

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 133 of 2022

BETWEEN : STATE

AND : TEVITA QAQA KAPAWALE

**Counsel : Ms T Sharma, Mr J Rabuku J & Mr E Samisoni for State
Mr T Ravuniwa & Mr E Veibataki for Accused**

Voir Dire Ruling : 9 July 2024

**Trial Dates (2025) : January 14-17 & 27-31
February 3-5 & 7
March 24 & 26**

No Case to Answer : 21 February 2025

Ruling : 18 March 2025

Closing Submissions : 28 April 2025

Judgment : 11 July 2025

JUDGMENT

[1] Tevita Qaqa Kapawale¹ is charged with the following seven counts:

Count 1

Statement of Offence

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

¹ The accused.

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters murdered **BENJAMIN SEMUEL MATITAPUTTY**.

Count 2

Statement of Offence

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

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters murdered **EME WARMA**.

Count 3

Statement of Offence

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

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters murdered **ALFAT KODRI**.

Count 4

Statement of Offence

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

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters murdered **SAMUELA SUKERA**.

Count 5

Statement of Offence

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

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters murdered **QIRITIVABEA CAGILABAKOMELI**.

Count 6

Statement of Offence

ATTEMPTED MURDER: Contrary to Sections 44 and 237 of the Crimes Act 2009.

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters, attempted to murder **KAMINIELI TUCAMA**.

Count 7

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375(1)(a)(i)(iv)2(a) of the Crimes Act 2009.

Particulars of Offence

TEVITA QAQA KAPAWALE between the 17th day of May 2021 and the 19th day of May 2021 while at sea within Fiji waters, threatened to cause the death of **MITIELI CAMA** by uttering the words 'If you want to die, come up', with the intent to cause alarm to **MITIELI CAMA**.

- [2] The accused is charged with five counts of murder, one count of attempted murder and one count of criminal intimidation in respect to events between 17 May and 19 May 2021. He is alleged to have murdered Benjamin Samuel Matitaputty, Eme Warma, Alfat Kodri, Samuela Sukera and Qiritivabea Cagilabakomeli. He is alleged to have attempted to murder Kaminieli Tucama and alleged to have criminally intimidated Mitieli Cama.
- [3] The accused denies having committed the offences.

Counts 1 to 5 - Murder

- [4] The elements for the offence of murder are:
- i. The accused engaged in conduct;
 - ii. With the intention of causing the death of Benjamin Samuel Matitaputty, Eme Warma, Alfat Kodri, Samuela Sukera and Qiritivabea Cagilabakomeli or was reckless as to causing their deaths; and
 - iii. The conduct caused their deaths.

Count 6 - Attempted Murder

- [5] The elements for attempted murder, and the matters for the Court to consider, are summarised by Sharma J in *State v Balevirewa* [2022] FJHC 678 (24 October 2022) as follows:

5. ... the prosecution must prove the following elements of the offences of attempted murder beyond reasonable doubt:
- a) The accused;
 - b) engaged in a conduct; and
 - c) the said conduct was an attempt to cause the death of the complainants; and
 - (d) the accused intended to cause the death of...the complainants by his conduct.
6. ...The first element of the offence of attempted murder is concerned with the identity of the person who allegedly committed the offences of attempted murder.
7. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.
8. For the accused to be guilty of attempted murder, the accused's conduct must be more than merely preparatory to the commission of the offences. The question whether a conduct is more than merely preparatory to the commission of the offences is one of fact.
9. The third element is that the said conduct of the accused was an attempt to cause the death of both the complainants.
10. The final element is concerned with the state of mind of the accused that he intended to cause the death of...the complainants. It is not possible to have direct evidence regarding an accused's state of mind since no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, one can construe the state of mind of the accused from the facts and circumstances proved.

[6] The elements that the Prosecution must prove beyond reasonable doubt for count 6 are:

- i. The accused engaged in conduct;
- ii. The accused intended to cause the death of Kaminieli Tucama; and
- iii. The said conduct was an attempt to cause the death of Kaminieli Tucama.

Count 7 – Criminal Intimidation

[7] Hamza J provided the following discussion on the elements for criminal intimidation in *State v Ali* [2024] FJHC 785 (9 October 2024):

[31] Therefore, in order for the prosecution to prove the third count of Criminal Intimidation, they must establish beyond any reasonable doubt that;

- (i) The accused;*
- (ii) On the specified day (in this case on the 25 July 2022);*
- (iii) At Lautoka, in the Western Division;*
- (iv) Without lawful excuse;*
- (v) Threatened Kritesh Nand with injury to his person (by the use of a cane knife and with words);*
- (vi) With the intention to cause alarm to the said Kritesh Nand.*

[32] To further elaborate on these elements in respect of the third count.

[33] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond any reasonable doubt that the accused and no one else committed the offence.

[34] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[35] The fourth element the prosecution must prove beyond reasonable doubt is that the accused acted without lawful excuse. As stated before, the term "unlawfully" simply means without lawful excuse. As such, it is for Court to consider and decide whether the accused acted in an unlawful manner in the given circumstances.

[36] The fifth element the prosecution must prove beyond reasonable doubt is that the accused threatened Kritesh Nand with injury to his person. The prosecution must establish that by his actions (in this instance by the use of a cane knife and by the words the accused had used at the time), that the accused threatened Kritesh Nand with injury to his person.

[37] The final element the prosecution must prove beyond reasonable doubt is that the accused intended to cause alarm to the said Kritesh Nand. This concerns the state of mind of the accused. As stated previously, it is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, Court can deduce the state of mind of the accused from the facts and circumstances that it would consider as proved. Knowledge or intention of an accused can be inferred based on relevant proven facts and circumstances.

[8] The elements that the Prosecution must prove beyond reasonable doubt for count 7 are:

- i. The accused without lawful excuse;
- ii. Threatened Mitieli Cama with injury to his person (whilst holding an axe and uttering the words 'if you want to die, come'); and
- iii. With the intention to cause alarm to Mitieli Cama.

Burden of proof and my approach to the assessment of the evidence

- [9] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence.
- [10] The accused chose to remain silent. He has a right to do so. No adverse inference will be drawn from this. The burden is on the prosecution to prove the charges beyond a reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.
- [11] I approach the evidence dispassionately, without sympathy or value-laden rules. It is entirely a matter for me to decide which witnesses are credible and reliable and which part of their evidence I accept as true.

Prosecution case

- [12] On 8 May 2021, eight crew on the fishing boat **Tiro II** departed Walu Bay, Suva, for a 14-day fishing trip. Thirteen days later, on 21 May, the Tiro II sank in the waters off the Yasawa Islands. Three of the crew were rescued while the other five remain unaccounted for. Two of the survivors, Kaminieli Tucama (PW1) and Mitieli Cama (PW2), provided evidence for the prosecution. The third survivor is the accused. Only these three persons know the truth of what occurred on Tiro II.
- [13] There are two conflicting versions of the events that took place at the material time on Tiro II. PW1 and PW2 provide a different version to the accused.² They allege that the accused caused the deaths of the five missing crew. They also allege that the accused attempted to murder PW1 and threatened PW2. The question for the Court to determine is whether the accounts of PW1 and PW2 are true.

² The accused did not provide evidence. Nevertheless he relies on the account that he provided at interview with the police in May and October 2021.

[14] The Prosecution called the following 15 witnesses:

- Kaminieli Tucama (PW1) – crew member on Tiro II.
- Mitieli Cama (PW2) – crew member on Tiro II.
- Waisake Tikoduadua (PW3) – Fiji Navy officer.
- Luke Madanavasa (PW4) – Fiji Navy officer, Commander of HFMF Kikau.
- John Brereton (PW5) – New Zealand Air Force officer.
- Tarasese Rokoceva (PW6) – wife of missing crew member, Samuela Sukera.
- Ratu Isoa Tokalauvere (PW7) – Fiji Navy officer, Commander of HFMF Savenaca.
- Pita Velia (PW8) – friend/neighbour of the accused.
- Ivamere Nataro (PW9) – reporter with Fiji Sun newspaper.
- Salote Ratuve (PW10) – sister of missing crew member, Qiritivabea Cagilabakomeli.
- Adi Taqini (PW11) - cousin of the accused and employee of Green Tuna Fisheries which owned Tiro II.
- Sgt Ikimi Nacama (PW12) – Fiji Police, charging officer.
- Cpl Tomasi Cabecuvu (PW13) – Fiji Police, witnessing officer during charging of the accused.
- Sgt Semi Volitiko (PW14) – Fiji Police, interviewing officer.
- Jin Kyung Oh (PW15) – General Manager of Green Tuna Fisheries.

[15] PW1 and PW2 explained the events on the Tiro II from the time it departed Suva up to the time of the alleged murders and the subsequent rescue. PW3, PW4, PW5 and PW7 were members of the Fiji Navy and the New Zealand Air Force involved in the rescue efforts. PW3 collated data to assist with rescue efforts. PW4 and PW7 were the respective Commanders of RFMF Kikau and RFMF Savenaca, the two naval boats searching for the Tiro II and the missing crew. PW5 was on the aircraft, Orion.

[16] PW6 and PW10 are family members of two of the missing crew, Samuela Sukera and Qiritivabea Cagilabakomeli. They confirmed that neither crew member has returned home from the fishing trip in May 2021.

- [17] PW15, the General Manager of Green Tuna Fisheries confirmed that none of the three Indonesian crew members returned from the fishing trip in May 2021. Along with PW11, they confirm that 8 crew left on the Tiro II on 8 May 2021, the names of the eight crew and the fact they were each employees of Green Tuna Fisheries. PW15 also provides information regarding the layout of Tiro II.
- [18] Finally, the Prosecution relies on admissions made by the accused of his alleged role in the murder of the five crew. Admissions were made to PW8 and PW9 as well as to the police during interviews with PW12, PW13 and PW14. The admissions to the police and PW9 were audio recorded. The English translation of the transcript of the recordings have been produced in evidence.

Defence case

- [19] The identity of the accused is not an issue in this case.
- [20] The accused chose to remain silent. As stated, that is his right. The Defence relied on the accused's version of the events conveyed to the police during interviews in May and October 2021. The English translation of the transcript of the recordings were produced in evidence during the Prosecution case. The accused laid the blame for the missing five crew on PW1 and PW2.
- [21] The Defence challenge the plausibility of several key aspects of the Prosecution's case, namely:
- i. PW1's evidence that he remained in the engine room for about 30 hours.
 - ii. PW2's evidence that he remained in the fish hold for about 30 hours.
 - iii. That the Tiro II sank in the circumstances alleged by PW1 and PW2. It is the Defence case that PW1 and PW2 deliberately scuttled the Tiro II to bury evidence demonstrating their guilt.

- iv. The Defence argue that it is improbable that one person (being the accused) was able to force 7 crew to yield. The accused's version is more plausible, being that PW1 and PW2 acted in concert.

[22] The Defence called three witnesses to refute the evidence of PW1 and PW2, being:

- Savenaca Kadavi (DW1) – retired, 39 years' experience as ship's captain.
- Noa Dadekimerika (DW2) – Marine engineer.
- Robert Kubukawa Sila (DW3) – Marine engineer.

Evidence

[23] The Tiro II left Suva on 8 May 2021 with eight crew. There were three Indonesian crew, being the captain (Benjamin Samuel Matitaputty), the cook (Alfat Kodri) and the chief engineer (Eme Warma). The other five crew were local. PW2 was the Bosun. He was responsible for the local crew. PW1³ and PW2⁴ were experienced fishermen. The two are related. The accused, Samuela Sukera (**Samuela**) and Qiritivabea Cagilabakomeli (**Qiri**) were late additions to the crew. The accused had not previously worked on a fishing boat. The job was organised by PW11, who worked for Green Tuna Fisheries and had known the accused since childhood. She contacted the accused on 8 May 2021 to check his availability. The accused met with PW15, a contract was signed and the accused left on the Tiro II the same day on a 14-day fishing trip.

[24] It appears that rough weather changed plans. The captain had originally planned to fish in the Lomaiviti waters but changed course to the west, travelling to the waters to the west of the Yasawa Group of Islands. Once there, the crew followed a similar work routine catching fish each day. Fishing lines were put out by the crew between 6am to 11am, after which they had a shower, rest, had a meal and then slept. The fishing lines were hauled in at about 6pm along with their catch of fish. They worked from 6pm until the early hours, pulling in the fishing lines, unhooking the fish, gutting the fish and placing the fish in the fish hold. All the activity was at the rear of the boat on the lower

³ He has about 20 years experience on fishing boats.

⁴ He has been working on fishing boats for 27 years.

deck, mainly on the starboard side. The five local crew each had a role – although the cook and chief engineer also assisted. At night the crew worked under bright lights positioned high on the mast. They finished at about 4am, showered, ate and then slept.

[25] This routine repeated itself each day, including on Monday the 17th of May 2021. The lines were put out that Monday morning. From 6pm the lines were hauled in along with the catch. At about midnight, or in the early hours of Tuesday 18 May 2021, as the lines were still being hauled in, the incident that is the subject of the charges against the accused occurred. It is at this point that the version from PW1 and PW2 differ to that provided by the accused to the police in 2021.

[26] Relying on the evidence of PW1 and PW2 the Prosecution case is as follows.

[27] Samuela, the accused and PW1 were on starboard side hauling in the line and catch. At the stern, in the middle, Qiri was gutting the fish using a knife. PW2 was in the fish hold (situated next to Qiri and below deck) stacking the fish that had been gutted. Alfat Kodri and Eme Warma were present assisting with this work.

[28] PW1's evidence is that at this point he heard Qiri's voice and looked towards him. He saw Qiri on his knee and the accused standing in front of him holding an axe. Qiri looked in pain. The accused moved toward PW1, looking angry. PW1 fled, believing he was in danger, running to the front of the boat. He climbed up to the top deck - there were three decks on the Tiro II; the main deck where the fishing activity occurred, the lower deck where the engine room and fish hold were located and the top deck where the life raft was situated. PW1 was able to observe the subsequent events from the top deck.

[29] It is appropriate to bring PW2 into the picture at this point. When the incident first occurred, PW2 was in the fish hold. He heard the commotion and went up to check. He saw Qiri lying down with blood to his nose and saw the accused holding an axe and striking Qiri. The accused had his back to PW2. PW2 saw Alfat Kodri sitting on the deck holding his chest. PW2 called out to the accused. The accused told PW2 that *'if you want to live, you stay there, you want to die you come up'*. PW2 decided it was safest to go back down into the fish hold. He remained in the fish hold for the next 24-30 hours and did not see any further action on the deck.

- [30] Back to PW1 who was hiding on the top deck observing events below him on the main deck. PW1 heard Samuela's voice in the sea, starboard side, pleading for a life jacket. The accused threw a life buoy to Samuela in the water. He saw Alfat Kodri and Eme Warma at the back of the boat. Alfat Kodri was sitting on the deck holding on to his chest with blood on his face. Eme Warma was leaning on ropes. The accused moved toward Eme Warma holding the axe and told him to jump off the boat. Eme Warma refused, to which the accused lifted the axe up to strike Eme Warma. Eme Warma then jumped off the boat. Eme Warma grabbed hold of the fishing line in the water to save himself. The accused cut the fishing line and PW1 lost sight of Eme Warma as he drifted away from the boat into the darkness. PW1 saw the accused then drag Qiri's listless body along the deck and throw him into the sea. He saw Qiri floating in the sea face down.
- [31] PW1 then saw the captain walk to the top deck and talk to the accused who was still at the stern on the main deck. The accused told the captain that he was aware there was someone else on the top deck hiding. The captain told the accused that everyone had jumped off because the accused had told them to jump. The accused stated he was coming up to the top deck. PW1 stated that he knew that the accused would do something to him and the captain. Therefore, as the accused made his way to the top deck, PW1 quietly crawled along the edge of the top deck, dropping into an open window in the wheelhouse. PW1 then made his way down to the engine room – while he was doing so he heard the accused talking with the captain. PW1 thought he would be safe in the engine room. The chief engineer had a bed in the engine room. PW1 hid under the mattress.
- [32] After some time, PW1 heard the accused come into the engine room looking for him. The accused discovered PW1 and ran out of the engine room and called out to PW1. PW1 could see that the accused was holding two knives. PW1 told the accused he was not going to jump off the boat. The accused told him to wait there as he was coming down to the engine room. PW1 went into the engine room and locked the door, barricading himself inside the engine room. PW1 remained in the engine room for the next 24-30 hours. He stated it was hot and noisy. He drank water. He was unaware what

was occurring elsewhere on the boat. He was unaware that PW2 was in the fish hold – as was PW2 unaware that PW1 was in the engine room.

- [33] As stated, PW2's evidence is that he remained in the fish hold. The fish hold is filled with ice before the boat leaves the wharf. The fish hold is intended to preserve the catch (fish) as well as the food to be eaten by the crew. There were about 8 compartments in the fish hold, some to store the catch, others to store food. PW2 stayed in one of the compartments which he stated was warmer than the other compartments and had its own door. He stated that he was wearing gumboots, rubber pants and a jacket (raincoat). There was a hole in the fish hold, allowing PW2 to see outside.
- [34] PW2 was the first to leave his safe enclosure. He stated that he left because the ice was melting and he could feel water. He did not leave earlier because the hold door made a loud sound – it appears that he was wary that the accused was still on the boat and would do PW2 harm. PW2 made his way out of the fish hold at about 4am on Wednesday morning, 19 May. It was dark. There were no signs of anyone else on the boat. He went to the top deck and sat there as the sun rose. Sometime after sunrise, PW1 made his way out of the engine room. He took pieces of steel in order to protect himself from the accused if attacked. PW1 made his way to the wheelhouse. He saw PW2 on the top deck and both men then realised that they had both survived.
- [35] No one else was on the Tiro II. The life raft was also missing. PW1 and PW2 assumed that the accused had abandoned the Tiro II onto the life raft.
- [36] At about 8.30 that morning, on Wednesday 19 May, they received a call on the boat's satellite phone from PW15. PW1 spoke to PW15 to advise him what had happened. PW15, in turn, contacted the police. While waiting to be rescued, and at the request of PW15, PW1 started the boat and headed toward Nadi. PW1 received a further call from PW15 later in the day to stop the boat and wait for a Navy boat to rescue them.
- [37] The authorities made arrangements for a search and rescue. The Fiji Navy was contacted. PW3 is trained with respect to rescues. Using data from the Vessel Monitoring System

(VMS)⁵, PW3 was able to identify the movement and speed of the Tiro II since it left Suva on 8 May 2021. PW3 was able to ascertain from this information that the Tiro II was fishing from 11 May to 17 May but not fishing on 18 and 19 May. At 2.28am on 18 May, the boat stopped and started drifting. It was then about 90km from the Navula Passage. The boat remained drifting until 8.28am on 19 May when the boat began moving at a speed of 3 knots until 4.28pm the same day when the boat stopped again. According to PW3, during the incident on 18 May 2021, there were no other vessels in close proximity to Tiro II to render assistance. With this data, along with weather and tide information, PW3 created a search area for the missing crew of the Tiro II.

- [38] The Navy sent the RFMF Kikau from Suva to search for the Tiro II and the crew. The Kikau left at about 8pm on 19 May. The Fiji authorities reached out to its search and rescue counterparts in New Zealand. The New Zealand air force sent the Orion aircraft to assist. PW5 was a member of the aircrew on the Orion.
- [39] The RFMF Kikau arrived in the search area the next day, Thursday 20 May, at about 9am. The Orion arrived in the same area a little earlier.
- [40] At 9.47am, the Orion discovered the Tiro II and took photographs of the boat. PW5 produced two photographs of the boat. The Orion also made contact with the two crew on the Tiro II, speaking with PW1. PW1 advised the Orion crew that the accused was on a life raft. The coordinates for Tiro II were sent to the RFMF Kikau, which made its way toward Tiro II – the Commander of RFMF Kikau, PW4, intended to extract PW1 and PW2 and replace them with navy officers on the Tiro II. The Orion then searched for the life raft.
- [41] The Orion discovered the accused on the life raft at 1.28pm on Thursday 20 May. The plane dropped a package for the accused containing water, food, a blanket and GPS. The coordinates of the life raft were communicated to RFMF Kikau. When the Kikau received the position of the life raft, it had almost reached the Tiro II which was within visual proximity. PW4 calculated that they could not extract the two crew on Tiro II, and then rescue the accused before nightfall. Therefore, at about 2.30pm the Kikau turned

⁵ VMS monitors the location and speed of fishing vessels. The electronic data is kept in the Solomon Islands. Fiji has access to this information.

and made its way to the location of the life raft. The Orion returned to New Zealand at about 2.42pm.

[42] At about this time, the weather and the conditions on the water were deteriorating. The winds were picking up and the sea was rough. According to PW4 they were encountering 40-50 knot winds and 4-5 metre swells. The Kikau picked up the accused between 5 to 6pm. The Kikau then returned to the Tiro II, arriving at about 8.30pm. The weather was too rough to attempt an extraction, and, therefore, the Kikau returned to the mainland to transfer the accused to the police. The Kikau arrived at Navula Passage at 1.30am on Friday 21 May.

[43] In the meantime, matters were getting decidedly worse for PW1 and PW2 on the Tiro II. They stated that the boat had been taking on water. On Thursday afternoon they saw that the engine room was full of water. They tried bailing the water out by hand but without success. PW15 had told them to start the boat but it would not start. With the weather and sea conditions deteriorating around them that night, on 20 May, PW1 and PW2 realised that the boat was sinking. They made a makeshift raft from the cage at the stern of the boat, filling it with floats. They packed some gear⁶ and a flare gun from the wheelhouse. The boat began sinking at about 5am. They abandoned the boat on the makeshift raft wearing life jackets.⁷

[44] At about 9.30am on 21 May, the Kikau headed back to the Tiro II unaware that the boat had sunk. At about this time, PW1 and PW2 saw a passing fishing boat and fired a flare. The fishing boat saw the flare and picked up the two crew from the sea at about 10am.

[45] At 3pm that afternoon, PW1 and PW2 were transferred from the fishing boat to the Kikau. The Kikau then spent the next 5-6 hours searching for the five missing crew in the waters within the search area mapped by PW3. PW4 estimated that between the Kikau and the Orion they had searched about 70% of the search area. The Kikau headed back to Suva at about 8.30pm on Friday 21 May arriving at Suva at 11am the next day, and handed over PW1 and PW2 to the police.

⁶ Taking cash, phones and other items from the missing crew.

⁷ According to PW3 the last VMS record for the Tiro II was at 5.28am on 21 May 2021.

- [46] Another naval boat, the RFMF Savenaca, replaced the Kikau to conduct a further search of the search area for the five missing crew. It arrived at the search area on Saturday 22 May 2021 and conducted a search for the missing crew for 8 to 9 hours that day without success. The commander, PW7, stated that they had covered about 60% of the search area in that time.
- [47] The accused was interviewed by police on 22 and 23 May and on 20 and 21 October 2021. He provided a different version to PW1 and PW2 of the incident on Tuesday 18 May 2021. The accused stated that Qiri and PW2 had an argument over the shark bite fish. The shark bite fish are given to the crew to sell and share as a bonus. The accused stated that PW2 was throwing the shark bite fish off the boat, which angered Qiri. Qiri was holding a knife that he was using to gut the fish. He confronted PW2 with the knife. In response, PW2 (who was wearing gumboots) did a back kick to Qiri's chest, causing Qiri to fall. Qiri fell on his knife which pierced his stomach. PW2 then forced the accused and Samuela to throw Qiri's unconscious (but still breathing) body off the boat. PW1 and PW2 then demanded that the rest of the crew jump off the boat. PW1 and PW2 each held knives to back up their threats.
- [48] The accused stated that the crew jumped off the boat whilst the accused ran to the front of the boat and hid. PW1 and PW2 were unaware that the accused was hiding on the boat. After the rest of the crew had jumped off the boat, PW2 had a shower whilst PW1 had a smoke. PW1 and PW2 then steered the boat. When it was daylight, PW1 removed the life raft from the top deck and cut the rope. The accused saw his opportunity to flee. He jumped off the boat and swam to the raft. As he did so, PW1 and PW2 saw him. They shouted that they would blame the accused for the deaths of the five missing crew.
- [49] The accused remained on the life raft for the next few days until he was found by the Orion and then rescued by the Kikau on Thursday 20 May.

Analysis and findings

- [50] The elements for murder, attempted murder and criminal intimidation are set out above. If I am sure that the accounts of PW1 and PW2 are true and correct, and so are the

admissions by the accused at interview with the police in April 2022, then the accused is guilty of each of the offences for which he has been charged. On this evidence, the accused struck Alfat Kodri and Qiritivabea Cagilabakomeli with an axe and threw their injured bodies into the sea. He forced Benjamin Samuel Matitaputty, Eme Warma and Samuela Sukera to jump into the open sea about 90km from land with no lifejacket and no prospect of surviving. PW1's evidence is that the accused would have murdered him too if PW1 had not barricaded himself in the engine room. PW2's evidence is that immediately after striking Qiri with an axe, the accused threatened PW2 with a similar fate if he came out of the fish hold, saying '*if you want to live, you stay there, you want to die you come up*'. If those words had been said to PW2 in those circumstances they were certainly intended to cause PW2 alarm.

- [51] Are the accounts of PW1 and PW2 true and correct? Are the accused's admissions at interview with the police reliable?
- [52] In deciding whether PW1 and PW2 are telling the truth, I keep in mind the following factors when determining the credibility and reliability of a witness such as: promptness, spontaneity, probability, improbability, consistency, inconsistency, contradictions, omissions, interestedness, disinterestedness, bias, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022)). In *Liberato and Others v The Queen* [1985] HCA 66; 159 CLR 507 at 515 the court discussed the approach to be taken where there are conflicting versions of evidence given by the Prosecution and the Defence witnesses. Brennan J stated:

When a case turns on a conflict between the evidence of a Prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the Prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond

reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is "a gross simplification".⁸

[53] In *State of UP v M K Anthony* (1985) 1 SCC 505, the Court stated:

While appreciating the evidence of a witness, the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinize the evidence more particularly to find out whether deficiencies, drawbacks, and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and a refined lawyer.⁹

[54] In *Bharwada Bhoginbhai Hirjibhai v State of Gudjarat* (1983) 3 SCC 217, the Court stated:

A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen ... The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another It is unrealistic to expect a witness

⁸ My emphasis.

⁹ My emphasis.

*to be a human tape recorder..... In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense of individuals, which varies from person to person.... Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on...*¹⁰

- [55] I have carefully considered the evidence of PW1 and PW2. I have considered their demeanour, their reactions to questions, and any internal inconsistencies. I have also considered their evidence as against the other evidence produced at trial, including the three witnesses for the Defence, and the admissions by the accused. I found PW1 and PW2 to be believable and honest. PW1 gave his evidence without hesitation. He made concessions in cross-examination such as in respect to a dispute between PW2 and another bosun, Kova. While PW2 was guarded and, at times, reluctant (or struggling) to communicate I put this down to the traumatic and terrifying events he and PW1 endured on the Tiro II. They saw their fellow crew members being murdered and only avoided this fate narrowly. For about 30 hours, they sat waiting in the fish hold and engine room with no idea what was happening on the boat and whether they would lose their lives. I consider it natural for PW2 to have struggled to relive these events in court.
- [56] The Defence challenged the evidence of PW1 and PW2 arguing that they were not telling the truth. The Defence pointed to many instances of inconsistencies in their evidence. For example, PW1 earlier stated to the police that the accused used a knife not an axe and that he earlier stated to the police that he saw the accused strike Eme Warma with an axe whereas in court he stated that he did not see this. With respect to PW2, he had taken personal property from the other crew including cash from the captain and did not inform the police. The Defence claimed that there was a dispute between PW2 and Qiri concerning shark bites - PW2 stated that the crew were getting on. The Defence also

¹⁰ My emphasis.

pointed out that the fish line had trackers which allowed the boat to locate the cut line and potentially rescue the missing crew yet PW1 and PW2 made no effort to do so.

[57] The events occurred quickly. The crew had been working for several hours and nearing the end of the haul, the time being in the early hours of Tuesday 18 May. They would have been tired. The events themselves were traumatic. It is understandable there will be inconsistencies. PW1 saw Alfat Kodri bleeding and injured. He saw the accused raise an axe to strike Eme Warma before the latter jumped into the sea. The events will have become jumbled. The fact that PW2 took personal property from the missing crew does not, of itself, undermine PW2's account of the accused's actions at the material time.

[58] The Defence case is that PW1 and PW2 were responsible for the deaths of the five missing crew. They argue that certain aspects of their evidence are simply implausible. There are four aspects, in particular, that they point to:

- i. **It was not plausible for PW2 to remain in the fish hold for more than a day.**
The fish hold contains ice to preserve the fish and the crew's food. The temperature is low. According to the evidence of the three witnesses for the Defence it is not plausible for a person to remain in a fish hold for more than two hours. DW1 has considerable experience as a ship's captain. DW2 and DW3 are both marine engineers. DW1 stated that he was certain that a person cannot survive in an ice hold for more than six hours. He stated that in addition to the extreme cold there would not have been sufficient oxygen and PW2 would have suffocated. DW2 stated he had inspected the fish hold on the Tiro II some months before the events in question – although he did not go inside and he did not examine the compartment that PW2 stated that he had stayed in. DW2 stated that PW2 would not have survived more than 2 hours before suffocating. He based this on his experience as a marine engineer. He stated that he had been approached by the Defence the day before attending court to provide evidence. DW3 is a marine engineer with 20 years' experience working for fish company. He too stated that it was not possible to survive in a fish hold for more than 2 hours as the person would need oxygen.

The three Defence witnesses were offered as expert witnesses on the matter. While DW1 and DW3 have considerable experience to draw on to offer an opinion on the question whether a person could remain in an ice hold for more than a day, I am not satisfied that any could properly be described as an expert witness and even if they could their opinions have little to no probative value. My reasons are as follows:

- To offer an expert opinion on the issue requires technical expertise on ice holds. How they are designed and constructed and their purpose. The usual temperature when filled with ice and the likely temperature as ice melts over the subsequent days and weeks – as occurred here (the Tiro II was on day 10 or 11 when PW2 went into the hold). How much oxygen is usually in the fish hold. What impact opening and closing the fish hold door on a frequent basis has on these factors. Then there is the medical question. How long can a human body remain alive in the conditions described? I am not satisfied that any of the three Defence witnesses can properly hold themselves out as expert witnesses. At best, they offer an opinion based on their own lived experiences as a ship's captain and marine engineer; DW1 and DW3 having particular and a long history working on fishing boats. This does not qualify them as experts on the issue of whether a human being is capable of staying in a fish hold for 24 -30 hours as occurred in the present case.
- The other vital aspect of expert evidence is having a full and informed picture of the material facts in the case which they are providing an opinion. I am satisfied that all three Defence witnesses lacked the requisite full facts. They were not aware of the particular circumstances of the fish hold on the Tiro II; that it had a compartment with its own door. PW2 stated that he remained in that compartment in the fish hold and was wearing gumboots, rubber pants and a jacket. PW15 confirmed the fact of the compartment in the fish hold which he described as the size of the witness box. He stated that the compartment was not insulated and close to the operating area. He stated that the compartment was not that cold.

PW15 stated that it was also closed off from the rest of the fish hold. He stated in cross-examination that a person could survive in the compartment for more than 30 hours. Further, PW2 stated that he was able to get oxygen from a hole in the fish hold. These are all facts that an expert must be aware of and weigh when providing an expert opinion.

ii. **It was not plausible for PW1 to have remained in the engine room for more than a day.** The witnesses for the Defence stated that an engine room is too hot and too noisy for this to have been plausible. DW1 stated that he found it hard to believe that PW1 could have remained in the engine room for 2 days given these conditions – in fact, PW1 was in the engine room for a little over 1 day, and by his account no more than 30 hours. DW2 stated it was impossible for PW1 to survive in the engine room for 2½ days – again that period is not correct. DW3 stated that a person could not remain in the engine room for more than 24 hours because it is too hot and too small. He stated that the person would need to be super human to survive. None took into account PW1's evidence that the engine room had a blower that sucked out air making the room cooler. Also, it appears that the chief engineer slept in the engine room as indicated by the presence of a bed in the engine room. The three Defence witnesses were quick to offer an opinion on matters where they did not have a complete picture – as they did with their opinions on the fish hold.

iii. **It was implausible for the Tiro II to have sunk unless it was deliberately scuttled by PW1 and PW2.** Many of the witnesses stated that a boat does not just sink without the boat having been structurally damaged in some way. Even the General Manager of Green Tuna Fisheries expressed surprise that the Tiro II had sunk. The Defence case is that PW1 and PW2 scuttled the boat to hide incriminating evidence. No expert witness offered an opinion on this issue in this case. Further, the three Defence witnesses did not have sufficient information regarding the circumstances of the Tiro II to offer a probative opinion.

I am satisfied with PW1 and PW2's account that the boat took on water and sank in rough conditions. PW1 and PW2 stated in evidence that the engine room was filling with water. They were unable to explain the source of the water. The

owner gave evidence that there was an electric pump used by the chief engineer to pump water out of the boat. Water accumulated in the boat from the melting ice and the sea. How the water levels rose so quickly on Wednesday 19 May and Thursday 20 May is unclear. However, PW1 and PW2 gave evidence that this occurred. They also informed PW15 as well as the Orion of the alarming level of the water inside the boat. PW3 stated that PW15 relayed this same information to him concerning the fact that the Tiro II was taking on water. PW5 who was on the Orion supplied a transcript of the discussion with the crew on Tiro II on Thursday 20 May. According to the transcript, PW1 advised the Orion, '*Urgent problem, urgent problem. It's full of water inside the engine room.*' PW5's own observations of the boat supported this account. He stated that while the boat looked in a structurally normal condition, the Tiro II was lying very low and heavy in the water. He stated it was unusual to see the boat that low in the water. He noticed that water was coming out of the drain holes on the side of the boat and thus looked to be taking on too much water. It appears that the deteriorating weather conditions played a role as did the fact that the water pump used by the chief engineer was unable to be used by PW1 and PW2.

- iv. **It was implausible for the accused to have overcome 7 crew by himself.** The Defence argue that it is improbable for the accused to have overpowered the entire 7 crew members by himself. As PW2 explained in his evidence, the accused did not confront the 7 crew at the same time. According to the evidence produced by the Prosecution, the accused suddenly struck Qiri and Alfat Kodri with an axe seriously injuring both. The accused stated in his interview on 5 April 2022, that the reason he struck Qiri '*first was because he was the one that was lifting up the knife. If I had hit someone else first, I would have met that knife and could have been my day*'. After dealing with Qiri and Alfat Kodri, the accused threatened PW2 with death if he came out of the fish hold. PW2 therefore remained in the hold. The accused then advanced with his axe on PW1 who fled. He then threatened Samuela and Eme Warma with the axe if they did not jump off the boat. Both jumped overboard. This left PW1 and the captain. They could have worked together to try to overcome the accused but they did not do so. The accused was able to overcome the 7 crew because of the suddenness of his violence which caused shock and terror to the crew. The axe was a weapon which

gave the accused a significant advantage in the moment. The fact that the accused had shown himself to be prepared to use the axe and to kill had its impact on the crew.

[59] As stated, the other significant evidence relied on by the Prosecution, in addition to the direct evidence of PW1 and PW2, are admissions made by the accused regarding his role in the murders of the missing crew. This evidence is consistent with the accounts provided by PW1 and PW2. The Prosecution rely on admissions on three separate occasions.

[60] The accused initially admitted killing the five crew in February 2022. He did so to a friend, PW8, who he had known for about 7 or 8 years. They had played rugby together and attended church youth service. They were also neighbours. In February 2022 they were in the plantation talking. PW8 stated in evidence:

... I was weeding my taro/dalo plantation in Colo-i-suva and we were talking about the life of being away at sea, like boarding the fishing vessel, and then I asked him about the case that he was allegedly been accused of and then he told me that he was the one that truly committed it.

...

He told me that the trip that the sea boat had taken, it was not meant to come back, it was to go and never come back. And he said when they were missing in the night, and before anything happens, he should do something to defend himself. He said that before something happens or done to him he should do something to try and defend himself. And he said strike one of them and he threatened the rest to jump over...

[61] PW8 stated that he did not believe the accused. PW8 did not come forward with this information to the police. The police learned of it later through admissions made to PW9 in March 2022 and to the police in April 2022. The Defence rely on the fact that PW8 stated in his evidence that he did not believe the accused and thought the accused was lying about killing the missing crew. I fail to see how PW8's view of the veracity of the accused's admission undermines the admission by the accused. There is no obvious

reason why the accused would make up such a story to his friend. It would not raise his esteem in the eyes of his friend. They both attended church youth service.

[62] The second admission by the accused was on 8 March 2022 to a Fiji Sun reporter, Ivamere Nataro (PW9). PW9 was writing an investigative column called 'Shine a Light'. PW9 researched cases of corruption and cold cases - criminal cases that were still unresolved. The column was published on Saturdays. PW9 was aware that this case was a year old without a person having been charged. She undertook some research, reading early media reports on the case. She became aware that there were three survivors from the boat and she decided to interview each of the survivors beginning with the accused. PW9 approached the accused at his home for his account of what happened on the boat. She informed the accused that she was with the Fiji Sun. The accused's father was present when she first approached the accused at his home. Both were initially reluctant but the accused agreed to the interview. PW9 audio recorded the conversation without informing the accused. The audio recording was subsequently provided to the police. An English translation of the transcript was produced in evidence.

[63] The accused admitted to PW9 his role in the murder of the crew on the Tiro II. His admissions were consistent with the accounts from PW1 and PW2 – he also informed PW9 that he had already informed his friend¹¹ what had happened. The accused informed PW9 that he believed that the other crew were intending to harm him. He stated, *'I knew that something was going to happen to me' ...I then came just took the axe...The two iTaukei, the two that survived, they fled, they fled for their life, I would have emptied the whole boat if they did not flee'*. Further, *'it would have been my day, they wanted to do it, but they were double minded'*. PW9 asked *'which part on them did you hit with axe?'*. The accused responded, *'I hit them straight on the head...I only took down two, the rest of them, I warned them to all jump to the sea, I did not kill all of them...The guy from Kadavu and the Indonesian, those were the two I hit with the axe, the rest I told them to jump'*. He also stated:

They all jumped. Those two survived, they locked themselves, one locked himself at the lower deck. (cargo hold), the other one locked himself at the engine room.

¹¹ Being, PW8.

This engine room, when it's locked from the inside you cannot open it from the outside, that's it, that's why they survived, if not, I would have cleared the whole boat.

- [64] And further, *'They [PW1 and PW2] both stayed on the boat, I alone released the life raft, stored food for myself, drinking water, then left'*.
- [65] Some of the accused's descriptions to PW9 of the events on the boat were peculiar. He stated that he understood that the other crew were planning to harm him. He also stated that the crew thought he had a marble in his penis – the Defence argued that this statement demonstrated that the accused was telling a fictional story and was trying to flirt and impress PW9 whom the Defence argue was also encouraging the flirtatious behaviour during the interview. The Defence suggest that the story was patently false as demonstrated by the reference to marbles in his penis. The Defence argue that no weight can be placed on the admissions for this reason. The Defence question the probative value of the admissions to PW9. They argue that PW9 tricked the accused into making up stories about the murder by flirting with him and encouraging the accused to believe that they would have a sexual relationship. There was also a question raised whether PW9 said to the accused that the interview was confidential.
- [66] It is evident from the transcript that the accused was flirting with PW9 and may well have believed that she was also flirting with him. However, I do not accept that the accused concocted a story to PW9. The details are entirely consistent with the accounts of PW1 and PW2. Only a month earlier the accused had made similar admissions to his friend.
- [67] The Fiji Sun published an account of PW9's interview with the accused on 12 March 2022. The police subsequently got in touch with PW9 to obtain a copy of the audio recording of the interview and took the opportunity to re-interview the accused, doing so on 5 April and 6 April 2022. The accused was informed of his rights under the Constitution. He made full admissions to the police regarding his role in the alleged offending on the boat. He admitted making earlier admissions to PW8 and PW9. The accused confirmed that the admissions were true. With respect to the events in the early hours of Tuesday 18 May 2021, the accused stated:

... But little did I know that they [the other crew] are planning everything down there, what to do to me. In all time they told me to work up there and not to follow them down to the cabin.... It like this all the time, how they treated me until the last morning. I saw their body language and how they behaved to me has changed.... When I passed them fishing line to them (actions) I saw them over acting. At the same time it is nearly dawn and something came into my mind, when I know that something will happen. I was very afraid...I suspected that they wanted to do something to me..... I went and roll the Fijian tobacco (suki). After finished rolled the Fijian tobacco, what I had suspected for them to do me I saw it with Samu. He took a knife out from his jacket and dropped it inside his overall. It came to my mind that this will be my last day of my life. If I was not active on that day, it will be my last day on earth. I then ... I can fight, but what I saw [inaudible] I can't do that, I am afraid of it. But on that day there was no choice and no option, I did it...resulted in [becomes teary].... I commit a very serious offense, yes [inaudible] I want to spare my life too... for me [inaudible] for what happened. After I finished them. It came to my mind, why didn't they did it to me in the first place....

...

...I then went inside the cabin. I told myself that I have to do something to them so that I can save myself. I then [inaudible] lift up an axe and hit that man first, Qiri who was holding a knife, he was there in front and was holding a big knife and was cleaning the fish. I hit him first, then hit our cooker then I forced other crews members to jump into the sea, open sea. I then looked for the other two crews and lucky they ran for their life. My intention to empty [inaudible] that boat. Our Bosun ran for his life and hide in the fish hole and the other crew member, his cousin, he ran into the engine room to save his life... After I did those thing I went out in the life raft...."

- [68] The accused stated that he hit Qiri to the head with the axe and did the same to Alfat Kodri. He then forced the other crew members to jump into the sea, both Samuela and Eme Warma doing so. He stated that Samuela had pleaded for a life jacket and the accused threw him a life buoy hanging on the side of the boat. The accused threw the bodies of Qiri and Alfat Kodri into the sea. He stated that both were already dead when

he threw them into the sea. With respect to the captain, the accused stated *'I took his T shirt [and trousers] and threw him overboard'*.

[69] After dealing with the 5 crew, the accused went looking for PW1 and PW2, *'I tried to open the cover of the fish hole but it was locked from inside. I went into the crews cabin and the engine was very loud, I wanted to go inside there to look for ...Tucama...I went inside to look, I saw Tucama closing the engine room. I tried to open it but I couldn't since there was no other clitch from outside...Locked from inside and that's it. I just went up, opened the life raft. I don't know how many days I will be drifting. And that's it. I took whatever I can take with me to keep me alive at sea...I load it with my food and everything...'*

[70] The accused provided more details regarding PW1 and PW2. When the events first occurred, PW2 *'came up [from the fish hold] I warned him and I hit the lid of the deck (fish hold)'*. The accused was asked, *'He [PW2] was saying that you told him to stay down below and if he wants to die to come up'*. The accused replied *'Yes'*. The accused also confirmed that he saw PW1 hiding under a mattress. He went and obtained 2 knives in order to kill PW1.

[71] In explanation for why he got into the life raft, the accused stated:

The life raft, I was the one who opened it and threw it in the sea, that was before the captain jumped, he was probably calling for another boat to come before I put him to sea. And then I got scared. I was scared that the crews of the other boat might do something to me. That was the reason I opened the life raft and escaped and not be staying close to the boat.

[72] He stated that he loaded the raft with a bucket of biscuits.

[73] The accused made it clear that he intended to kill everyone on the boat. When asked whether he knew the crew would die when he told them to jump in the sea, he replied, *'Yes'*. He was asked, *'Your intention is to kill all of them?'* The accused replied, *'Yes'*. With respect to PW1, he stated that when he discovered PW1 in the engine room he

grabbed two knives and went back to the engine room. Asked why, the accused replied, *'For me to kill him'*.

- [74] The accused acknowledged that he provided a different account to the police in 2021. He stated that he was then *'scared to tell the truth'*. He stated, *'now I am not scared and I want to tell the real story. This is the true story that I am now telling'*. The accused also made admissions when charged on 6 April 2022. He stated:

...I have been told that I need not say anything unless I wish to do so and that whatever I say may be given in evidence. I wish to say that I fully admitted to the charge as I had given my statement during my caution interview yesterday.

- [75] The Defence challenge the admissions in April 2022 as being fabricated stories. It was put to the charging officer, PW12, that if the police keep asking about the murders over and over again eventually the accused will agree – meaning that the accused was simply worn down to lie about the alleged murders. It was put to the interviewing officer, PW14, that the police had tunnel vision. They concluded early that the accused was responsible and did not properly investigate the case. They did not investigate whether it was plausible for PW1 to have stayed in the engine room for 24-30 hours or for PW2 to stay in the fish hold for a similar amount of time. They also did not investigate how the Tiro II could have sunk having seemingly no structural reason to do so. I am, however, satisfied that the police were justified in re-interviewing the accused in April 2022. There was a very good reason for them to do so; the accused had the previous month admitted to PW9 having killed the crew on the Tiro II. The admission was published in the Fiji Sun. The Police were not responsible for the accused's admissions to PW8 in February 2022 or to PW9 in March 2022. The accused had made those admissions of his own volition.

- [76] As the Defence point out, the accused provided a very different account when interviewed by the police on 22 and 23 May 2021 and 20 and 21 October 2021. He laid the blame for the events on the boat and the murder of the five missing crew on PW1 and PW2. The accused by his own admission at interview in April 2022 acknowledged that the 2021 account was not true. Having carefully considered the version provided by the accused

during his police interviews in 2021, I am satisfied that the earlier version was false. I say this for the following reasons:

- i. The 2021 version has an air of unreality. The accused stated that Qiri confronted PW2 with a knife during an argument. That PW2 in response, while wearing gumboots, back kicked Qiri to the chest. PW2 was 53 years old when he gave evidence in court and about 50 years when the events occurred. I am unable to accept that PW2 would have been involved in any back kicking to a knife wielding attacker, less so while wearing gumboots, and again even less so being able to strike the chest of the attacker with his foot.
- ii. The other aspect that is thin on reality is the reaction of PW1 and PW2 to Qiri falling on his own knife. The account provided by the accused is of PW2 defending himself and Qiri falling on his own knife. No reasonable person would expect to be in trouble with the police in such circumstances. Therefore, the accused's account that PW1 and PW2 then demanded all the crew jump off the boat into the open sea is nonsensical.
- iii. Another aspect of the accused's 2021 version that I consider fanciful is that according to the accused neither PW1 nor PW2 realised that the accused had not jumped off the boat with the other crew members.
- iv. There were a number of inconsistencies with the accused's 2021 version but the most damning is that the accused stated that he saw PW1 and PW2 steering the boat and that it was moving at speed when he jumped off the boat to swim to the raft. He stated, *'When it fell [the life raft] there was distance between the boat and the life raft as the boat was speeding...The boat was really speeding...I heard the sound of the engine'*. The evidence from PW3 relying on data from VMS taken for Tiro II, was that the boat was stationary and drifting from 2.28am on Tuesday 18 May to 8.28am on 19 May.

[77] The Defence question whether the Prosecution have proved that the 5 missing crew are dead. The bodies have not been found and the Defence argue that it is possible, even likely, that the missing crew could have been rescued by a passing boat or by some other means.

[78] This argument has no substance. Two of the missing crew were struck with an axe and were likely dead on entering the water or dead shortly thereafter. The other three crew jumped into the sea without a life jacket although it appears that the accused threw a life buoy to Samuela. According to PW3, the Tiro II was about 90km from the nearest land at that time. His view was that there was no chance that the five missing crew would have survived. The Navy officers and NZ airforce officer involved in the rescue stated that there was no realistic prospect of the crew swimming 90km to the nearest land. PW4 described the prospect of survival as bleak. PW5 described the chances as almost zero. PW7 was blunt, stating that *'it would be closer to zero to find survivors, especially in that weather and without survival equipment'*. The fact that none of the crew have been in touch with authorities or family since the events on 18 May 2021 would support the fact that, sadly, they lost their lives in the waters shortly after being forced off the Tiro II.

Conclusion

[79] The accused remained silent and did not give evidence. That is his right. The burden is on the Prosecution throughout to prove that the accused committed each of the 7 offences with which he has been charged.

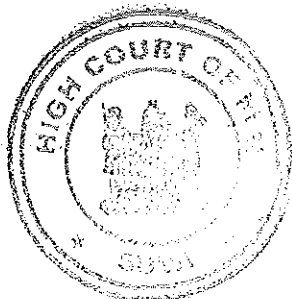
[80] Having considered the evidence, I am satisfied that the Prosecution have proven beyond reasonable doubt that the accused committed the seven counts which he has been charged. I am sure that PW1 and PW2 have told the truth about the events on the Tiro II in the early hours on Tuesday 18 May 2021. I am sure that the accused truthfully admitted his role in the offending when interviewed by the police on 5 and 6 April 2022.

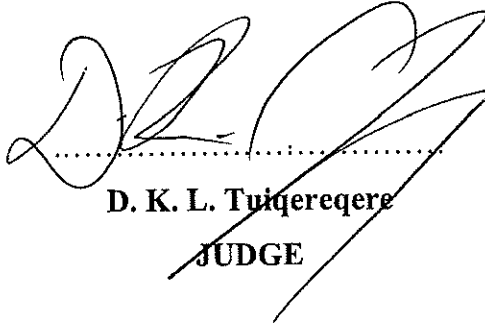
[81] The accused struck Qiritivabea Cagilabakomeli and Alfat Kodri with an axe before throwing their dead or seriously injured bodies into the sea. He forced Benjamin Samuel Matitaputty, Eme Warma and Samuela Sekura to jump into the sea knowing that they would die in the waters, having no prospect of survival. He threatened Mitieli Cama that

he would kill him if he came out of the fish hold. He attempted to murder Kaminieli Tucama. When Kaminieli Tucama tried to hide in the engine room, the accused grabbed 2 knives to kill Kaminieli Tucama. Kaminieli Tucama only avoided this fate by locking himself in the engine room.

[82] By his own admission during the police interviews in April 2022, the accused intended to kill all seven crew. He only succeeded in killing 5 of them. Nevertheless, it is clear from the accused's actions on board the Tiro II on 18 May 2021 that he intended to kill the crew.

[83] In view of the above, I find the accused guilty of the murders of Benjamin Samuel Matitaputty, Eme Warma, Alfat Kodri, Samuela Sukera and Qiritivabea Cagilabakomeli; guilty of the attempted murder of Kaminieli Tucama; and guilty of the criminal intimidation of Miteli Cama. The accused is, accordingly, convicted.




D. K. L. Tuiqereqere
JUDGE

Solicitors:

Office of the Director of Public Prosecutions for the State

Office of the Legal Aid Commission for the accused