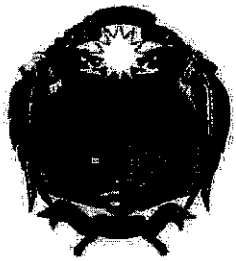

IN THE NAURU COURT OF APPEAL
AT YAREN
CRIMINAL APPELLATE JURISDICTION

Criminal Appeal No. 4 of 2018
Supreme Court Criminal Case No. 3 of 2017

BETWEEN

SAMARANCH ENGAR

APPELLANT

AND

THE REPUBLIC

RESPONDENT

BEFORE: **Justice R. Wimalasena, President**
Justice Sir A. Palmer
Justice C. Makail

DATE OF HEARING:	**30 July 2024**
DATE OF JUDGMENT:	**18 October 2024**
CITATION:	**Samaranch Engar v The Republic**
KEYWORDS:	COURT OF APPEAL – Appeal against conviction – One count of murder – Proof of – Circumstantial evidence – No contest as to death – Whether appellant was the assailant – Crimes Act, 2016 – Section 55 COURT OF APPEAL – Practice & Procedure – Application to summon expert witness – Forensic pathologist – First application refused – Second application granted – Whether trial judge was functus officio after ruling in the first application – Whether second application barred by doctrine of res judicata – Principles of functus officio and doctrine of res judicata discussed – Criminal Procedure Act 1972 – Section 100
LEGISLATION:	Section 55 of the Crimes Act 2016 of Nauru; Section 22 and 32 of the Nauru Court of Appeal Act 2018; Section 100 of the Criminal Procedure Act 1972; Rule 10, 20 and 21 of the Nauru Court of Appeal Rules 2018
CASES CITED:	R v. Gitoa [2013] SBHC; HCSI-CRC 447 of 2006 (17th May 2013); King v. The Queen (1986) 161 CLR 423 (21st October 1986); Johnson v. Miller (1937) 59 CLR 467; R v. Tangye (1997) 92 A Crim R 545 (NSW CA) Clyne v. NSW Bar Association (1960) 104 CLR 186; The Queen v. Green [2002] VCSA 34 (20th March 2002); King v. R (1986) 161 CLR 423; Jovanovic v. The Queen 106 a Crim R 548; The Queen v. G.A.M (No 2) [2004] VSCA 117 (2nd July 2004); Sambasivam v. Public Prosecutor, Federation of Malaya [1950] AC 458; Talbot v. Berkshire County Council (C.A.) [1994] QB 290; Peacock v. The King (1911) 13 CLR 619; GR Logging Limited v. David Dotoana, PNG Forest

Authority & Ors (2018) SC1690; Browne v. Duun (1893) 6 R 67 HL; R v. Lucas [1981] 1 QB 720

APPEARANCES:

COUNSEL FOR the Appellant: **Mr. R Tagivakatini**

COUNSEL FOR the Respondent: **Ms. A Driu**

JUDGMENT

1. The appellant was convicted on a charge of murder of an adult female one Unique Lee Dick contrary to Section 55 of the *Crimes Act,* 2016. He was sentenced to a term of 19 years imprisonment. He appealed against his conviction on nine grounds.

Introduction

2. The charge preferred by the Director of the Public Prosecution ("the DPP") in the information states in part as follows:

*"**SAMARANCH ENGAR** is charged with the following offence:*

Statement of Offence

Murder: *Contrary to section 55(a) (b) (c) of the Crimes Act 2016.*

Particulars of Offence

SAMARANCH ENGAR *on the 10th day of December 2016 at Nauru, intentionally engaged in a conduct that caused the death of Unique Lee Dick, and he was reckless about causing the death of Unique Lee Dick by that conduct."*

3. The prosecution alleged that the appellant caused the death of the deceased by strangling her on her neck in a motor vehicle on 10th December 2016 in Nauru. At trial in the Supreme Court, the prosecution called the following witnesses:

(a) Ursula Amwano,
(b) Damoon Akibwib
(c) Belson Hubert,
(d) Bureka Kakiouea,
(e) Nason Hubert,
(f) Joshua Agege,
(g) David Deireragea,
(h) Foleim Kakiouea,
(i) Joshua Jeremiah,
(j) Sereima Aremwa,
(k) Ronay Dick,
(l) Jayma Bop
(m) Finmay Apadinuwe
(n) Raeko Finch,
(o) Dr Richard Walsh Leona,
(p) Sergeant Iyo Adam, and
(q) Professor David Leo Ranson.

4. It is not clear from the appeal record if Jayjay Bop gave evidence, but the prosecution tendered a post-mortem report by Dr Yeliena Baber dated 15th December 2016.

5. The appellant gave evidence in his defence. He called one witness. The witness was Cullen Gadenang.

Rehearing

6. Before proceeding further, I would like to place on record that this is a rehearing of the appeal because at the time of the first hearing, her Honour Justice Dr Bandaranayake was the Acting President of the Court and presiding President of the Court.

Notice of Appeal

7. The appellant filed three notices of appeal in this appeal. The first was on 1st June 2018 to comply with the time limitation of 30 days provided in Section 22 of the *Nauru Court of Appeal Act* and Rule 10(2)(a) of the *Nauru Court of Appeal Rules,* 2018.

8. The second was on 19th October 2018 to comply with the format for a notice of appeal provided under Rule 10(5) and Form 1 of Schedule 1 of the *Nauru Court of Appeal Rules,* 2018. Finally, a supplementary notice of appeal was filed on 6th September 2019 with two additional grounds of appeal.

Grounds of Appeal

9. At the hearing the appellant advanced nine grounds of appeal in the supplementary notice of appeal which will be addressed below.

Bail

10. Pending the hearing of the appeal, he applied and was granted bail and a stay of his sentence by the Honourable Chief Justice sitting as single judge of the Nauru Court of Appeal on 24th July 2019 pursuant to Rules 20 and 21 of the *Nauru Court of Appeal Rules,* 2018.

Principles of Appeal

11. In considering the grounds of the appeal, the Court is guided by the following principles, when a convicted person appeals to the Nauru Court of Appeal ("the Court") the Court may dismiss the appeal or allow it. If the appeal is dismissed, the appellant's conviction in the Supreme Court is affirmed and continues until the appellant's sentence is fully served. If, however, the appeal is allowed, the conviction shall be set aside. The conviction shall be set aside if: *"(a) if the conviction in all the circumstances is inconsistent with the findings of facts; (b) the judgment was a consequence of an error of law; or (c) a substantial miscarriage of justice has occurred."* See Section 32(1)(a), (b) and (c) of the *Nauru Court of Appeal Act,* 2018.

Grounds 1 and 2

12. The learned counsel for the appellant addressed Grounds 1 and 2 together because they allege an error of law pertaining to "opening addresses" by the prosecutors. Grounds 1 and 2 are restated below:

> *"1. That the Learned Trial Judge erred in law in convicting the Appellant when the prosecution was not able to prove in evidence that the Appellant had manually strangled Unique Lee Dick in Bureka Kaikioua's car as submitted in the opening of the prosecution's case."*
>
> *"2. That the Learned Trial Judge erred in law in convicting the Appellant for the murder of Unique Lee Dick at Jayjay Bop's house when this was not the prosecution's case opened by the prosecution in the prosecution's opening address."*

13. The learned counsel submitted that generally, the prosecutor should outline the evidence on which the Crown or State or the Republic will rely on during the trial and should explain to the Court and to the defence in their "opening address" the legal nature or legal basis of their case.

14. Pertinently, the prosecution informed the Court in the opening address of the appellant's trial as follows:

> *"Your Honour, the information before this court is for murder under section 55(a), (b) and (c) of the Crimes Act. The law of Nauru states: A person commits the offence of murder if (a) the person intentionally engages in conduct, (b) the conduct causes the death*

of that person and (c) the person is reckless about causing the death of that person. The prosecution case is, your Honour, that Mr Samaranch Engar and no other person, manually strangled his girlfriend Unique Lee Dick, that led to her death on the 10th of December 2016. Where, does the court ask? Where did this happen? The prosecution says that this happened inside the vehicle of Mr Bureka Kakioua while it was parked at the Akibwib's place and he was reckless about causing her death. After he strangled her, your Honour, he knew that she had died. He remained with her inside that vehicle and therefore asked for the deceased together with him to be dropped at JJ Bop's place.

Her body, your Honour, and the prosecution will then show, remained with him from midday on Saturday until 10 pm on Saturday, when Ronay Dick, the mother of the deceased, forces her way into that bedroom and discovers a dead child. Your Honour the prosecution has strong circumstantial evidence to show the only person at the Akibwib's residence who had motive and the opportunity to harm the deceased, was Samaranch Engar, the defendant in this matter."

15. The learned counsel submitted that based on the opening address, the prosecution case was, the appellant killed Unique by strangulation inside Bureka's motor vehicle at the Akibwib's place in Menen District. The prosecution should have, in law, led evidence to prove its case based on its opening address.

16. Despite this, the learned trial judge found otherwise, in that:

"In the circumstances it is therefore reasonable to infer that the accused had motive and or intention to harm the deceased. Further, having considered all the hypothesis consistent with innocence of the accused and taking into account other alternatives, I find that the accused had intended to cause, or was reckless about causing the death of the deceased. I find that he did so when he was alone with her at Jayma's house."

17. In conclusion, the learned counsel submitted that it was not open to the learned trial judge to alter the prosecution case and when he did, he made an error of law which had resulted in a miscarriage of justice. Relying on the Solomon Islands Supreme Court case of *R v. Gitoa* [2013] SBHC; HCSI-CRC 447 of 2006 (17th May 2013) the learned counsel urged the Court to declare the trial void.

18. The DPP submitted that these grounds lacked merit because even though the trial prosecutor opened the prosecution case by referring to the motor vehicle and the strangling of the deceased happened or could have happened in it, and that the learned trial judge held that the strangulation happened in the house, it does not alter the prosecution case that the deceased died in the hands of the appellant. The cause of death was neck compression.

19. In relation to *R.v Gitoa* the DPP submitted that that case is distinguishable on its facts and is of no relevance to this case. He submitted that that was a case where the prosecution in the opening address outlined two legal liability theory. First was that the accused was the person who shot the deceased and the second was common purpose based on Section 22 of the *Penal Code.* Then at the closing, the prosecution posited a third alternative.

20. In summing up his submissions, the DPP submitted that in the present case, it is important that the prosecution maintain the legal liability theory of its case until the close of its case. The prosecution's case theory was that the deceased died in the hands of the appellant and the prosecution demonstrated by evidence led at trial that the deceased was not motionless and unresponsive after being inside the motor vehicle and when carried to the house. The death could have been occasioned in the motor vehicle or at the house. On both counts, the appellant was present, and it was open to the learned trial judge to hold that the deceased died in the house.

21. On the issue of opening address, it is one of the procedural safeguards accorded to an accused to ensure fairness in the context of a criminal proceedings. Pertinently, the Court notes the statement in *King v. The Queen* (1986) 161 CLR 423 (21st October 1986) where Deane J referred to *Johnson v. Miller* (1937) 59 CLR 467 at 489 per Murphy J as follows:

> *"It is the right of every accused person to know, with particularity, the case which the prosecution wishes to prove at trial. As a direct consequence of this right, a prosecutor 'clearly should be required to identify the transaction on which he relies and he should be so required to identify the complaint, in spite of its apparent particularity, is equally capable of referring to a number of occurrences each of which constitutes the offence the legal nature of which is described in the complaint. For a defendant is entitled to be appraised not only of the legal nature of the offence with which he is charged but also of the particular act, matter or thing alleged as the foundation of the charge'".*

22. To reinforce the significance of the concept of procedural fairness, in *R v. Tangye* (1997) 92 A Crim R 545 (NSW CA) at 556, Hunt J stated:

"The obligation of the Crown Prosecutor in opening the Crown case is not merely to outline the facts which the Crown proposes to establish in evidence. It is also to indicate, in conceptional terms, the nature of the Crown case. This is to assist both the judge and counsel for the accused more so than the jury. It is essential that any doubt about the nature of the Crown case, conceptionally, be removed at that early stage."

23. In *Clyne v. NSW Bar Association* (1960) 104 CLR 186 it was stated: *"The opening should not contain reference to a fact which the prosecutor is not in a position to prove."*

24. I note there is some authority for the proposition that a failure by the prosecution to accord procedural fairness in the opening address of the prosecution case may result in miscarriage of justice and a mistrial may be declared. In the Solomon Islands Supreme Court case *R v. Gitoa*, Pallaras J, observed:

"76. The Crown submitted that it is open for me to convict on the basis of aiding and abetting if the proven facts support that result. It submits that there is no compulsion on the prosecutor to state the 'specific liability theory' of the Crown.

77. With respect this too misses the point. In the present case, the prosecutor himself did elect to outline the "specific liability theory" of the Crown. He in fact outlined two, the first being that the accused was the person who shot the deceased and the second was common purpose based on section 22 of the Penal Code. The issue arises when only in closing, a third alternative is posited.

> *78. I do not accept that such a shift in the Crown case have no consequence. It cannot be that everything that was contained in the opening address can be disregarded. This is not, as is the case in some authorities offered by the Crown, a situation where a prosecutor mentions evidence in his opening address which he later fails to call. This is not a change in the evidential basis of the case but rather the legal basis upon which it is being presented. If the accused is presented with a case in the opening which differs from the case at closing then a question of whether he has had a fair trial immediately arises. If there has been unfairness, then the trial is void."* (Underlining added).

25. As the DPP pointed out, that was a case where the prosecution case theory was substantially altered at the close of its case when the prosecution proposed a third alternative for consideration by the trial judge. In the present case, I accept the DPP's submission that the prosecution case theory was that the appellant was the person who caused the death of the deceased. As it was revealed by the evidence from the witnesses at trial, the appellant was present with the deceased in the motor vehicle and also at the house.

26. The prosecution's case theory is reinforced by the charge as set out in the Information which reads in part:

> *"**SAMARANCH ENGAR** on the 10th day of December 2016 at Nauru, intentionally engaged in a conduct that caused the death of Unique Lee Dick, and he was reckless about causing the death of Unique Lee Dick by that conduct."*

27. Where the breach of the opening address is the sole ground of appeal and where the prosecution's closing is a significant departure from the opening address, it will support the defence case that the appeal be upheld, and the accused is entitled to an acquittal. Where there are other grounds of appeal which alleged inconsistencies in the prosecution's case or that the proven facts are not in consistent with other reasonable hypothesis and include the possibility that the deceased died from beating by her mother in the room at the house of Jayjay and Jayma Bop on 10th December 2022, the departure of the prosecution from its opening address is an indication that the prosecution had a weak case as the evidence it said it was to adduce was not forthcoming.

28. It was not the prosecution's case that the deceased died at Jayjay and Jayma Bop's house. It is apparent that having noted that there was no evidence, even circumstantial, adduced by the prosecution to support their case that the deceased was killed at the Akiwib's compound, the learned trial judge then shifted the place of death to Jayjay and Jayma Bop's house (*"Jayjay Bop's house/residence"*) to find the appellant guilty of murder.

29. In *The Queen v. Green* [2002] VCSA 34 (20th March 2002) the Supreme Court of Victoria sitting as the Victorian Court of Appeal was faced with the issue that the prosecutor did not address "motive" in their opening address or mentioned it during the trial. The prosecutor even said that there was no issue on "motive" relative to that case. The defence relied on the opening right throughout the trial and addressed the absence of motive strongly during their closing. However, during the prosecutor's closing address the prosecutor speculated and introduced the issue of motive and asked the trial judge to address motive in his summing up to the jury.

30. Unlike the case of *King v. R* (1986) 161 423, the present case does not show a significant departure by the prosecution from the opening address because while the prosecution had outlined in their opening address that the death occurred in the car, the evidence led the learned trial judge to find that the death occurred in the house. However, what it does show is that the prosecution had a weak case as the evidence it said it was to adduce to establish that the death occurred in the motor vehicle was not forthcoming.

31. While the location of the death of the deceased is not one of the elements of the offence under consideration, the lack of evidence to establish that the deceased died in the motor vehicle cast doubt in the prosecution's case that the prosecution was not certain whether the deceased died in the motor vehicle or at Jay-Jay and Jayma Bopi's house.

32. The difference between this case and *King v. R* is that the identity of the accused as the person who caused the death of the deceased is an element of the offence of murder and it was necessary for the prosecution to prove. In that case, King and another man named Mathews were charged with the murder of King's wife. The prosecution case at the trial was that Mathews had killed the deceased. The prosecution did not suggest at any time during the trial or in the prosecutor's address to the jury that it was someone else who had killed the deceased. In the prosecutions closing submissions that it might have been someone else who had killed the deceased, and it may not have been Mathews.

33. The trial judge accepted this submission by the prosecution and added it to his summing up to the jury. The jury acquitted Mathews and found King guilty. King appealed. The majority of the High Court of Australia, per Dawson, Wilson, Brennan JJ and Gibbs CJ, all said that:

"……the direction given by the trial judge at the behest of the Crown involved such a change in the course of the trial at such a late stage that inevitably the conviction could not be allowed to stand."

34. As the prosecution's closing submission departed from its opening address in relation to who caused the death of the deceased, the accused (King) was denied a fair hearing and justice was miscarried. It is not the case here because the location of the death of the deceased is not an element of the offence of murder and that the case of *King v. R* is of limited application.

35. It follows that if the appeal was based solely on the ground that the conviction of the appellant was unsafe because the prosecution departed from its opening address that the deceased died in the motor vehicle, the appeal would fail. However, as the learned trial judge's finding on guilt was based on circumstantial evidence, the question of location of the death of the deceased must be examined having regard to the entire circumstances of the case. No error has been established and Grounds 1 and 2 of appeal are dismissed.

Ground 3

36. The next issue is the kind of evidence that the prosecution adduced to establish the charge. In addition to the eyewitnesses' account, the admission of the post-mortem report was a contentious piece of evidence between the parties at trial and forms the third ground of appeal.

37. Ground 3 states:

"3. That the Learned Trial Judge erred in law in allowing Professor David Ranson, on a second application by the prosecution

and contrary to the principle of functus officio and the doctrine of res judicata to attend to the Appellant's trial and adduce opinions on Dr. Yeliena Baber's Post Mortem Report after His Honour had refused Professor David Ranson's attendance to the trial and to adduce opinion evidence on an earlier application by the prosecution."

38. The learned counsel submitted that two interlocutory applications seeking the same orders were made by the prosecution in the trial Court. Both applications related to one of the prosecution witnesses Professor David Ranson of the Victorian Institute of Forensic Medicine (VIFM).

39. The first application by the prosecution was made under common law, and sought two of four orders:

(a) Leave be granted to the prosecution to summon and adduce evidence of a substitute forensic pathologist, Professor David Ranson of Victorian Institute of Forensic Medicine, due to unavailability of Dr Yeliena Baber.

(b) The autopsy report prepared by Dr Yeliena Baber for the death of Unique Lee Dick is admissible as a business record of the Victorian Institute of Forensic Medicine.

40. On 21st February 2018 the learned trial judge refused the application for the following reasons:

"Unlike other jurisdictions which have legislative provisions to allow a substitute pathologist to give evidence, we do not have any provisions in Nauru and in the absence of which I cannot allow

Professor Ranson to give evidence of the autopsy report as a substituted pathologist.

I am satisfied that if RON Hospital does not have facilities available in terms of expertise it can outsource work and the work done on its behalf falls within the ambit of business as defined under the Criminal Evidence Act 1965."

41. In the second application filed on 9th April 2018 the prosecution sought an order that Professor David Ranson be summoned as a prosecution witness on 17th April 2018 on behalf of the prosecution during the appellant's trial. The second application was made under Section 100 of the Nauru *Criminal Procedure Act* 1972. The learned trial judge granted the application for the following reasons:

"This application is only to assist the parties and the Court to have a better understanding of the autopsy report by an expert who holds a very senior position within VIFM and his explanation will enable the parties to cross examine him on the explanations he provides.

I reiterate my ruling on 21 February 2018 was in the context explained earlier and this application is in an entirely different context under the provision of s. 100 of the Criminal Procedure Act 1972 and I am satisfied that Professor Ranson would be a material witness, so I allow the application."

42. The appellant objected to the evidence of Professor Ranson and the autopsy report on the grounds that the Court was *functus officio* and, decision to exclude the autopsy report is *res judicata*.

Functus officio

43. I accept the submissions of the learned counsel for the appellant in relation to the principle of *functus officio*. As the High Court of Australia observed in *Jovanovic v. The Queen* 106 A Crim R 548 at 551, *"As a general rule, except by way of an appeal, a court has no power to review, rehear, vary or set aside any judgment or order once it is formally recorded."*

44. In *The Queen v. G.A.M (No. 2)* [2004] VSCA 117 (2nd July 2004), Winneke P of the Supreme Court of Victoria with three Justices said: *"These decisions appear to recognize the principle that once an appeal or application for leave to appeal against conviction or sentence has been dismissed and the decision of the Court of Appeal has passed into record, a further appeal or application for leave, based on fresh evidence, cannot be entertained by the Court which is, by then, functus officio."*

45. The DPP referred to Section 100 of the *Criminal Procedure Act,* 1972 and argued that it was open to the learned trial judge to grant the second application based on the Autopsy Report because it formed part of business record of RON Hospital and Professor Ranson was allowed to give evidence as an expert and not as a "substitute pathologist".

46. The DPP further argued that the ruling in the first application is not a final judgment but a ruling in the trial process on whether or not a post-mortem report by Dr Yeliena Baber should be admitted as evidence for the prosecution case. The learned trial judge ruled that there are no laws in Nauru to allow a "substitute" pathologist to give evidence on a post-mortem report. For this reason, the learned trial judge declined to allow the post-mortem report by Dr Baber to be admitted as evidence for the prosecution case.

47. The DPP further argued that in the second application the prosecution relied on Section 100 of the *Criminal Procedure Act.* The learned trial judge accepted the prosecution submission that the post-mortem report formed part of the business record of RON Hospital and allowed Professor Ranson to be called and to comment on it.

Res judicata

48. I accept the learned counsel's articulation of the doctrine of *res judicata.* A summary of this doctrine may be found in the House of Lords case in *Sambasivam v. Public Prosecutor, Federation of Malaya* [1950] AC 458 where their Lordships stated the following in so far as an acquittal from a criminal charge is concerned:

> *"The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim "Res judicata pro veritate accipitur" is no less applicable to criminal than in civil proceedings."*

49. The rational for the doctrine of *res judicata* in the context of criminal proceedings as Archbold (2016) at page 439, para. 4-221 stated:

> *"(b) The doctrine of res judicata does apply to the criminal law in the form of the maxim nemo debet bis vexari pro eadem causa, or nemo debet his puniri pro uno delicto – "no one should be twice put in jeopardy of being convicted and punished for the same offence."*

50. A more detailed summary of the doctrine is stated in *Talbot v. Berkshire County Council (C.A.)* [1994] QB 290 at 296

> *"The rule is thus in two parts. The first relates to those points which were actually decided by the court; this is res judicata in the strict sense. Secondly, those which might have been brought forward at the time, but were not. The second is not a true case of res judicata but rather founded on the principle of public policy in preventing multiplicity of actions, it being in the public interest that there should be an end to litigation; the court will stay or strike out the subsequent action as an abuse of process."*

51. I add in Papua New Guinea in the civil appeal case of *GR Logging Limited v. David Dotoana, PNG Forest Authority & Ors* (2018) SC1690, at [56], the Supreme Court outlined the tests for *res judicata*:

> *"56. In light of the decision in O'Neill v Eliakim, and earlier Supreme Court authorities including Titi Christian v Rabbie Namaliu (1996) SC1583 at [21], questions to consider in determining whether a cause of action is res judicata are whether, in respect of an earlier decision:*
>
> *(1) the decision was judicial;*
>
> *(2) the decision was pronounced;*
>
> *(3) the decision-maker had jurisdiction over the parties and the subject matter;*
>
> *(4) the decision was:*
>
> *a. final; and*

b. on the merits;

(5) the original decision determined a question that was raised in the present litigation; and

(6) the parties are, or are effectively, the same."

52. It was argued for the appellant that the prosecution was barred from bringing the second application by the doctrine of *res judicata* because on the authority of *Sambasivam v. Public Prosecutor, Federation of Malaya* the doctrine of *res judicata* applies to both civil and criminal proceedings and on the authority of *Talbot v. Bershire County Council (C.A.)* the doctrine applies to substantive and interlocutory proceedings.

53. It was further argued that in the present case the second application on the same subject should not have been granted by the learned trial judge because:

(a) an application to call Professor Ranson as a witness and give opinion on Dr. Baber's post-mortem report had been made in the first application,

(b) both interlocutory application for orders pertaining to the post-mortem report and to Dr. Baber ought to have been made together in the first application pursuant to common law and to Section 100 of the *Criminal Procedure Act* 1972, and

(c) the ruling by the learned trial judge on the first application is final on the issue.

54. It was submitted that for the reasons outlined above, by not dismissing the second application, the learned trial judge erred in law.

Whether the learned trial judge was functus officio

55. I accept the DPP's submission that the first application and second application are interlocutory applications and made in the course of the trial. However, I am not satisfied that the rulings are final. Common to both applications are Professor Ranson and the post-mortem report. Professor Ranson is the link to the post-mortem report because Dr Yeliena Baber who was the doctor who prepared the post-mortem report was unavailable at the time of the trial. The prosecution sought to introduce the post-mortem report through Professor Ranson in place of Dr Baber.

56. It is equally important to note the ground of each application. I note that in the first application, the prosecution advanced the grounds that it be allowed to call Professor Ranson to give evidence as a "substitute" forensic pathologist due to the unavailability of Dr Baber. At [59] of the judgment the learned trial judge refused the application because *"as there was no provision in the Criminal Procedure Act 1972, that would allow a substitute pathologist to give evidence on Dr. Baber's report."* This was the reason for refusing the first application.

57. However, I note at [59] of the judgment the learned trial judge allowed the post-mortem report to be admitted as evidence for the prosecution. His Honour said *"However, the autopsy report was accepted as part of the business record of RON Hospital under the provisions of the Criminal Evidence Act 1965 (UK)."*

58. Following that ruling, the prosecution brought the second application. The prosecution based this application on Section 100 of the *Criminal Procedure Act* 1972 because the post-mortem report formed part of the business record of RON Hospital and sought an order to have Professor Ranson called to comment on it. The learned trial judge accepted this ground and granted the second application.

59. Section 100 of the *Criminal Procedure Act* 1972 states:

> *"POWER TO SUMMON MATERIAL WITNESES AND EXAMINE PERSONS PRESENT.*
>
> *100(1) Any Court may at any stage of any proceeding under this Act, of its own motion or on the application of any party, summon any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the Court shall, unless the circumstances make it impossible to do so, summon and examine or recall and re-examine any such person if his evidence, or further evidence, appears to it essential to the just decision of the case:*
>
> *Provided that the prosecutor, or the legal practitioner, if any, for the prosecution, and the accused, or his or her legal practitioner, if any, shall have the right to cross-examine any such person, and the Court shall adjourn the case for such time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared, if in its opinion, either party may be prejudiced by the calling of any person as a witness.*

(2) The provisions of section 49 of the Courts Act 1972 shall apply mutatis mutantis in respect of any person who fails to attend before any Court in obedience to a summons issued under the preceding subsection as though that summons had been issued under section 48 of the said Courts Act."

60. The first application was based on the grounds that Professor Ranson was to give evidence as a "substitute" pathologist and in the second application, the prosecution did not advance the same ground. It advanced different grounds based on Section 100 of the *Criminal Procedure Act* 1972. In my view, Section 100(1) is wide enough to include the prosecution's second application to have Professor Ranson called, not as a "substitute" pathologist, but an independent expert witness to comment on the post-mortem report prepared by Dr. Baber. This is because the post-mortem report formed part of the business record of the RON Hospital and Professor Ranson's comment on the post-mortem report was *"essential to the just decision of the case."*

61. Moreover, as the prosecution advanced a different ground in the second application, the question of whether Professor Ranson should be summoned to give evidence under Section 100(1) was not decided in the first application and the learned trial judge having ruled and refused the first application on a different ground was not *functus officio*. Hence, the learned trial judge was not barred from entertaining the second application.

62. For these reasons, I am not satisfied that the learned trial judge erred in law when he ruled and refused the first application and was *functus officio* hence barred from entertaining and granting the second application to allow Professor Ranson to be called as an expert witness to comment on the post-mortem report.

Whether the learned trial judge was barred by the doctrine of *res judicata* to entertain and rule on the second application

63. As to the ground that the ruling in the second application is barred by the doctrine of *res judicata,* I point out that the ruling in the first application did not terminate the proceedings in favour of the appellant whereby a verdict of acquittal on the charge of murder was pronounced for the appellant and the prosecution had subsequently brought a same charge based on the same allegations in the second application. I find the present case cannot be characterized as the one described here and, in my view, the statement by the House of Lords case in *Sambasivam v. Public Prosecutor, Federation of Malaya* that a *"person acquitted cannot be trial again for the same offence"* or what is commonly referred to as double jeopardy does not apply.

64. On the other hand, I am of the view that while *GR Logging v. David Dotaona, PNG Forest Authority & Ors* was a civil appeal case, it is useful. In that case GR Logging commenced two sets of proceedings in the trial Court. First was by originating summons in the Civil Track of the National Court. The second was an application for judicial review in the Appeals and Judicial Review Track of the National Court. In both proceedings GR Logging challenged the legality of the Minister for Forests' decision to grant a timber permit to the first respondent.

65. At the hearing of the application for leave to apply for judicial review, the defendants sought dismissal of the application on the ground that it was an abuse of process because GR Logging commenced multiple proceedings on the same dispute. The trial Court upheld the defendants' motion and dismissed the application for leave on the ground that it was an abuse of

process for GR Logging to commence multiple proceedings on the same dispute.

66. GR Logging discontinued the related originating summons proceedings and refiled an application for judicial review. It sought leave to apply for judicial review. The trial judge refused leave for the second time, this time on the ground that the application for leave was *res judicata,* as the first application, which relied on the same cause of action as the second application, had been heard and determined.

67. The Supreme Court held that because in the first application for leave, the trial Court dismissed it as being an abuse of process, the decision to refuse the second application for leave was not barred by the doctrine of *res judicata* because it was not decided on the same ground as the first application. On the other hand, the application should have been decided on the tests for the grant of leave. The trial Court failed to do that and fell into error.

68. In the same vein, I consider the appellant's submission that the application to call Professor Ranson as a witness and to give an opinion on Dr. Baber's post-mortem report is incorrect because that was not the ground for the first application. The correct ground was that Professor Ranson should be called to give evidence as a "substitute" forensic pathologist for Dr Baber.

69. This distinction is important because while I accept that the ruling in the first application was a judicial decision, that the decision was pronounced at the trial, that the decision-maker had jurisdiction over the parties and the subject matter, that the parties are the same and that the decision in the first application was final and on the merits of the application, I am not satisfied that it determined the question that was raised in the second application.

70. The question decided in the second application was whether the post-mortem report formed part of the business record of RON Hospital and should be made available for Professor Ranson to comment on it. It was on this basis that the court allowed the prosecution to call Professor Ranson as a witness and to comment on it. For these reasons, I am not satisfied that the second application was barred by the doctrine of *res judicata.* Ground 3 of the appeal is not made out and I dismiss it.

Grounds 4, 5 and 6

71. The learned counsel for the appellant addressed Grounds 4, 5 and 6 collectively because they bring up the issues in relation to the time of death, the inconsistences in the evidence as to the time of death and inference that the deceased died at Jayjay Bop's house.

72. Grounds 4, 5 and 6 state:

> *"4 That the Learned Trial Judge erred in law and in fact in holding that the deceased was killed at Jayjay Bop's house when Doctor Richard Leona testified that the deceased's time of death was between twelve (12) to twenty four (24) hours before 12:00 midnight on Saturday10 December, 2016."*
>
> *"5. That the Learned Trial Judge erred in fact and in law in convicting the Appellant when medical evidence by Doctor Richard Leona, Doctor Yeliena Baber, Professor David Ranson and Enrolled Nurse Finey Apadinuwe were so inconsistent that it was so uncertain what the time of death was thus creating reasonable doubt in favour of the Appellant."*

"6 That with the uncertainty as to the time of death, the Learned Trial Judge erred in law and in fact in making the inference that Unique Lee Dick died at Jayjay Bop's house on the basis of the medical evidence adduced in the Appellant's trial."

73. As to the medical explanation for the cause of death, I note that the prosecution adduced evidence from Doctor Richard Leona (Dr Leona), Enrolled Nurse Finmay Apadinuwe (Nurse Apadinuwe) and Professor Ranson.

74. It is not disputed that Dr Leona was the first doctor who examined the deceased's body on Sunday 11 December 2016 at 12:05 am. In summary, his professional opinion was that the deceased was dead for 12 hours to 24 hours before the body was examined. He had taken into account that rigor mortis had set in, and that Nauru has a very warm climate. The deceased therefore would have died between Saturday 10 December 2016 at 12:05 am (24 hours prior) and Saturday 10 December 2016 at 12:05 pm (12 hours prior).

75. Further, it is not disputed that Nurse Apadinuwe was one of the first responders at the scene when the deceased's family called the hospital. The hospital staff received the call on Saturday 10 December 2016 at around 11:00 pm and Nurse Apadinuwe and others attended the scene a few minutes after. She tried resuscitating the deceased via CPR but felt that the deceased was stiff and cold. In summary, she stated that she heard from doctors that rigor mortis sets in after 8 hours of death.

76. Professor Ranson did not examine the deceased but gave evidence based on Dr Baber's post-mortem report and his general professional opinion. In

summary, he stated that rigor mortis is the stiffening of muscles that occur after death and that in a general temperate climate, it would come one hour after 12 hours, stay for 12 hours and pass off in 12 hours.

77. Linking the time of death of the deceased to the evidence of Jeshua Agege and Joshua Jeremiah, they said they dropped off the appellant and the deceased at Jayjay Bop's residence and they estimated the time at 11:00 am. Jayma Bop estimated their time of arrival between 12:00 pm and 1:00 pm. The learned counsel for the appellant pointed out that Jeshua and Joshua were drinking alcohol at that time while Jayma was sober. The learned trial judge commented that Jayma was the only witness that kept track of time.

78. Jeshua, Joshua, Jayma and the appellant did not see any injuries in the deceased's face at that time. The official cause of death in the post-mortem report was neck compression, not facial fracture.

79. Jayma saw the deceased being carried into the room and noticed that the deceased was not responding or moving. Jayma never saw the deceased leave the bedroom for a drink or visit the toilet. Her observation of the deceased was that the deceased was unresponsive upon arrival at her residence. According to the appellant's counsel, this suggests that deceased had already died.

80. Dr Leona's examination of the deceased's body occurred on Sunday 11 December 2016 at 12:05 am (midnight), who then opined that the deceased was dead for at least 12 hours. The appellant's counsel submitted that 12-hour period was around the time the deceased was taken to Jayjay Bop's residence at 12:00 pm on Saturday 10 December 2016.

81. Given that none of the prosecution's witnesses saw the appellant cause the death of the deceased and the evidence pointing to the appellant is circumstantial, the prosecution still bore the burden to prove that the guilt of the appellant is the only rational inference that the circumstances would enable the Court to draw. As the Court in *Peacock v. The King* (1911) 13 CLR 619 at 634 said:

> *"When the case against an accused person rests substantially upon circumstantial evidence the jury cannot return a verdict of guilty unless the circumstances are such as to be inconsistent with any reasonable hypothesis other than the guilt of the accused.*
>
> *To enable a jury to be satisfied beyond reasonable doubt of the guilt of the accused it is necessary not only that his guilt should be a rational inference but that it should be the only rational inference that the circumstances would enable them to draw.*
>
> *However, an inference to be reasonable must rest upon something more than mere conjecture. The bare possibility for innocence should not prevent a jury from finding the prisoner guilty, if the inference of guilt is the only inference of open to reasonable men upon a consideration of all the facts in evidence."*

82. Based on the above principles, I accept the appellant's counsel's submissions that taking the exact time into consideration, the following is open to infer:

(a) the deceased was already dead when she was taken to Jayjay Bop's residence, based on Jayma's observations,

(b) based on Dr Leona's professional opinion on the timeline, the possibility that the deceased died before she was taken to Jayjay's Bop's residence cannot be ruled out,

(c) Professor Ranson's professional opinion on rigor mortis supports Dr Leona's evidence that rigor mortis sets in 12 hours after death,

(d) Nurse Apadinuwe's evidence on rigor mortis setting in after 8 hours is hearsay as opposed to the professional medical evidence by Dr Leona and Professor Ranson,

(e) the respondent's case theory was that the deceased died inside Bureka Kakiouea's vehicle, which was before the deceased was taken to Jayjay Bop's residence,

(f) the finding by the learned trial judge that there were no injuries to the face and lips of the deceased upon arrival at Jayjay Bop's residence contradicted the wound to the deceased's neck,

(g) the injuries to the face and lips of the deceased were caused by her mother and is not relevant to the cause of death.

83. I elaborate on the last two points (f) and (g) to explain why I say the learned trial judge's finding that there were no injuries to the face and lips of the deceased when she was carried from the car to Jayjay Bop's house is contrary to the evidence of the prosecution. The prosecution adduced evidence from Ronay Dick. She is the mother of the deceased.

84. Her evidence may be summarized as follows; she was at her house in Menen on the night of Saturday 10 December 2016. The deceased went

out for a party and did not return to the house, and she was worried sick for the deceased. Using her mobile phone, she rung around to find out where the deceased was. A relative by the name of Reiko informed her that the deceased was at Jayjay Bop's house. When she heard this, she was angry and said that she will go to the deceased and assault her. Reiko picked her up in a car and drove her to Jayjay Bop's residence.

85. When they arrived at Jayjay Bop's residence, she saw Jayjay Bop standing at the door of the house. She stepped out of the motor vehicle and stormed passed him into the house. She saw Jayma Bop sitting on the floor in the lounge room and the appellant's mother Daigu standing next to the bedroom door where the deceased was. She walked towards the bedroom door and called out for the deceased. She turned the door handle and bushed it. It did not open. She kicked the door several times before the appellant slightly opened it from inside the bedroom. When the appellant saw her, he pushed the door towards her to close it, but she pushed it back and it opened.

86. She entered the bedroom and saw the deceased lying on a bed facing upwards. The deceased was covered in a blanket from the abdomen down to her feet. She walked over to the deceased, grabbed her by the hair, lifted her head up and punched her face. As the deceased was lying next to the wall of the bedroom, she grabbed the deceased's arm with one arm and leg with another and pulled the deceased towards her to exit the bedroom. She removed the blanket from the deceased and noticed that she was naked from her waist down. When she saw this, she punched the deceased in her hip bone, but the deceased was unresponsive.

87. While she was doing that, she saw the appellant sitting in the corner of the bedroom and she asked him why the deceased was unresponsive. The

appellant responded, *"because of you"*. She charged at the appellant, but he ran out of the bedroom room. Reiko stopped her and she returned and checked the pulse of the deceased. In cross-examination by defence trial counsel, she admitted punching the deceased in her face but denied punching her on the jaw and causing a fracture.

88. The last observation I make is in relation to [87] of the judgment where the learned trial judge accepted the evidence of Professor Ranson and held that there were no injuries to the face and lips of the deceased when she was carried from the car to Jayjay Bop's house. His Honour stated:

> *"Professor Ranson stated that the fracture of the mandible occurred when the deceased was alive and had blood pressure. Professor Ranson relied on Dr. Baber's autopsy report, as well as the photographs taken of the internal examination which clearly stated that there was internal haemorrhaging. Professor Ranson explained that this internal haemorrhaging was indicative of the fact that the injuries were inflicted whilst the deceased was still alive."*

89. However, the prosecution did not adduce evidence to rule out the possibility that the deceased was still alive when she was in the bedroom of Jayjay Bop's house and when she was assaulted by her mother Ronay Dick. Moreover, at [86] of the judgment the learned trial judge too was not convinced that the deceased was dead by the time she was brought to Jayjay Bop's residence. His Honour observed *"It is correct that when the deceased was taken into the house her body was very slack and her limbs were hanging. However, I do not consider the slackness of her body as suggesting that the sic she was already dead at this stage."* Given this it is open to infer that the *"fracture of the mandible"* was caused by Ronay Dick.

90. Apart from this possibility, in my view, the evidence as outlined above point to the possibility that the deceased died inside Bureka Kakiouea's vehicle. I will elaborate on this point in the next ground of appeal. I uphold Grounds 4, 5 and 6 of the appeal.

Ground 7

91. Ground 7 brings up the issue of whether the prosecution had adduced evidence to rule out other possibilities of the cause of death of the deceased. Ground 7 states:

> *"7. That the Learned Trial Judge erred in law in shifting the onus of providing an alternative hypothesis, relative to Unique Lee Dick's cause of death, to the defence Counsel."*

92. The appellant's learned counsel referred to paragraph 92 of the Judgment which states:

> *"I asked Mr Valenitabua whether he wanted to make any submissions as to any alternative hypotheses that the defence would like me to consider. He submitted that this case was either murder or nothing. Mr Valenitabua maintained that the defendant did not kill the deceased. He further informed me that he did not have alternative hypotheses except that he was relying on Dr Leona's timeline of death evidence in relation to when a body would be in a state of "rigor mortis"."*

93. According to the learned counsel, the respondent bore the burden of proving the charge beyond reasonable doubt, but this paragraph shows that

the learned trial judge did not ask the prosecution of any alternative hypothesis or theory. That burden was shifted to the appellant.

94. I accept the appellant's learned counsel's submissions. The burden of proof rests with the prosecution throughout a criminal trial. In this case, I note that the appellant gave evidence that he was released from police custody at around 12:00 pm. The learned trial judge did not reject this evidence. The appellant was therefore not with the deceased around the estimated time of death. This would be somewhere between Saturday 10 December 2016 from 12:00 am to 12:00 pm. I further note that this was what the trial counsel was referring to in his response to the learned trial judge's question on an alternative hypothesis.

95. Furthermore, I note that the prosecution relied on the evidence of David Deireragea, who testified that his father told him that he (father) saw the appellant punching the deceased inside Bureka Kakiouea's car at Akibwib's residence. I accept the appellant's counsel's submission that this evidence is not only hearsay but also shows that the prosecution was relying on direct evidence to prove their case, not only circumstantial evidence.

96. However, at no point during the trial did the prosecution submit that the deceased died at Jayjay Bop's residence nor present circumstantial evidence. As I have observed at [71] to [90] above, the learned trial judge found the appellant guilty based on circumstantial evidence at Jayjay Bop's house because none of the prosecution witnesses testified seeing the appellant kill the deceased.

97. Moreover, as I have observed in Grounds 1 and 2 of the appeal at [12] to [35] above, the prosecution informed the Court in its opening address that

the deceased was killed in the motor vehicle at Akiwib's residence. However, it is clear to me that the prosecution had a weak case to prove its case theory that the appellant caused the death of the deceased in the motor vehicle at Akiwib's residence.

98. In the case of David Deireragea, while his evidence is hearsay because he said when he asked his father why his father was looking out of his father's room window, his father did, it also reinforces the notion that the prosecution had a weak case because this witness refused to tell the Court at the first given opportunity what his father told him. The pertinent parts of David Deireragea's evidence in chief is set out below:

> *"LT: Now David, what was the reason for you going into your father's room on that day, on that Saturday the 10th of December 2016?*
>
> *DD: I wanted to see what my father was looking at.*
>
> *LT: How did you know your father was (sic) something?*
>
> *DD: I saw that he wasn't looking at the people who were drinking, but he was looking at something specific. I saw that he was looking at the car, that's when I approached him.*
>
> *LT: Now when you saw him looking at the car and as you approached, did you also speak to your father did you ask him what he was looking at?*
>
> *DD: Yes I did. I asked him.*

LT: So when you asked your father, what was your father's response to you?

DD: Can you wait for my father to ask that question?

LT: No you were there, so you were talking to your father, so my question is this to you, your father then spoke to you, what did he tell you?

DD: I want my father to be here to help you with this case.

LT: No, you listen to me. You're on the stand, you've given oath I ask you questions ok David? You said you asked your father and your father then responded; the question is this, what did your father say to you?

DD: I rather that my father be here. I want to know if my father was lying to me what he said, or if it was it the truth.

LT: So you saying that you don't want to answer my questions, is that what you saying?

DD: The reason being is what I saw him doing was, he was peeping at someone. He was peeping at something and I want....."
(Underlining added).

99. Eventually, after he was shown his statement to the police to 'refresh' his memory, David Deireragea opened-up. The pertinent parts of David Deireragea's evidence in chief is set out below:

"LT: Ok, take you to, refresh your memory, take you straight to paragraph sight of that statement; have a look at paragraph 8 of your statement, right. So you've read, so now you can remember what your father told you?

DD: I remember.

LT: Ok.

DD: He was punching her on the side.

LT: Ok. And so..

Ct: Who was punching her on the side? Is his father going to give evidence?

LT: We will get him sir, if he is back from Cancer trip.

Ct: Then what he has told me is hearsay, isn't it?

LT: That's in his statement sir, we are refreshing the statement.

Ct: But he is telling my what his father said; someone else said.

LT: Yes, that's the conversation between the two of them.

Ct: If that is admissible them there's no need to call the father. He can say that the father drew his attention to something and then you can lead to what he saw. But if you want to tell him what the father said, then its hearsay.

LT: I'm not telling him what the father said, that's what he is saying.

DD: My father said its true.

Ct: He's what? No I'm talking to you Ms Tabuakuro.

LT: Yh, I'm not the one that's there, he's the one that's there, I don't know what....

Ct: Well, you're the counsel you should know that he cannot come and repeat what his father said.

LT: But yh he's only party with his father we are trying to get to get his father and we will. And the court can then putt whatever weight to that comment because this is a very important piece of evidence.

SV: Yh, its back to what I said, if they're going to call Mr Deireragea's father then we wouldn't mind. But at this point in time, we really don't know his father is going to be brought in to give evidence or not. Now in that case that piece of evidence that you just heard, that is hearsay. It is inadmissible as hearsay.

Ct: Yes."

100. Further on in David Deireragea's evidence in chief:

"LT: Ok, very well, Now when your father said that you, when he said your friend there Samaranch is punching that girl down there.

DD: When I asked my father what he was looking at, my father said your friend is a poofter, he is punching that girl down there.

LT: Ok, now we've moved past that. When he said that, what did you then do? Now your father has told you something.

DD: I told my friends who were drinking downstairs.

LT: No, I take back right. Take you back, did you remember what you did after your father said this to you?

DD: I went downstairs I told my friends who were drinking down there, and they said no, its none of our business because those two are engaged, in a relationship.

LT: Ok did you at any time then look into the car by yourself?

DD: Yes I did.

LT: And where did you do this?

DD: I looked down at the back of the car.

LT: And then what did you see?

DD: I saw the girl, it looked like her eyes were, or her face was hurting.

Ct: Face was?

DD: Hurting.

Ct: Hurting.

DD: Hurting. H-U-R-T-I-N-G.

LT: And how long did you stand there looking at them; do you know how long?

DD: Three minutes, and then I went downstairs.

LT: Ok, did you see Samaranch doing anything to the girl? Let's first talk about the girl. Who was the girl that you saw whose face was hurting?

DD: Unique.

LT: Unique, and did you see Samaranch....

Ct: I think that leading, you should say who was hurting her?

LT: Did you see who was hurting Unique?

DD: Samaranch.

LT: Ok, I've no further questions sir."

101. In my view David Daireragea's account as outlined in the preceding paragraph does not establish the appellant causing the death of the deceased. This is further reinforced by the trial defence counsel in cross-examination of David Daireragea where he could not say if the deceased had died. He said, *"I don't know when she died but I know that at that time when I was looking down, she was blinking her eyes like she was in pain."*

102. In the case of Bureka Kakiouea, Nason Hubert and Joshua Agege, they said that they were with the deceased at Akiwib's residence. Bureka Kakiouea drove the deceased back to Akiwib's residence. The deceased came out of the front passenger seat and went into the back seat and slept. He went to join the drinking party. Nason Hubert said when he went to the motor vehicle to get water and saw the deceased sleeping in the back seat.

103. Joshua Agege said with the permission of Bureka, he went to the motor vehicle to sleep because it had aircon. He saw Nason Hubert coming out of the motor vehicle. He saw the appellant and the deceased in the back seat of the motor vehicle. The deceased was sleeping while the appellant was sitting in the middle of the back seat. The appellant told him to leave because he wanted to talk to the deceased. However, none of their accounts point to the appellant as the person who caused the death of the deceased. Their respective accounts also placed them at the location where the prosecution alleged the murder took place and they are possible suspects.

104. Where the direct evidence from eyewitnesses' accounts is not strong for the Court to find that the deceased died at Akibwib's residence, then the benefit of doubt should be given to appellant, and he should be acquitted. This is where I find the conclusion by the learned trial judge at [91] of the

judgment that *"Nason and Agege were in the car with the deceased and left at the request of the accused and at the material time the deceased was sleeping and alive. Therefore neither of them could have caused her death"* is unsustainable.

105. However, if the Court were to rely on circumstantial evidence, the prosecution still bore the burden to prove that the guilt of the appellant is the only rational inference that the circumstances would enable the Court to draw. As the prosecution did not have the evidence from the eyewitnesses' accounts that the appellant caused the death of the deceased in the motor vehicle at Akiwib's residence, it explains why the learned trial judge considered the further evidence of the eyewitnesses' accounts at the residence of Jayjay Bop before the discovery of her death.

Grounds 8 and 9

106. Finally, I address Grounds 8 and 9 together because they challenge the credibility finding of the learned trial judge in relation to the evidence of the mother of the deceased Ronay Dick.

107. Grounds 8 and 9 state:

> *"8. That the Learned Trial Judge erred in law in classifying cross-examination questions asked by defence Counsel putting to a prosecution witness that the witness had caused certain injuries to Unique Lee Dick, as manifestations of "lies" on the part of the Appellant."*

"9. That the Learned Trial Judge erred in law in holding that the Appellant had lied in Court during the trial in attempting to deflect the blame to Unique Lee Dick's death to another person."

108. Ronay Dick gave evidence and was cross-examined by the defence trial counsel. A material aspect of her evidence when she was cross-examined was her admission that she assaulted the deceased when the deceased was inside the bedroom. To analyze the credibility of Ronay Dick's evidence, I set out the pertinent parts of the Ronay Dick's evidence in chief below:

"LT: Ok, so her arms were up. Now we'll go on to you were saying that you walk in and you start pulling her hair, just tell us when you start pulling her hair, what did you do to her?

RD: I grabbed her by the hair and punched her in the face."

109. As to Ronay Dick's response on cross-examination:

"SV: We understand. The question is if you see the injuries on the neck and the arms, right? Now we're putting to you that you caused these injuries while assaulting your daughter. What do you say to that?

Crt: All the injuries or some of them.

RD: How?

SV: You assaulted your daughter?

RD: Yes, I did.

SV: You did, and you punched your daughter and started dragging her?

RD: Yes, I did.

SV: And you could have done other things which you cannot remember now because you were so angry. That is human.

RD: There is a limit to what you can do to your own daughter. You see, when you punish your daughter you punish her but there is a limit to it. You won't cause this.

SV: To your daughter?

RD: Yes.

SV: So you just answer the question. Did you cause the injuries or not?

RD: I did not.

SV: You did not. Now that's all we want to hear."

110. Ronay Dick's admission to assaulting the deceased is reinforced by the appellant in his evidence in chief where he said:

"SV: And then?

SE: I tried to stop Ronay.

SV: Why did you try to stop Ronay?

SE: When she was beating up Unique.

SV: Who beat up Unique?

SE: Ronay."

111. I do not find the questions put to the appellant in cross-examination by the trial prosecution counsel broke down the appellant to the extent that he had lost credibility and his statement that Ronay Dick assaulted the deceased was a lie. In my view, the trial prosecution counsel's questions and the appellant's response reinforced Ronay Dick's admission to assaulting the deceased. These can be clearly seen from the cross-examination of the appellant below:

"LT: And when she came in you agree that she started assaulting Unique, right? She pulled her by the hair and she pulled her towards her?

SE: Yes.

LT: Yes; from your examination-in-chief, you only talked generally about the fact that Ronay assaulted Unique inside your bedroom on that night. And this was around 10 pm on the 10th of December, right? She came and you said in your examination-in-chief she then assaulted Unique on the bed, yes, you agree with that?

SE: Yes.

LT: Yes, now Samaranch did you also see Ronay strangle and put her arms around Unique's neck? Did you see that?

SE: No."

112. Significantly, I note that despite Ronay Dick's admission to assaulting the deceased, the learned trial judge found her to be a credible witness and accepted her evidence. This credibility finding was based on the learned trial judge's observation that *"Ronay became very upset about the allegations that she caused her daughter's death"*.

113. Conversely, I note his Honour made adverse credibility findings against the appellant at [101] and [102] of the judgment, under the heading 'Post Offence Lies':

"101. In this matter the accused was attempting to deflect the blame on Ronay Dick the deceased's mother. In his evidence he stated that the mother more than likely caused the injuries on her lips. In cross-examination of Ronay Dick, his counsel, Mr Valenitabua, put directly to her that she caused those injuries on the neck and she refuted those allegations. Ronay became very upset about the allegations that she caused her daughter's death.

102. Obviously those questions were asked by Mr Valenitabua on the instructions of his client. This goes to show that the accused would go to any lengths to deflect the blame and distance himself from what he did. His claims that Ronay

caused the injuries and death of the deceased was and is a lie, as the deceased was already dead. I agree with the prosecution that any reasonable person in the room with the deceased prior to Ronay entering, would have known the deceased was dead as she was already in rigor mortis."

114. However, these adverse credibility findings are unsubstantiated. I accept the appellant's counsel submission that the trial defence counsel had a duty and did put to Ronay Dick if the deceased sustained injuries from the assault and she denied. In my view, it was not only a reasonable follow-up question by the trial defence counsel but also to comply with the rule on fairness in *Browne v. Duun* (1893) 6 R 67 HL where the defence must put its case to the prosecution witnesses to give them the opportunity to respond to it. I also agree with counsel that the trial defence counsel's questions in relation to whether Ronay Dick caused the injuries were relevant and normal in the line of questioning in cross-examination.

115. Moreover, I do not think that the defence trial counsel acted beyond the defence case when he suggested to Ronay Dick that she caused the injuries to the deceased. Notably, it was the defence case that it was not the appellant who caused the injuries. It could be someone else. That someone else could be Ronay Dick. For the learned trial judge to take it beyond its meaning and infer that the appellant was covering up and lying about his actions is not only unfair but contrary to the rule in *Browne v. Dunn* and erroneous.

116. And speaking of lies, it is important to note that it is not necessarily the case that a witness account that differs from another is a lie. Moreover, a lie may not be so obvious and detected from a witness account. A statement by a witness will constitute a lying statement if it is established

that it was deliberate and relate to a material issue. In *R v. Lucas* [1981] 1 QB 720 his Honour Lord Lane CJ delivering the judgment of the Court of Appeal (Criminal Division), stated in the Head Note the following:

> *"Held, allowing the appeal, that for a lying statement made out of court to be capable of amounting to corroboration it had to be deliberate and relate to a material issue, the motive for lying had to be a realization of guilty and a fear of the truth, and the statement had to be shown to be a lie by admission or evidence from a witness who was independent and other than the accomplice to be corroborated; that lies in court which fulfilled those four criteria were available for consideration by the jury as corroboration....."*

117. While I do not have the benefit of observing the demeanour of the witnesses, my perusal of the transcript of the appellant's account at the material time and place at Jayjay Bop's residence does not lend support to the learned trial judge's finding that the appellant was lying and his evidence to shifting the blame to the mother of the deceased should be rejected. To illustrate the point, I refer to relevant parts of the appellant's evidence in examination in chief below:

> *"SV: When did you realise that Unique had died?*
>
> *SE: When her mother came in.*
>
> *SV: Did you see Reik come to JJ's house?*
>
> *SE: Yes.*
>
> *SV: And Reiko was followed by her mother?*

SE: *Yes.*

SV: *And what happened after they came in?*

SE: *When they came in and knocked on the door, Ronay kicked the door and came inside the room.*

SV: *And what did you do?*

SE: *When the door was open, I stood there and just looked at her.*

SV: *Did you see her apply resuscitation to Unique?*

SE: *Yes.*

SV: *And then?*

SE" *I tried to stop Ronay, but she pushed me.*

SV: *Why did you want to stop Ronay?*

SE: *When she was beating up Unique.*

SV: *Who beat up Unique?*

SE: *Ronay.*

SV: *And then? What happened?*

SE: I tried to stop her. And that's when we found out she was not alive and when we tried to apply CPR on her. Ronay first and Reiko, we were trying to wake her up.

SV: Did you apply CPR?

SE: No, I don't know how to."

118. In cross-examination by the trial prosecution counsel the appellant responded as follows:

"LT: I disagree; and that the only reason why Ronay entered the bedroom was because she kicked the door down. I put to you.

SE: Yes.

LT: You did not allow her to come in, you did not allow her to come in. You didn't open the door and say 'Oh Ms Ronay come in and see your daughter'. You opened the door and she just kicked the door?

SE: No, because I was sleeping and then I heard the knock. I got up to open the door and she just kicked the door open.

LT: When she kicked the door, she come directly into the room didn't she?

SE: Yes.

LT: *And when she came in you agree that she started assaulting Unique, right? She pulled her by the hair and she pulled her towards her?*

SE: *Yes.*

LT: *Yes; from, your examination in chief you only talked generally about the fact that Ronay assaulted Unique inside your bedroom on that night. And this was around 10 pm on the 10th December, right? She came and you said in your examination in chief she then assaulted Unique on the bed, yes, you agree with that?*

SE: *No.*

LT: *.....tell us what she was doing to Unique? Tell us exactly did she do?*

SE: *She was hitting her.*

LT: *Hitting her with what?*

SE: *Using her hands.*

LT: *When you say hitting you mean she was punching?*

SE: *Yes.*

LT: *And where did she punch Unique?*

SE: I don't know which direction, but I saw she was hitting her.

LT: Hitting her face; ok and how many times if you can remember?

SE: I can't remember."

119. Further:

"LT: Ok. Samaranch you also sat in court when Ronay also gave evidence, do you remember that?

SE: Yes.

LT: .....and you agree that Ronay was upset because she is the mother of Unique?

SE: Yes.

LT: Now you were sitting in court when Rony gave her evidence, which you said yes to, do you remember hearing your lawyer tell Ms Ronay that she was the one that (sic) caused the injuries to the neck of Unique, to her own daughter; do you remember that question being put to Ms Ronay?

SE: I can't remember.

LT: Can't remember; did you give instructions to your counsel that it was Ronay that inflicted those injuries on Unique's neck. Did you say that to your lawyer?

SE: *.....*"

120. Finally:

"*LT:* *Right, Samaranch, now you've heard that your counsel on your instructions put to Ronay, the mother of Unique that she was the one that (sic) caused the injuries on her neck and arm. Did you give that instruction*"

SE: *I did tell that Ronay assaulted Unique but never said that the injuries were caused by Ronay, I never said that.*

LT: *So you are disagreeing with your own lawyer, yes?*

SE: *No. That's what I said. I told my lawyer about the incident that happened.*

LT: *Did that incident include that you saw Ronay also assault Unique on the neck? Did you tell your lawyer that or not?*

SE: *I told him that she. Ronay, assaulted her.*

LT: *No, you are avoiding the question, and my question is very specific and you understand English. Did you or did you not tell your lawyer that you saw Ronay assault the neck area of Unique? Is that a yes or no?*

SE: *I didn't.*"

121. In my view, the appellant's account as outlined at [118] to [120] above is nothing more than an explanation of how the mother of the deceased reacted when she saw the deceased. By all accounts, it was a tense situation. Here was a mother looking for her daughter who did not return home after a night out with friends and was upset and reacted in the way the appellant had described.

122. In addition, based on *R v. Lucas* the learned trial judge' adverse credibility finding against the appellant *"....to deflect the blame and distance himself from what he did. His claims that Ronay caused the injuries and death of the deceased was and is a lie, as the deceased was already dead"* is not corroborated by an independent witness because none of the prosecution witnesses testified that the appellant lied that the Ronay Dick assaulted the deceased and caused the injuries on her face and lips including the fractured jaw. There was, therefore, no basis for the learned trial judge to find that the appellant lied and tried to *".....deflect the blame and distance himself from what he did."*

123. Against this is the burden the prosecution bore to adduce evidence to rule out the possibility that the injuries sustained by the deceased on her face and lips including the fracture to jaw were not caused by a person other than the appellant. In my view, the prosecution failed to rule out this possibility.

124. The other possibility is where I have pointed out at [82(a)-(e)] above that the deceased was already dead when she was taken to Jayjay Bop's residence because the time rigor mortis would have set in is 12 hours after death and the 12-hour period was around the time the deceased was taken to Jayjay Bop's residence at 12:00 pm on Saturday 10 December 2016.

And based on the post-mortem report, the deceased died from neck strangulation. The prosecution did not rule out this possibility.

125. For the foregoing reasons, I uphold Grounds 8 and 9.

Conclusion

126. Based on grounds that I have upheld, I am satisfied that the prosecution had failed to prove beyond a reasonable doubt that the deceased had been killed in the motor vehicle at Akiwib's residence conclude that the prosecution had a weak case because it did not have the evidence to prove that the deceased died in the motor vehicle at Akiwib's residence. This lack of evidence is reinforced by the inconsistences in the evidence in relation to the time of death of the deceased and the failure by the prosecution to rule out the possibility that the deceased was dead when she was brought to Jayjay Bop's residence. I note that the prosecution's case is that the deceased had died when she was taken to Jayjay Bop's residence or died shortly thereafter and that by the time her mother had assaulted her at the residence, she was already dead. I am not satisfied this fact had been established to the required standard of proof beyond reasonable doubt.

127. In the result I find that the conviction was unsafe, that it was a consequence of an error of law and that substantial miscarriage of justice has occurred pursuant to Section 32(1)(b) and (c) of the *Nauru Court of Appeal Act,* 2018.

Order

128. I order that:

1. The appeal be allowed.

2. The judgment of the Supreme Court dated 1 May 2018 is set aside and the conviction on the charge of murder is quashed.

3. The sentence of the Supreme Court dated 3 May 2018 sentencing the appellant to 19 years imprisonment is set aside.

4. A verdict of not guilty is entered and the appellant is acquitted of the offence of murder under Section 55(a), (b) and (c) of the *Crimes Act*, 2016.

5. The appellant's bail money shall be refunded forthwith.

Dated this 18 October 2024

Justice Colin Makail

NAURU COURT OF APPEAL

Justice of Appeal

Justice Rangajeeva Wimalasena

I agree

President

Justice Sir Albert Palmer

I agree

Justice of Appeal