

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

**CRIMINAL APPEAL NO. AAU 88 of 2021**  
**[In the High Court at Lautoka Criminal Case No. HAC 08 of 2017]**

**BETWEEN** : **VIJAY KUMAR**

**Appellant**

**AND** : **THE STATE**

**Respondent**

**Coram** : **Prematilaka, RJA**

**Counsel** : **Ms. L. Ratidara for the Appellant**  
: **Ms. K. Use for the Respondent**

**Date of Hearing** : **05 April 2024**

**Date of Ruling** : **08 April 2024**

## **RULING**

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed attempted murder of his wife Adi Ilisapeci Marama contrary to section 44(1) and 237 of the Crimes Act 2009. The particulars of the offence are:

### **Statement of Offence**

**ATTEMPTED MURDER:** *contrary to section 44 (1) and 237 of the Crimes Act 2009.*

### **Particulars of Offence**

*Vijay Kumar, on the 27<sup>th</sup> of December, 2016 at Nadi in the Western Division, attempted to murder Adi Ilisapeci Marama.'*

[2] After the appellant pleaded guilty, the trial judge convicted the appellant and sentenced him on 09 December 2020 to mandatory life imprisonment and set a minimum serving period of 10 years.

- [3] Though the appellant’s appeal is out of time by 01 month and 05 days, his appeal against conviction lodged in person by the appellant could be considered timely being within the grace period of 03 months.
- [4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction is ‘reasonable prospect of success’ [see Caucau v State [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), Navuki v State [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and State v Vakarau [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), Sadrugu v The State [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and Waqasaqa v State [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will 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 (15 July 2014) and Naisua v State [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see Nasila v State [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].
- [5] The grounds of appeal raised by the appellant is as follows:

**‘Conviction:**

**Ground 1:**

*THAT the Learned Trial Judge erred in fact and in law in failing to take into consideration that the summary of facts did not support the charge of Attempted Murder.’*

- [6] According to the sentencing order the summary of facts are as follows:

4. *‘The Summary of facts disclose that:*

*The complainant is Adi Ilisapeci Marama (hereinafter referred to as “PW1”) and she is 44 years of age. The accused is Vijay Kumar, 54 years of age and he is employed as a Steel Fixer and Blender for Focus Construction Limited at Garden City in Suva. He resides at Delainavesi, Lami. The accused and PW1 are husband and wife however they were not residing together at the material time. PW1 is employed as a baby sitter and a house-girl at the house of Inoke Lutumailagi*

*(hereinafter referred to as “PW2”) which is situated at Lodhia Street in Nadi Town. On the 23<sup>rd</sup> of December, 2016, the accused came from Suva to spend the Christmas weekend with PW1 in Nadi. During this weekend, the accused was suspicious that PW1 was having an affair with PW2. On the 27<sup>th</sup> of December, 2016, the accused questioned PW1 as to why she was disrespecting him and not treating him like a husband but she ignored him. PW1 then went to the bathroom to have her shower. The accused also wanted to have a shower with PW1 but she chased him outside the bathroom. The accused then forcefully entered the bathroom and started to punch PW1 on her face and body. PW1 managed to escape from the bathroom and ran towards outside. The accused then got hold of an iron rod and ran after PW1 who was at the passage of the sitting room. The accused then struck PW1 with the iron rod several times on her face, jaw and head until she was unconscious. The accused then ran away from the scene and with the assistance of the public, he was arrested by the police. PW1 was taken to the Nadi Hospital and then referred to the Lautoka Hospital. She was assessed with severe head injury and multiple face and scalp laceration. She suffered from mandible and maxillary fractures. According to her medical report, PW1 required intensive care and ventilator support for 10 days. She was transferred to CWM Hospital for further dental surgical treatment. [A copy of PW1’s medical report is attached herein as “A”]. The accused was interviewed under caution and admitted the allegation in his record of interview. [A copy of the accused’s record of interview is attached herein as “B”]. The accused was subsequently charged with one count of attempted murder contrary to section 44 (1) and section 237 of the Crimes Act 2009.*

### **Grounds of appeal 01**

- [7] The appellant argues that the summary of facts do not support the fault element of attempted murder. Intention and knowledge are the two fault elements in relation to physical element of the offence of attempted murder whereas intention to cause death, or being reckless as to causing the death of the other person are the two fault elements for the offence of murder. In **Vosa v State** [2019] FJCA89; AAU 0084 of 2015:06 June 2019 the Court of Appeal reiterating section 44(3) of the Crimes Act stated that for attempted murder the fault elements are intention or knowledge whereas for murder intention, knowledge or recklessness are the fault elements.
- [8] The Supreme Court of Canada in **The Queen v. Ancio** 1984] 1 SCR 225 (1984-04-02) dealt with ‘intention’ as one of the fault elements for attempted murder *vis-à-vis* murder as follows:

*‘The mens rea for attempted murder is the specific intent to kill and a mental state falling short of that level, while it might lead to conviction for other*

*offences, cannot lead to a conviction for an attempt. The completed offence of murder involves killing and any intention to complete that offence must include the intention to kill. An attempt to murder should have no lesser intent. Nothing illogical arises from the fact that in certain circumstances a lesser intent will suffice for a conviction for murder.....*


*The crime of attempt developed as, and remains, an offence separate and distinct from murder. While the Crown must still prove both mens rea and actus reus, the mens rea is the more important element. The intent to commit the desired offence is a basic element of the offence of attempt, and indeed, may be the sole criminal element in the offence given that an attempt may be complete without completion of the offence intended.'*

- [9] Given the evidence revealed in the summary of facts, the trial judge was justified in concluding that the appellant had intended to cause death of the complainant or he knew that his action would cause the death of the complainant and he did not intend just to do grievous bodily harm of the complainant as argued by the appellant. Given the manner of the attack, the ferocity of the attack, the areas of the complainant's body where the attack was directed at by the appellant and the nature of injuries suggest unmistakably that he simply did not act only with intent to cause grievous harm but he either intended to cause death of the complainant or he knew that his action would cause the death of the complainant.

**Order of the Court:**

1. Leave to appeal against conviction is refused.



  
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**Hon. Mr. Justice C. Prematilaka**  
**RESIDENT JUSTICE OF APPEAL**

**Solicitors:**

Legal Aid Commission for the Appellant  
Office of the Director of Public Prosecution for the Respondent