

IN THE COURT OF APPEAL, FIJI  
[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0160 of 2017  
[High Court of Suva Criminal Case No. HAC 143 of 2016]

BETWEEN : RAKESH NARAYAN

*Appellant*

AND : STATE

*Respondent*

Coram : Prematilaka, JA

Counsel : Ms. S. Nasedra for the Appellant  
: Mr. R. Kumar for the Respondent

Date of Hearing : 05 October 2020

Date of Judgment : 06 October 2020

**RULING**

[1] The appeal arises from the conviction of the appellant on one count of attempted murder of Sakindra Devi contrary to section 44 and 237 of the Crimes Act, 2009 and another count of 'Act with Intent to Cause Grievous Harm' to Rakash Roashan Deo contrary to section 255 (a) of the Crimes Act, 2009 alleged to have been committed on 16 March 2016 at Nakasi, Suva in the Central Division.

[2] The information read as follows.

**FIRST COUNT**

*Statement of offence*

**ATTEMPTED MURDER:** *Contrary to Section 44 and 237 of the Crimes Act No. 44 of 2009.*

*Particulars of the Offence*

***RAKESH NARAYAN** on the 16<sup>th</sup> day of March 2016 at Nakasi, Suva, in the Central Division, attempted to cause the death of Sakindra Devi, and at the time, intended to cause her death.*

**SECOND COUNT**

*Statement of offence*

**ACT WITH THE INTENT TO CAUSE GRIEVOUS HARM;** *Contrary to Section 255(a) of the Crimes Act No. 44 of 2009.*

*Particulars of the Offence*

***RAKESH NARAYAN** on the 16<sup>th</sup> day of March 2016 at Nakasi, Suva, in the Central Division, with the intent to do some grievous harm to Rakash Roashan Deo, unlawfully wounded the said Rakash Roashan Deo with a kitchen knife.*

- [3] After the summing-up, the assessors had returned a unanimous opinion of guilty against the appellant in respect of both counts on 31 July 2017. The Learned Trial Judge on 01 August 2017 delivered the judgment agreeing with the assessors and convicted the appellant of both counts and sentenced him on 29 September 2017 to mandatory life imprisonment with a minimum serving periods of 12 years on the first count and 03 years and 06 months with a non-parole period of 01 year and 06 months on the second count.
- [4] The appellant in person had appealed against conviction and sentence out of time on 21 November 2017. The delay is less than one month. The appellant had tendered an application in Form 3 on 04 April 2019 to abandon his appeal against sentence and his written submissions on 09 July 2020. The Legal Aid Commission had filed amended grounds of appeal and written submissions on behalf of the appellant on 20 July 2020. The state had responded on 30 September 2020.
- [5] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. The test for leave to appeal is '**reasonable prospect of success**' (see **Caucu v State** AAU0029 of 2016: 4 October 2018 [2018] FJCA 171, **Navuki v State** AAU0038 of 2016: 4 October 2018 [2018] FJCA 172 and

State v Vakarau AAU0052 of 2017;4 October 2018 [2018] FJCA 173, Sadrugu v The State Criminal Appeal No. AAU 0057 of 2015; 06 June 2019 [2019] FJCA87 and Waqasaqa v State [2019] FJCA 144; AAU83.2015 (12 July 2019) in order to distinguish arguable grounds [see Chand v State [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), Chaudry v State [2014] FJCA 106; AAU10 of 2014 and Naisua v State [2013] FJCA 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds.

[6] The sole grounds of appeal urged on behalf of the appellant:

*'That the Learned Trial Judge erred in law and fact when he failed to fully and properly direct the Assessors and himself on the partial defense of self-defense which was available to the defense case in light of the evidence adduced during the trial.*

[7] The evidence led of Sakindra Devi by the prosecution as narrated in the summing-up is as follows.

'68..... (iii) *On 16 of March 2016, she was at work at the said Shop N Save Restaurant. Around 8.40 p.m. her brother, Rakesh Rishi Kapoor, called her and informed that the accused had gone to her brother's residence and told him that he is going to kill Sakindra Devi. Her brother had told her not to get out of the restaurant.*

*(iv) However, her husband Rakash Roashan Deo had come to pick her up from work. On seeing him near the door of the restaurant, she came out.*

*(v) She and her husband were walking to get into their car. They were just about to get into the car when the accused had pushed her husband Rakash Roashan Deo from behind.*

*(vi) She said that this incident took place in the parking lot in front of the Shop N Save restaurant.*

*(vii) Thereafter, the accused had held her hand and pulled her away from the car. When her husband got up and tried to come to her assistance, the accused had stabbed him on his forehead. She testified that when her husband tried to hold her, the accused stabbed her husband. Her husband had fallen down.*

*(viii) The accused had then started stabbing her with a knife. He had stabbed her on her head, upper left hand/elbow and on the left side of the neck.*

'69. (iii) On 16 March 2016, he was at home after work. He had been drinking grog with nephew. He had received a call from Rakesh Rishi (his brother in-law) around 8.40 in the evening. Rakesh Rishi had told him to lock his door and lock the gates and stay inside. He had realised that something was wrong. He had immediately called Sakindra Devi and told her to stay inside the restaurant where she works.

(iv) The witness had then left with his nephew to pick his wife up from the Shop N Save Restaurant. His nephew had parked the vehicle in the parking lot right in front of the Shop N Save Restaurant.

(v) The witness had then gone inside to bring Sakindra Devi. As they came out of the restaurant and were about to open the car door, he had been pushed by the accused. When he was pushed, the witness was thrown to a side but did not fall down. The accused had then grabbed Sakindra Devi's hand and pulled her around the car.

(vi) Rakash Roashan Deo had followed in an attempt to assist Sakindra Devi. The accused had told him to back off. When the witness tried to grab Sakindra, the accused had punched him on his jaw. However, the witness had attempted again to get Sakindra Devi. The accused had then punched him again and stabbed him above his left eye (the witness clearly demonstrated in Court how exactly that incident took place). The witness had then fallen down.

(vii) When he got up, he had noticed a cut over the eye and blood oozing out. He had seen Sakindra and the accused a short distance away. The accused had been grabbing Sakindra by her T-shirt/work uniform. Sakindra had tried to save herself by putting up her arm and the bag she was carrying. He then saw the accused stabbing Sakindra twice on her neck. The accused had then taken off in his taxi.

[8] The appellant had earlier declared his intention by telling his daughter and his former wife Sakindra Devi's brother prior to the incident that he had heard that she had got married and he was going to kill her and thereafter the whole family. An eye-witness had seen the attack on Sakindra Devi and corroborated her evidence. The appellant's cautioned interview and the charge statement too had been produced as part of the prosecution case against him.

[9] The appellant's evidence given in the summing-up had been as follows.

'81. (vii) He had then come to the Shop N Save Restaurant at Nakasi. He had parked in front of the Shop N Save Supermarket. He had wanted to talk to Sakindra Devi when she gets out of the work place.

(viii) *When Sakindra Devi came out, he went to her and held onto her hand and pulled her. There was another person with her who intervened. He had come in the middle. The witness had then pushed that man away.*

(ix) *The man had come a second time towards him. The witness had told him that it is not your problem, you back off.*

(x) *When on the third time he came to him he had left Sakindra's hand and punched him on the face. Then the man had fallen down.*

(xi) The witness testifies that he saw the man trying to take something out of his pocket. It was a knife. Then with his right leg the witness had stomped on the man's chest. When the man completely fell on the ground, he had used his left leg and stepped on the man's right hand. The man had then released the knife.

(xii) The witness had then taken the same knife from him and stabbed the man in self defence. He had stabbed him just above the left side of the eye brow.

(xiii) After stabbing the man, when he lifted his hand, Sakindra Devi had held on to his right hand. The other man was also getting up at the time. The witness had then put more power to free his hand from Sakindra Devi. He had jerked his hand one or two times. Suddenly, Sakindra Devi had released his hand. Since he was pulling his hand to get it free, the knife had gone straight inside Sakindra's chin area. He says suddenly the knife went there, he didn't know.

(xiv) *He saw that Sakindra was hurt. He left her and went away to where his car was parked. There was garden opposite his car. He had thrown the knife there. He had then got into the car and driven away to his mother's place.*

(xv) *He testifies that he had no intention to cause harm to Sakindra Devi. The witness testified that although he had consumed beer prior to the incident, he was not in a state of intoxication and he was aware as to what he was doing.*

[10] The appellant argues that though the trial judge had given directions to some extent on self-defense, they were not full and adequate. The directions on self-defense are as follows.

*[62] In this case, the accused has stated that he acted in self-defence against Rakash Roashan Deo. Section 42(1) of the Crimes Act sets out: "A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence."*

*[63] In terms of Section 42(2) of the Crimes Act:*

*"A person carries out conduct in self-defence if and only if he or she believes the conduct is necessary:*

*(a) to defend himself or herself or another person; or*

*(b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*

*(c) to protect property from unlawful appropriation, destruction, damage or interference; or*

*(d) to prevent criminal trespass to any land or premises; or*

*(e) to remove from any land or premises a person who is committing criminal trespass —*

*and the conduct is a reasonable response in the circumstances as he or she perceives them."*

*[64] The position of the Prosecution is that there was no necessity for the accused to act in self-defence, because there was no threat emanating from the complainant Rakash Roashan Deo at the given time.*

*[65] This is matter for you to decide based on all the facts and circumstances of the case. It is for you to decide whether the conduct of the accused, in the given circumstances was necessary and a reasonable response to the circumstances as perceived by him.*

- [11] Obviously, the appellant's position on self-defense had not aimed at the injuries caused to the first victim, his former wife. It is only applicable to the injuries caused to the second victim who was the first victim's new husband. Thus, the appellant's evidence that he acted in self-defense in stabbing the second victim has no relevance to the injuries caused by him to the first victim. In other words, his defense of self-defense had nothing to do with the attempted murder charge of his former wife.
- [12] The appellant argues that the above directions were not adequate in the light of **Naitini v State** [2020] FJCA 20 AAU135 of 2014, AAU 145 of 2014 which in turn had quoted from **Vasuitoga v State** [2013] FJSC 1; CAV001 of 2013 (29 January 2016) regarding the duty of the trial judge when defense of self-defense is relied upon by an accused.



*[28] It is settled that when an accused relies on self-defence, the trial judge should direct the assessors to consider whether the accused believed that his actions were necessary in order to defend himself and whether he held that belief on reasonable grounds. As the Privy Council said in Palmer v The Queen [1971] AC 814, 831-832:*

*"The question to be asked in the end is quite simple. It is whether the accused believed upon reasonable ground that it was necessary in self defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."*

*[29] In State v Li Jun unreported CAV0017/2007S; 13 October 2008 Sackville JA referred to the English and Australian authorities on self-defence and said at [46]:*

*"It is important to appreciate that the test stated in Zecevic is not wholly objective. It is the belief of the accused, based on the circumstances as he or she perceives them to be, which has to be reasonable."*

*[30] We also refer to what Lord Lowry C.J said in R v Browne [1973] NI 96 which is cited in the unreported decision of the English Court of Appeal of Balogun [1999] EWCA Crim. 2120. Lord Lowry said at p 106:*

*"To justify killing or inflicting serious injury in self-defence the accused must honestly believe on reasonable grounds that he is in immediate danger of death or serious injury and that to kill or inflict serious injury provides the only reasonable means of protection."*

- [13] The trial judge had given his mind to the appellant's defense of self-defense in the judgment too.

*[17] The position of the Prosecution was that there was no necessity for the accused to act in self-defence, because there was no threat emanating from the complainant Rakash Roashan Deo at the given time.*

*[18] In the circumstances, it was a matter for the Assessors to decide based on all the facts and circumstances of the case. The Assessors had to decide whether the conduct of the accused, in the given circumstances, was necessary and a reasonable response to the circumstances as perceived by him.*

- [14] In my view, in the case of a defense of self-defense the primary question similar to that of provocation is whether such a defence arises on the evidence – or to be more precise, whether there is “a credible narrative of events suggesting the presence of” such a defence [see the decision of the Privy Council in Lee Chun Chuen v R [1963] AC 220 and Fiji Supreme Court decision in Naicker v State [2018] FJSC 24;

AAV0019.2018 (1 November 2018)]. If and when the factual matrix giving rise to 'self-defense' is believed, the assessors have to then consider whether it could be said that the accused believed upon reasonable grounds that it was necessary in self-defense to do what he did. If the accused had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal. However, the test is not wholly objective and it is the subjective belief of the accused based on the circumstances, as perceived by him, that counts but that belief should be objectively reasonable in those circumstances that he was in immediate danger of death or serious injury and that to kill or inflict serious injury provided the only reasonable means of protection. The fact that an appellant has taken up 'self-defense' in his evidence does not necessarily make it a credible story and the assessors should always act upon it.

- [15] The trial judge had cautioned the assessors as follows toward the end of the summing-up too.

*'[83] Firstly, you must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences against the accused, beyond reasonable doubt.'*

*'[84] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability of the prosecution evidence, also when you are assessing the evidence of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. However, I must caution you that if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.'*



- [16] I have no doubt that the trial judge's direction on the appellant's 'self-defense' in paragraph 62-65 of the summing-up is sufficient in the circumstances of the case. The Supreme Court in **Boila vs State** [2008] FJSC 35; CAV005 of 2006.S: (25 February 2008) held that the adequacy of a particular direction will necessarily depend on the circumstances of the case. There is no incantation to be read and the required guidance needs not be formulaic [See also **Khan v State** [2014] FJSC 6; CAV009 of 2013: (17 April 2014)].
- [17] At the same time I am not convinced that the appellant's theory of self-defense had a credible narrative in it on the whole of the evidence. Even on his own evidence the second victim's right hand had lost the grip of the knife while lying on the ground crushed by the appellant's foot. The appellant had then taken it and stabbed the second victim. It is also interesting to find out what the appellant's position had been in his cautioned interview and the charge statement on this issue.
- [18] I am guided by the pronouncements in **Sahib v State** AAU0018u of 87s: 27 November 1992 [1992] FJCA 24 as to whether this court should interfere with the opinion of the assessor and the judgment of the learned High Court Judge. The Court of Appeal in **Sahib** stated with regard to the approach the appellate court should adopt in an appeal in the light of section 23 of the Court of Appeal Act in the following words

*Authorities in England since the passing of the 1966 Act are based on the requirement that the Court shall consider whether the verdict is unsafe or unsatisfactory. That test has given a number of appeal decisions based on a wide ranging consideration of the evidence before the lower Court and the views of the appellate Court on it. We were urged to make it the basis of our consideration of the present case but section 23 does not allow us that liberty and the powers of this Court are limited by the statute that created it. The difference of approach between the two tests was concisely stated by Widgery LJ in the final passages of his judgment in R v Cooper (1968) 53 Cr. App. R 82.*

*Having considered the evidence against this appellant as a whole, we cannot say the verdict was unreasonable. There was clearly evidence on which the verdict could be based. Neither can we, after reviewing the various discrepancies between the evidence of the prosecution eyewitnesses, the medical evidence, the written statements of the appellant and his and his brother's evidence, consider that there was a miscarriage of justice.*

It has been stated many times that the trial Court has the considerable advantage of having seen and heard the witnesses. It was in a better position to assess credibility and weight and we should not lightly interfere. There was undoubtedly evidence before the Court that, if accepted, would support such verdicts.

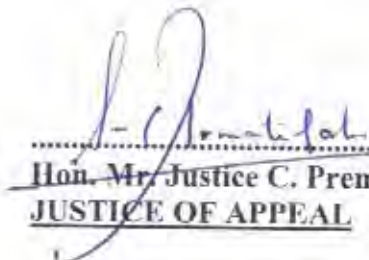
We are not able to usurp the functions of the lower Court and substitute our own opinion.

[19] Therefore, there is no reasonable prospect of success in this ground of appeal.

**The Order**

1. Leave to appeal against conviction is refused.



  
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Hon. Mr. Justice C. Prematilaka  
JUSTICE OF APPEAL