on the 12th of June 2017. Further, she mentions of having seen a knife at the time of the incident for the first time in this 2nd statement. She has not mentioned anything about a knife in her 1st statement.
- v) She admits that Sela was the one who went to Rizwan and punched several times and then only Rizwan started punching back Sela. Though she stated that she saw Rizwan stabbing Sela, she has not stated so to the police in any of her statements. The witness admits that the interview which led to her 2nd statement was conducted in question and answer format but the questions were not recorded and only her answers are recorded in her statement.
- vi) In her 1st statement, she stated that Rizwan was holding a spanner when Sela approached him. She states that she forgot to mention that to the police in her 2nd statement as the police questioned her only regarding the knife. It should be noted that her evidence in this regard is very much inconsistent.
- vii) The witness states that the T-shirt Rizwan wore had a top pocket and she saw the handle of the knife in it. The defense suggests that the T-shirt which Rizwan wore did not have a pocket and she denies it. However it should be noted that t-shirt was recovered and taken into the custody though not produced in court. Though the state undertook to bring that to court, they have not done so and you may draw an appropriate and a reasonable inference from it.
- viii) Having stabbed Sela, this witness has seen Rizwan taking the knife and cutting his left hand with it. As for the admitted medical certificate of Rizwan his injury was on his right palm. Therefore her evidence is inconsistent on that as well.

- ix) She admits that Saula came there when Sela and Rizwan were still fighting. Saula came and pulled Sela away. She further states that by the time Saula came, Rizwan has already thrown the knife away and there was bleeding from his hand. She did not see where Sela was stabbed but states that Rizwan stabbed Sela. You should evaluate the consistency of this evidence and give it an appropriate weight.
- x) The witness states that she is unaware of Sela assaulting Rizwan on several occasions, but admits that Sela assaulted Rizwan on Saturday, two days prior to the incident.
- xi) At the time of the incident, Sela pulled up Rizwan's shirt to cover Rizwan's face and then started punching him. Rizwan fought back without seeing in wilderness.
- xii) When suggested that Rizwan received the cut injury when fighting back in wilderness, the witness refrains from answering. When further suggested that Sela was having the knife and Rizwan held it from the sharp side and when Sela pulled that Rizwan had the cut injury, the witness refrains from answering. When it is suggested that thereafter Rizwan held Sela from his back the witness says that she could not recollect.

38. The PW3 was Saula Batiratu. His evidence was that;

- i) In 2017, he was working at Khan's Brothers Company and was residing at Vatukarasa.
- ii) He has joined the Company in the beginning of the 2017 and was working there as a mechanic. There were about 10 employees working and some were Wise, Bobby, Tarusila, Faiyaz, Rizwan Pande, Sela, Bulou and another Bobby. He knows Sela well as they worked together and they were related too and Sela was the No.1 mechanic there. Sela was staying at the farm house and Bulou, his cousin was also with him.
- iii) He knows Rizwan, the accused as he too was working there as a digger operator. When he came to work on the 12th of June 2017 morning, Rizwan and Bobby were already there.
- iv) He was cleaning the grader and the other two were also with him. Then Bobby has asked Rizwan to get the oil from drum inside the garage and Rizwan has gone to do it.
- v) Then Sela has come to the back of the grader saying 'Rizwan, you lied to me' and gone to the front of the grader. Then the witness has continued with his work and after a while he has heard some things falling and gone there. When he arrived there he has seen Sela punching Rizwan but, was without any force and not being able to punch properly. He has separated

the two and was talking to Rizwan when Sela fell on to the ground. He has taken them to the hospital.

- vi) When he went to the scene, Sela was punching Rizwan and Rizwan had his head down and was avoiding the punches by covering his head with his hands. He did not see any injury on Rizwan, but saw blood on Sela's t-shirt. Having separated them, while he was attending to Sela, he heard Rizwan shouting that he is injured. He did not see how Rizwan got injured.
- vii) Apart from him, Sela and Rizwan, Bobby, Tarusila and some others were there at that time. Sela came in together with Bulou and Rizwan's wife that morning and Sela had his back towards Bulou at the time of the incident.
- viii) He does not know how Sela or Rizwan got injured that day. When he pulled back Sela, Sela had his hands on the chest and was already injured. He has worked with Rizwan for about 4 months and knows Rizwan to be a right-hander. He has not seen any pocket in the t-shirt Rizwan was wearing underneath his shirt.
- ix) The witness states that there were three ways to leave the place where Rizwan was.

39. In answering the cross examination posed on behalf of the accused, the witness states that;

- i) He did inform the police in his statement that when he saw them, Sela was punching Rizwan without any force and that was not recorded by the police.
- ii) Before the alleged incident, Sela was shouting in I-Taukei at Rizwan in an angry manner. Sela swore at Rizwan and said that 'Rizwan, you lied to me'.
- iii) The witness admits stating to the police that he saw blood on both of them. But now states that he saw blood, only on Sela and what he told police soon after the incident is wrong.
- iv) Later, the witness goes on to say that he saw blood on both of them and saw injuries on both of them and what he told police was correct and that is the truth.
- v) The real name of the person referred to by the witness as Bobby, who was working with him and Rizwan that morning is Mohammed Janif.
- vi) Having heard the noise, when he came towards them, Sela was there first and had his back towards him and Rizwan was further away, facing him.

40. The next witness, PW4 was Tarusila Bolakoro. Her evidence is that;

- i) She has studied to level 5 at school and thereafter attended Nadroga Technical College and studied Automotive Engineering . She was doing her practical at Khan's Brothers Bulldozer Works at Sovi Bay, since 15th of May 2017. On the 12th of June 2017 she was at work by 8.00am.
- ii) By the time the incident took place she was cleaning a vehicle parked there. She heard someone screaming 'stop that'. It was a male voice in I-Taukei, in Nadroga dialect. She has ignored that and continued with her work. After a while she has looked at that side and has seen Saula pulling Sela towards the wall and another workmate trying to stop Rizwan.
- iii) She had seen Sela touching his chest as he is in pain. Sela looked dizzy and was not standing properly. Then Sela has fallen on to the ground face downwards. She has also seen Rizwan screaming holding his hand.
- iv) She did not see any weapon at the time of the incident. She did not see how Sela or Rizwan got injured. She did not go to the scene of the incident thereafter. But later when she was going back to work, she has seen the knife beside the blue cylinder. She has seen the knife from where she has been working. It should be noted that there was a wall towards that side and it is impossible to see the place where the knife was from where she is said to be.
- v) In answering the cross examination, the witness states that she saw blood on Rizwan's hand and it was coming from his right palm. The witness admits that Rizwan is married to Nadroga Itaukei lady and lives in front of the garage.

41. The PW5 was constable 4949, Pita Davuiqalita. His evidence was that;

He has been in the Fiji Police Force since 2013. He was serving in the Lautoka Police Station attached to the forensics department in 2017. On 12th of June 2017, he has received instructions from his senior officer, Inspector Terotuma, to attend to a case of Murder in Sigatoka. Accordingly he has gone with Inspector Terotuma and Cpl. Josateki to the crime scene at Sovi Bay, Sigatoka. He has been the evidence collector. He has collected the red stained knife among other things and identifies and produces the said knife marked PE3.

In answering the cross examination the witness states that he did not find any finger prints on the wooden handle of the knife as he did not check it for any because it was stained with blood. Though the swab of blood taken from the knife is sent for analysis, he is unaware of any report of it.

42. The final witness called on behalf of the prosecution, the PW6 was Dr. Avikali Mate. She is a MBBS qualified doctor and has a post graduate diploma in pathology from the Fiji National University, College of Medicine. She has become the Pathology Registrar at the CWM Hospital and then transferred to the Forensic Pathologists unit in the Forensic Science Services in the Fiji Police Force. She has carried out more than 800 autopsies since 2012 and given evidence in more than 100 cases. A post mortem report prepared by her in regards to the deceased Sela Macanawai Degei is identified, marked and produced as PE4. The said post-mortem examination was conducted on the 13th of June 2017. On examination of the body of the deceased, two injuries were identified. 1st was a vertically placed incised stab wound on the right front chest wall. It was 21 mm in length. The 2nd was at the back of the chest of 25mm in length. The 1st wound in the front was deeper compared to the 2nd wound. Both wounds could have been caused by the same weapon. The witness identifies the knife PE3 as a possible weapon to have caused both the injuries. The 1st injury has incised the sack which contains the heart and there has been blood collected there. It was caused by a sharp object. The cause of death was the excessive loss of blood due to the injury caused to the heart area. In answering the cross examination the witness states that 1st injury could have caused by the deceased falling on the knife while he was holding it.
43. With the leading of the above evidence from PW1 to PW6 and marking and producing PE1 to PE4, prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering the elements of the offence, decided to call for defense, acting under the virtue of section 231(2), of the Criminal Procedure Act, explaining and giving the due rights of the accused.
44. The accused having understood his rights, elected to give evidence on his behalf. His evidence is that;
- i) He is 37 years old, married and has 3 school going children. He has studied up to class 6.
 - ii) On the 12th of June 2017 he has been working as a digger operator at Khan's Brothers and was at work by 8.15am. He has asked his boss, what to do and as told he has gone to get some oil from the drum.
 - iii) While taking the oil someone has come from the back and hit him on the back of his head. When he turned round and seen that was Sela. The witness was wearing a long sleeve shirt on top of a t-shirt. After punching

- him once, Sela has lifted his shirt and covered his head with it and continued assaulting him. He has received some punches on his face.
- iv) Then he too has started punching Sela. But Sela was not hurt as he could not see Sela due to his face being covered with his shirt.
 - v) After a while he has felt a cut in his hand and it has been painful. The cut was on his right palm. Then he has held Sela from the back together with the Sela's hand so that Sela could not attack him again. Sela has tried to get released but he has held him tightly. While struggling, Sela has fallen in front and the witness has fallen on top of Sela. Thereafter he has stood up quickly and uncovered his face. Then he has seen Sela lying on the floor with the knife on the chest.
 - vi) That knife was Sela's. He has seen it before with Sela. Sela used it to open tuna tins when they had bread and tuna.
 - vii) Then the others came and took them to the hospital and he was admitted to the hospital. His medical examination form is identified and submitted as DE1.
 - viii) He was caution interviewed by the police on the 17th of June 2017. It was done in Hindi. He has placed his thumb print on the original. He has told the truth and what really happened, in the caution interview. He has told that the knife was Sela's.
 - ix) On the day of the incident, he was wearing a red t-shirt with lee pants and a blue shirt. There were no pockets in his t-shirt. He has given them to the police voluntarily and they are entered in the search list as recoveries. A copy of the said search list is marked and produced as DE2.
 - x) The witness denies stabbing Sela.

45. In cross examination by the prosecuting counsel, the witness states that;

- i) He has been working at Khan's Brothers since 2013. Sela has been there before him, but Sela was not a full time worker and used to come and go.
- ii) His relationship with Sela was not good. In 2017 June, Teresia Bulou was working for Khan's Brothers as an attachee. He denies having had a relationship with Teresia. In the month of June Sela too was working for Khan's brothers.
- iii) 2 days before the alleged incident, Sela fought with him while travelling inside a vehicle. He made a complaint to the police about that. But police did not take any action on that.
- iv) When Sela came to him from behind, Sela has punched him on the back of his head. He has not told that to the doctor who examined him as his hand was painful.

- v) The shirt he wore over the t-shirt was not buttoned at that time. Sela pulled it up and covered his face with it. He could not see what was happening and felt he is being punched. The punches have landed on his face and the body and they were heavy and painful. He could not take the shirt off his head as Sela was punching him and he has tried to defend himself by covering his head with his hands.
 - vi) He has tried to defend him-self by punching and pushing Sela. He has managed to hold Sela from his back together with a Sela's hand.
 - vii) When Sela tried to release himself, they slipped on the oil on the floor and both of the fell. The witness has fallen on top of Sela. Sela has fallen face downwards on the floor. When he got up and uncovered his face, he has seen Sela bleeding from the chest. The knife was on the Sela's chest. But when Sela tried to get up, the knife fell on to the floor. Then Sela has stood up but has fallen again.
 - viii) The knife has been on the floor between the green barrel and the lorry on the middle of the floor when he finally saw the knife. He doesn't know how or who moved it to the edge by the wall.
 - ix) He has been filling oil from the barrel marked No7 in PE1 (L). There were three exists to get out of there. When suggested that he could have walked out using any of the said exists the witness denies and states that Sela came from the front side and the back exists were covered by the tool boxes on the floor. When suggested that he could have cried for help, the witness states that it happened all of a sudden and he was shocked.
46. With the said evidence the accused has closed his case marking the exhibits DE1 and DE2, without calling any other witness.
47. That is a summary of the evidence given by the witnesses. Please remember that I have only referred to the evidence which I consider important to explain the case and the applicable legal principles to you. If I did not refer to certain evidence which you consider important, you should still consider that evidence and give it such weight you may think appropriate. As I have already explained, which evidence you would accept and which evidence you would not accept is a matter for you and you alone to decide.
48. Remember that you should first decide on the credibility and reliability of the witnesses who gave evidence in this case and accordingly decide what facts are proved and what reasonable inferences you can draw from those proven facts. Then you should consider whether the elements of the offence have been proven

beyond reasonable doubt. You should take into account my directions where relevant, in deciding whether the prosecution has proved all the elements.

49. Considering all the evidence you may decide to accept, you should first decide whether you are sure that the prosecution has proved that the accused stabbed the deceased, Sela. If you have any reasonable doubt of it you should give the benefit of such to the accused and find him not guilty of Murder.
50. If you have no doubt that the accused did stab the deceased then you should consider whether the accused intended to kill the deceased or whether you are sure that the accused was reckless as to causing the death of the deceased.
- a) If you are sure that the accused intended to kill the deceased or whether you are sure that the accused was reckless as to causing the death of the deceased, then you should consider the defence of self defence which I have explained before.
- 1) Having considered the defence of self-defense, if you are satisfied that the accused has acted within his right of self defence, you should find him not guilty of Murder.
 - 2) Having considered the defense of self-defense, if you are not satisfied that the accused acted within his rights or satisfied that the accused exceeded his right of self-defense you should not consider this as a valid defence and find him guilty of murder.
- b) If you are not sure that the accused intended to cause the death or not sure that the accused was reckless as to causing the death then you should find the accused not guilty of murder and consider whether he is guilty of the lesser offence of manslaughter;
Accordingly, you should consider whether the accused either intended or was reckless as to the risk that his conduct will cause serious harm to the deceased.
- (i) If you are not sure that the accused intended to cause serious harm or not sure that he was reckless as to the risk that his conduct will cause serious harm, then you should find him not guilty of manslaughter as well.
 - (ii) If you are sure that the accused intended to cause serious harm or you are sure that he was reckless as to the risk that his conduct will cause serious harm, then you should find him guilty for manslaughter.

51. I must again remind you that even though the accused gave evidence, he does not assume any burden of proving his case. Even in case you decide to disbelieve the accused, you should not consider it to strengthen the prosecution case. The burden of proving the case beyond reasonable doubt remains on the prosecution throughout. Accused's evidence must be considered along with all the other evidence and you can attach such weight to it as you think appropriate.
52. You must remember to assess the evidence for the prosecution and defense using the same yardstick but bearing in mind that it is always the prosecution who should prove the case.
53. Any re-directions? *no*
54. Madam and Gentlemen Assessors, that is my summing up. Now you may retire and deliberate together and may form your individual opinion on the charge against the accused. You may peruse any of the exhibits you like to consider. When you have reached your separate opinion you will come back to court and you will be asked to state your separate opinion.
55. Your possible opinions are;

Is the accused guilty or not of the offense of Murder?
If you decide not guilty, is he guilty or not of the offence of Manslaughter?



*Solicitors for the State
Solicitors for the Accused*

**Chamath S. Morais
JUDGE**

*Office of the Director of Public Prosecutions, Suva
Messrs. I. Khan*