

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 40 of 2018

STATE

V

MOHAMMED FAIYASH

Counsel : Mr. A. Singh for the State.
: Ms. S. Ravai for the Accused.

Dates of Hearing : 28, 29, 30, 31, May, 03 June, 2019
Closing Speeches : 04 June, 2019
Date of Summing Up : 05 June, 2019

SUMMING UP

Madam and Gentlemen Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to reject, these are matters entirely for you to decide for yourselves. If I

do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.
7. During the closing speeches the defence counsel had asked you to consider the answer given by the accused at question 144 of his caution interview as implying that he did not intend to kill the complainant. I direct you not to assume or speculate anything from the answer given by the accused.

8. Furthermore, the defence counsel also stated that this was a low speed, short distance impact which negated any real intent to cause serious harm or to kill the complainant. I direct you that there was no evidence that the car before the impact was travelling at low speed hence I direct you to disregard this submission in respect of the speed at which the car was travelling before the impact.

BURDEN OF PROOF AND STANDARD OF PROOF

9. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.
10. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
11. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
12. You must decide the facts without prejudice or sympathy to either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
13. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions

asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

14. The accused is charged with the following offences: (a copy of the information is with you).

FIRST COUNT
Statement of Offence

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

Particulars of Offence

MOHAMMED FAIYASH, on the 15th of February, 2018 at Lautoka in the Western Division attempted to murder **SITAL SHIVNALI LATA**.

SECOND COUNT
Statement of Offence

DAMAGING PROPERTY: contrary to section 369(1) of the Crimes Act of 2009.

Particulars of Offence

MOHAMMED FAIYASH, on the 15th of February, 2018 at Lautoka in the Western Division willfully and unlawfully damaged Telecom Fiji Limited Telephone booth valued at \$3,000.00 the property of Telecom Fiji Limited.

15. A person commits the offence of murder if:
- (a) the person engages in conduct; and*
 - (b) the conduct causes the death of another person; and*
 - (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.”*

16. In this case the accused is charged with one count of attempted murder the law in relation to attempt reads as follows:

“(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) for the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.”

17. To prove count one the prosecution must prove the following elements of the offence 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 complainant ;and
- (d) the accused intended to cause the death of the complainant by his conduct.

18. In this case the prosecution is alleging that the accused intended to cause the death of the complainant by his conduct. The first element of the offence of attempted murder is concerned with the identity of the person who allegedly committed the offence of attempted murder. There is no dispute that it was not the accused therefore you can accept this element of the offence as proven beyond reasonable doubt.

19. 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. For the accused to be guilty of attempted murder, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.

20. The third element is that the said conduct of the accused was an attempt to cause the death of the complainant.
21. The final element is concerned with the state of mind of the accused that he intended to cause the death of the complainant. 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, you can construe the state of mind of the accused from the facts and circumstances you would consider as proved.
22. In order for you to conclude that the accused intended to cause the death of the complainant, you should be satisfied that the accused intended to kill the complainant as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the complainant.
23. In this trial the accused has denied committing the offence of attempted murder. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to kill the complainant and with that intention he did something which was more than merely preparatory.

24. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.
25. The prosecution must also prove that with the intention to kill, the accused did something which was more than merely preparatory. Before you can find the accused guilty of the offence of attempted murder you must be satisfied beyond reasonable doubt of two things: first that the accused intended to commit the offence of murder and second, that, with that intention, he did something which was more than merely preparatory for committing that offence.
26. In other words, did he actually intend to commit the offence of murder, in which case he is guilty of attempting to commit murder, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
27. The prosecution says when the accused saw the complainant in the telephone booth outside the Lautoka Police Station he ran to his car which was parked opposite the police station, reversed the car and made a U-turn towards the telephone booth in which the complainant was standing. The accused then drove the car and bumped the telephone booth as a result the complainant was thrown out of the booth and she received injuries. If you accept the accused did this, then it is for you to decide whether what he did went beyond merely preparatory.

28. If you are satisfied that the prosecution has proved all the above elements beyond reasonable doubt then you must find the accused guilty of attempted murder.
29. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempted murder.
30. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard I direct you that if you find the accused not guilty of attempted murder that is you are not sure whether the accused had intended to kill the complainant then you should consider the offence of act intended to cause grievous harm.
31. To find the accused guilty of the offence of act intended to cause grievous harm the prosecution must prove the following elements beyond reasonable doubt:
 - a) The accused;
 - b) with intent to do some grievous harm;
 - c) unlawfully does grievous harm to the complainant by any means.
32. In law grievous harm means any harm which—
 - (a) amounts to a maim or dangerous harm; or*
 - (b) seriously or permanently injures health or which is likely so to injure health; or*

(c) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.

33. The term harm has also been defined as any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).
34. The first element of the offence of act intended to cause grievous harm is concerned with the identity of the person who allegedly committed the offence. There is no dispute it was not the accused therefore this element of the offence is proven beyond reasonable doubt.
35. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant.
36. The final element relates to the conduct of the accused that he did some grievous harm to the complainant by any means.
37. As I mentioned earlier you decide the intention of the accused by considering what the accused did, you should look at his actions before, at the time of, and after the act. Furthermore, unlawful means without lawful excuse and grievous harm means any dangerous harm to the body of another person.
38. If you are satisfied that the prosecution has proved all the above elements of the offence of act intended to cause grievous harm

beyond reasonable doubt, then you must find the accused guilty of the lesser offence of act intended to cause grievous harm. However, if you have a reasonable doubt with respect to any element of the offence of act intended to cause grievous harm then you must find the accused not guilty of this lesser offence.

39. To prove count two the prosecution must prove the following elements of the offence of damaging property beyond reasonable doubt:
 - a) The accused;
 - b) willfully and unlawfully;
 - c) damaged the telephone booth of Telecom Fiji Limited.
40. If you are satisfied beyond reasonable doubt that it was the accused who had willfully and unlawfully damaged the telephone booth of Telecom Fiji Limited then you must find the accused guilty of the offence of damaging property.
41. If on the other hand you have a reasonable doubt with regard to any of those elements concerning the offence of damaging property, then you must find the accused not guilty.
42. In this case, the accused is charged with one count of attempted murder and one count of damaging property, you should bear in mind that you are to consider the evidence in each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.

ADMITTED FACTS

43. In this trial the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
44. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
45. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was not a very long trial and I am sure things are still fresh in your minds.
46. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

47. The prosecution called nine (9) witnesses to prove the charges against the accused.
48. The complainant informed the court that she knew the accused from 2016, at the request of the accused she shifted into the two bedrooms flat of the accused as a caretaker since he had informed her that he was going overseas. The complainant and her family were occupying one bedroom in the flat and the accused was occupying the other. The complainant was not paying any rental, but

looked after the brother of the accused and was paying the household bills.

49. The complainant stayed there for two to three months and then left since the accused was asking her to be in a relationship with him but she did not wish to. After cyclone the accused helped the complainant and her family and took them to his house. The complainant and the accused were just like friends, the accused used to come to her work place and be with her friends as well.
50. On 15th February 2018, the complainant went to the Lautoka Police Station, the accused started calling her on her mobile phone, after about 10 minutes the accused came to the police station in his car. At the police station the accused started apologizing and wanted to talk to her, by this time it was after 1.00 pm the complainant was waiting to be served the accused was also sitting in the police station.
51. At about 4.50 pm the complainant came out of the police station, it was raining so she went into the bure. From the bure the complainant went to the telephone booth which was about half a minute walk from the bure. Inside the telephone booth the complainant was talking to a friend on her mobile phone.
52. Whilst the complainant was on the phone, she heard a loud sound and was thrown out of the booth, at this time she saw the booth falling, for a while she was shocked, then she heard someone say, "*get her inside*". The complainant was then taken inside the police station.
53. The complainant received injuries on her right hand, few scratches on her left leg and knee. When the complainant was lifted from the ground, she saw the accused's blue car after a while she was told

that she had an accident with the accused car. She panicked and saw blood coming out of her hand, she walked towards the back of the police station because she thought the accused may come to kill her. Later, the complainant was taken to the hospital. The complainant identified the accused in court.

54. In cross examination the complainant confirmed that apart from friendship she had no other relationship with the accused, she denied being in a defacto relationship with the accused. The complainant denied she was asking the accused to transfer his property to her name, otherwise she would make a false report against him to the police. When it was suggested that the accused never intended to kill or harm her in any way the complainant responded he did.
55. The day before the incident, the complainant had met the accused in town but she did not go to his place that evening. The complainant denied she was with the accused till 3.00 am in the morning and that he had dropped her home.
56. The second witness was Sgt. Silio who informed the court on 15th February, 2018 he was outside the Lautoka Police Station car park ready to cross the road when he heard a loud sound outside the police station fence.
57. The witness saw a blue hybrid vehicle had bumped the telephone booth just outside the police station fence. The telephone booth fell off from its basement beside the complainant and the car got stuck in the cement basement. The front bumper of the car got damaged, however, the accused managed to get the vehicle released from the basement, he reversed it onto the main road and headed towards town.

58. The witness got into a police vehicle and followed the car towards town. The accused drove his car inside the RB Patel car park and walked towards the taxi stand. The witness parked the police vehicle and ran after the accused some workers from Customs Department assisted whereby the accused then stopped. The witness arrested the accused and took him to the police station in the police vehicle. The accused was fine, but shivering, at the police station the accused was handed over to the charge room for further investigation.
59. In cross examination, the witness stated that at the time of arrest he had explained to the accused the reason of his arrest but this was not in his police statement. The witness stated that there was a possibility the accused was shivering because of fear after he saw police officers behind him.
60. The witness did not see any visible injuries on the accused he denied the accused was assaulted in the police vehicle on his way to the police station. The witness also denied he and another police officer had assaulted the accused at the police station.
61. The third witness was Nakumilevu Nailatikau the Caretaker of the Lautoka Police Station, on 15th February, 2018 at about 5.00 pm he was on his way to sign off from work, in the police station he saw the accused seated. After signing off he went to the bure, on his way out he was followed by the complainant she made her way to the telephone booth.
62. After a while the witness saw the accused rushing out of the Police Station, he sat in his car reversed it and drove it towards the telephone booth and bumped it. The telephone booth fell with the complainant in it. The witness ran to pull the complainant out, he

saw the complainant was injured on her left arm with blood coming out. At this time the car was stuck on the side of the sewer chamber beside the telephone booth. The witness saw as a result of the impact both the air bags in the car had inflated.

63. In cross examination, the witness stated that the accused came out of the station quickly and he looked angry when he went to his car.
64. The fourth witness was D/Sgt. Josateki Seuseu, on 15th February, 2018 he was instructed to take photographs of the crime scene after familiarizing himself with the scene, he started taking photographs and then drew a rough and fair sketch plan. The booklet of photographs were marked and tendered as prosecution exhibit no.1. The rough sketch plan and the fair sketch plan of the alleged crime scene were also marked and tendered as prosecution exhibit nos. 2 and 3.
65. The fifth witness was Dr. Mohammed Shaheel who obtained his MBBS Degree from the Fiji School of Medicine in 2015. On 15th February, 2018 the doctor had examined the complainant at the Lautoka Hospital. The Fiji Police Medical Examination Form of the complainant was marked and tendered as prosecution exhibit no. 4.
66. The specific medical findings of the doctor after examining the complainant were as follows:
 - Right hand extensor surface swollen with superficial laceration approximately 5 cm long with blood clot;
 - Tender to touch with decrease range of motion;
 - Superficial laceration on the upper lip.

67. The doctor explained a laceration was a cut and tender to touch meant when the laceration was touched it was painful to the patient and she was unable to move her hand. In the opinion of the doctor, the injuries were caused by blunt force trauma secondary to fall.
68. In cross examination, the doctor agreed the injuries sustained by the patient were very minor and not life threatening which could have been sustained as a result of a fall and not by a car bumping her.
69. The sixth witness was Esava Mateboto the former Team Leader from Telecom Fiji Limited, he informed the court that he graduated with Diploma in Management and Masters in Management from the University of the South Pacific. As a team leader, he was looking after all the telephone booths of Telecom Fiji Limited. In respect of telecom booths, the materials were purchased and assembled by local carpenters.
70. The telecom booth had two posts in front of about 100 mm in diameter and two at the back of about 50 mm in diameter. All the posts were made of light steel, and the walls were made of hard plastics of 20 mm thickness (about an inch) which were imported from China. The four posts were welded on chrome or silver plate with bolts and studs or nuts screwed on top.
71. The booth was meant to provide the user some safety but it was not designed to withstand a speed of 50 kilometers. The materials for the booth were worth \$3,000.00 except for bolts, nuts and cement for the concrete basement.
72. The witness had visited the scene, after the accident he saw the hard plastic wall had broken into two pieces and as a result of the impact all the posts were uprooted from the plate.

73. In cross examination, the witness agreed there was no written evidence about the damages to the telephone booth which was about 10 years old. The witness stated that slight impact would not have caused the damage as in this case. According to the witness, it would have to be a big impact to cause such damage.
74. The seventh witness was Det. Insp. Simone Ralovo, on 15th February, 2018 the complainant who was the defacto partner of the accused was at the police station, he informed the other police officers that she was about to leave after a while the accused who was also in the police station ran outside, went to his car, made a U-turn and drove across the road towards the telephone booth. The defacto partner of the accused was standing inside the telephone booth at this time.
75. As a result of the impact, the telephone booth fell and the complainant flew about a few meters from the telephone booth. The witness went to the complainant to make her stand up and took her inside the station.
76. The accused then drove the vehicle towards town after a while he was brought back to the police station. As a result of the impact the telephone booth was thrown on the ground.
77. In cross examination, the witness agreed the relationship between the complainant and the accused was tensed that day. The witness denied the accused was assaulted and verbally abused by him or the other police officers at the police station. He did not agree that the accused had given his interview under fear, according to the witness the accused appeared physically okay.

78. The eighth witness was Sgt. Salen Kumar the investigating and the interviewing officer in this case. On 15th February, 2018 the witness had commenced the caution interview of the accused at 2040 hrs. The witnessing officer was Det. Insp. Simone.
79. The interview was conducted in the English language, when he met the accused, the accused appeared normal he did not complain about anything also he had not complained of being physically or verbally abused by the police officers. All his rights were given and he did not complain that he was not mentally stable for the interview. The accused was given sufficient breaks, meals, and he was allowed to meet his lawyer. His lawyer had visited him on the 16th of February, which was the second day of the interview.
80. The lawyer of the accused did not lodge any complaints that the accused was unstable mentally for the caution interview or had been physically and verbally abused by police officers. The interview had concluded on 17th February, 2018.
81. The record of interview of the accused dated 15th February, 2018 was marked and tendered as prosecution exhibit no. 5.
82. The witness further stated that the accused after the conclusion of the interview did not complain about anything and to date he had not lodged any official complaint against the witness or another police officers.
83. In cross examination, the witness denied the caution interview was conducted in the Hindi language and not in English language, he also denied that most of the answers mentioned in the caution interview were not given by the accused.

84. The witness also denied fabricating the entire interview, he maintained all the rights were given to the accused, including his right to consult a solicitor and that the interview was not conducted in an oppressive manner due to the presence of Insp. Simone as a witnessing officer. The witness denied the caution interview was not read back to the accused and it was only given to the accused to sign.
85. The witness disagreed the accused had mentioned to him during the caution interview that he did not want to kill the complainant but had only wanted to frighten her. He also denied telling the accused to sign the interview so that he can go home. The witness agreed the answer to question 144 in the caution interview suggested the accused avoided doing anything further after bumping the telephone booth.

Madam and Gentlemen Assessors

86. In the caution of interview which is before you, you will find certain parts have been blacked out. You are not to speculate about the missing words or sentences just concentrate on what is legible.
87. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
88. During the cross examination of the police officers the counsel for the accused had asked questions of these police officers suggesting that the answers given by the accused were obtained as a result of fear, assault, oppression, false promise, verbal abuse, and intimidation,

during the time he was transported to the police station after his arrest and at the police station before and during his interview. The defence counsel also suggested that the interviewing officer had fabricated the answers. This meant counsel had put to these witnesses that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.

89. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.
90. The final witness was Aman Singh, a Motor Vehicle Examiner employed by the Land Transport Authority, after completing his apprenticeship, the witness did Trade Certificate in Heavy Commercial Vehicle Mechanic. He has been employed by the Land Transport Authority for the past 5 years.
91. As part of his duties, the witness issues certificates of road worthiness and also inspects accident vehicles, his findings are recorded and compiled in a report. The witness had examined the car of the accused registration number JG 380 on 16th February, 2018, the vehicle accident report was marked and tendered as prosecution exhibit no. 6.
92. The findings of the witness were as follows:
 - a) Damaged bonnet, head lamps, front bumper, radiator, front face panel, air con condenser, and air bag open;

- b) Braking systems were effective, there were no problems with the brakes;
- c) Intact suspension system and there were no visual damage;
- d) Wheels were in order;
- e) No visual damage to the steering system and all the components of the steering system were intact;
- f) Engine in good running condition;
- g) No visual damage to gearbox and all the linkages.

93. In the opinion of the witness the damages sustained were caused from the impact of the accident and there were no defects found which may have contributed to the accident.

94. In cross examination, the witness stated that the damages sustained to the car were severe damages but he could not say anything about the speed the car was driven before the impact.

Madam and Gentlemen Assessors

95. You have heard the evidence of the doctor who had examined the complainant after the alleged incident and the motor vehicle examiner who had examined the car that was involved in the accident. Both these witnesses were called as expert witnesses on behalf of the prosecution.

96. Expert evidence is permitted in a criminal trial to provide you with information and opinion, which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The medical report of the complainant prosecution exhibit no. 4 and the

motor vehicle accident report, prosecution exhibit no. 6 are before you and what the doctor and the motor vehicle examiner said in their evidence as a whole is to assist you.

97. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor and the Motor Vehicle Examiner. When coming to your own conclusions about this aspect of the case, you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the experts you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor and the motor vehicle examiner.
98. You should remember that the evidence of the doctor and the motor vehicle examiner relate only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
99. This was the prosecution case.

DEFENCE CASE

Madam and Gentlemen Assessors

100. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence under oath and be subjected to cross examination.
101. I now draw your attention to the evidence adduced by the defence during the course of the hearing. You must take into account what

the defence adduced in evidence when considering the issues of fact which you are determining.

102. The accused informed the court that he knows the complainant from 2015 their relationship was good and they were in a defacto relationship. The complainant stayed with her family in his house for around 4 months.
103. On 14th February, 2018 the complainant had taken his phone and car charger which she refused to return, so at 3 o'clock in the morning on the 15th February, 2018 the accused reported the matter to the police.
104. At about 1.30pm on the 15th the accused was called to the Lautoka Police Station. At the police Station he saw the complainant, after a while a police officer took his car keys, money and other things. Shortly after a police officer by the name of Salen came and informed him that he had parked his car very near to the roadside. This police officer gave him the car key to move the car to the other side of the road.
105. It was raining when he started the car the windscreen of the car was not clear. When he drove his car he saw a car coming from the opposite direction, he panicked and then all of a sudden he bumped into the telephone booth.
106. The air bag hit his nose and he blacked out he did not see anyone in the telephone booth he was scared so he reversed the car and left the scene. The car suddenly stopped at RB Patel car park he left the car and walked to the taxi stand.

107. Two police officers came and arrested him, he was taken to the police station in the car. The male police officer started to assault him in the car saying that he had bumped a girl. The accused denied the allegation and told them if he had intended to bump her, there was a cane knife lying in front of him at the police station he would have used this knife to hit her.
108. He was taken into the police station through the back door, the other police officers also came and assaulted him, at this time Insp. Simone was also swearing at him and said that he wanted to hit the accused with a stone.
109. He was punched on his back, both sides and everywhere they could. He was also punched on this hip where he had a surgery, he told the interviewing officer of what the police officers had done to him the reply was not to worry. The interviewing officer was asking questions in Hindi and he responded in Hindi but the typing was done in English on the computer. The accused is educated up to Class 5 only.
110. During the caution interview there were two Indo Fijian Police Officers present. Insp. Simone was not present throughout the caution interview, the accused was not given any opportunity to contact his family members, solicitor or counsellor before his interview. He was asked if he needed medical assistance and he told the police officers he wanted tablets since he was having headache after the assault. He was not given any tablet, but was told to sit and rest.
111. The caution interview was read to him, he did not agree with some of the answers written. In respect of the answer to question 96 the

accused stated that he did not say that he wanted to kill the complainant.

112. The accused also confirmed that answers to questions 108,109,111 and 136 were also not given by him. The accused stated that the answers were fabricated by the interviewing officer he did not give those answers because he had saved the complainant's life three times from other men.
113. The accused stated his answers were that he had no intention to kill the complainant he signed the caution interview because he was told he can go home after signing.
114. In cross examination, the accused agreed around midday on 15th February he went to the Lautoka Police Station in his car. He parked his car opposite the police station facing Nadi on the side of the road. On this day he was not that angry or frustrated with the complainant for refusing to return his phone and car charger. In the police station the accused saw the complainant.
115. From the position where the accused was sitting in the police station he was not able to see or hear the complainant and his sister in law in the bure outside the police station. The accused denied the suggestion that he was frustrated with the police officers because they did not take his complaint against the complainant or that he was angry when he heard the complainant arguing with his sister in law in the bure outside the police station. The accused also denied at this time he had made up his mind to kill the complainant.
116. When it was suggested that the accused had driven his car straight to the telephone booth where the complainant was standing the accused stated that he did not see the complainant, when he U-

turned the car it was raining and the windscreen was foggy he does not know how he bumped the telephone booth after the air bag hit his nose he blacked out.

117. The accused stated that he has been a motor vehicle driver for the past 33 years. The inflated air bag did not injure his nose, but he blacked out, he did not go to the hospital. The reason why he went towards RB Patel Supermarket was because he was scared.
118. The accused maintained that he was sworn at and assaulted by a police officer after he was arrested in the police vehicle and then at the police station he was assaulted by a number of police officers. The accused estimated he received about 50 punches in total.
119. The accused agreed his counsel had visited him on the second day of the caution interview but he did not tell his counsel that he had been assaulted by the police officers since he was scared. When he appeared in the Magistrate's Court and the High Court he also did not tell the court that he was assaulted by the police officers. The accused also did not tell his counsel that he wanted to be interviewed in Hindustani but the police officers had interviewed him in English. The accused did not also raise this issue in the Magistrate's Court or the High Court.
120. When it was suggested that the answers the accused had given in the caution interview coincided with his actions the accused stated that he wasn't aware the complainant was in the telephone booth at first the car bumped the sewer chamber and then it bumped the telephone booth.
121. In re-examination the accused clarified he did not tell his counsel about the police assault because he was scared of the police.

122. This was the defence case.

123. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.

ANALYSIS

124. The prosecution alleges that in the afternoon of 15th February, 2018 the accused and the complainant were at the Lautoka Police Station. When the accused saw the complainant leaving the police station and was standing in the telephone booth, he quickly left the police station and went to his car which was parked in front of the police station. The accused reversed his car across the road and made a U-turn towards the telephone booth.

125. He accused drove the car and bumped the telephone booth as a result of the impact the telephone booth was completely damaged resulting in a damage of \$3,000.00.

126. The prosecution further alleges by his conduct the accused had intended to kill the complainant and with that intention, he drove his motor vehicle and bumped the telephone booth in which the complainant was standing. Accordingly, what the accused did was more than merely preparatory to kill the complainant. The accused also willfully and unlawfully damaged the telephone booth of Telecom Fiji Limited in this process.

127. The defence on the other hand denies both the allegations the accused says he did not intend to kill the complainant. When he

went into his car it was raining the key was given to him by a police officer to park the car properly so when he reversed his car there was a car coming from the opposite direction that is from the Nadi side of the road and also the windscreen was not clear so he could not see properly as a result he drove and bumped the telephone booth.

128. At this time the accused had not seen the complainant in the telephone booth upon impact the air bag opened, he blacked out after the air bag hit his nose. If he wanted to kill the complainant, he could have used a cane knife to kill her which was lying in front of him at the police station. Furthermore, the accused had saved the life of the complainant on three earlier occasions, so why would he want to kill the complainant.
129. The admissions in the caution interview should not be believed since the accused did not give those answers voluntarily. Moreover, he was also not mentally stable to be interviewed.
130. The admissions have also been fabricated by the interviewing officer since he did not admit that he wanted to kill the complainant. He is only educated up to class 5 he does not write or read English the police officers had interviewed him in the Hindi language, but was typing in the computer in English he signed the caution interview because he was told if he signs he can go home.
131. In respect of the allegation of damaging the telephone booth the accused says it was an accident and he did not willfully damage it.

Madam and Gentlemen Assessors

132. You have seen all the witnesses giving evidence keep in mind that some witnesses react differently when giving evidence.

133. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.
134. In deciding the credibility of the witnesses and the reliability of their evidence it is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
135. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charges against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
136. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.

137. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.
138. The accused is not required to prove his innocence he is presumed innocent until proven guilty.
139. As mentioned earlier in this case, the accused is charged with one count of attempted murder and one count of damaging property, you should bear in mind that you are to consider the evidence in each count separately from the other. You must not assume that because the accused is guilty on one count that he must be guilty of the other as well.
140. Your possible opinions are:-

1. Count One: **ATTEMPTED MURDER - ACCUSED - GUILTY
OR NOT GUILTY.**

If you find the accused not guilty of attempted murder then you are to consider whether the accused is guilty or not guilty of **ACT INTENDED TO CAUSE GRIEVIOUS HARM.**

2. Count Two: **DAMAGING PROPERTY - ACCUSED - GUILTY
OR NOT GUILTY.**

Madam and Gentlemen Assessors

141. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of my staff so that the court can be reconvened.
142. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka

05 June, 2019

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Fazilat Shah Legal for the Accused.