

**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  
**Date of Judgment** : 06 June, 2019  
**Date of Sentence Hearing:** 25 June, 2019  
**Date of Sentence** : 28 June, 2019

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**SENTENCE**

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1. In a judgment delivered on 6<sup>th</sup> June, 2019 this court found the accused guilty of one count of attempted murder and one count of damaging property as per the following information:

**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 15<sup>th</sup> 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 15<sup>th</sup> 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.

2. The brief facts were as follows:
3. On 15<sup>th</sup> February, 2018 the victim and the accused were at the Lautoka Police Station at about 4.50pm the victim walked out of the police station, since it was raining she took shelter in the bure outside the police station.
4. After a while, the victim went into the telephone booth which was about half a minute walk from the bure. Inside the telephone booth which was near the fence of the police station the victim was talking to a friend on her mobile phone.
5. Upon seeing the victim in the telephone booth the accused ran out of the police station to his car which was parked outside the police station facing Nadi. The accused reversed his car in the opposite lane of the road and drove the car across the road and bumped the telephone booth. As a result of the impact, the telephone booth fell

off its basement and the victim was thrown out of the telephone booth thereafter the accused fled the scene in his car.

6. The victim received injuries as a result of the impact and was subsequently taken to the hospital. The telephone booth which belonged to Telecom Fiji Limited was damaged to the value of \$3,000.00.
7. After the accused was arrested in his caution interview he admitted that he intended to kill the victim with his car. The victim and the accused were good friends from 2016.
8. Counsel for the accused presented the following personal details and mitigation on behalf of the accused:
  - a) The accused is 46 years of age and a first offender;
  - b) He is a businessman operating an upholstery and carpentry business;
  - c) Sole bread winner of the family who supports his mentally challenged brother and 14 year old son;
  - d) This was not a preplanned or a premeditated act;
  - e) Injuries suffered by the victim were superficial;
  - f) Seeks leniency of the court since it was an isolated incident which was out of character.
9. Furthermore, counsel for the accused at paragraph 2.8 of her written mitigation stated:

*“The Accused however still maintains that what had happened on 15<sup>th</sup> February 2018 was merely an accident and that there was no intention on his part to kill the complainant despite the admissions made in his caution interview.”*

10. It is unfortunate that the accused counsel has embarked into making such incongruous comments on behalf of the accused knowing very well that this court has already convicted the accused. It is the duty of counsel to make submissions that are appropriate in its contents. Whilst the comments made shall not be taken against the accused I shall also desist from making a finding whether the paragraph in question amounts to contempt of court.

### **AGGRAVATING FACTORS**

11. The aggravating factors are as follows:

a) Victim was injured

The victim who was standing in the telephone booth and talking on her mobile phone was thrown out of the booth as a result she received some injuries although superficial.

b) Unprovoked attack

This was an unprovoked attack on the victim who was unsuspecting of what was going around her whilst inside the telephone booth.

c) Use of Motor Vehicle

The accused used his car as a weapon to bump the telephone booth in which the victim was standing.

d) Victim Impact Statement

According to the victim impact statement filed and served on the defence after the incident the victim was mentally disturbed and traumatized. For some time she was living in fear of the accused and was also frightened to be alone.

Although there is no expert evidence to support what the victim had mentioned in her victim impact statement, in my judgment there is no need for an expert to be called as long as the views expressed in the victim impact statement are a consequence of the accused conduct resulting in a harm suffered by the victim. Considering the facts and circumstances of this case, this court agrees that the contents of the victim impact statement are credible and therefore, it can be relied upon.

12. The English and Wales Court of Appeal in Regina v Joginder Chall and others [2019] EWCA Crim 865 made the following pertinent observations at paragraph 17:

*“The judicial assessment may in some cases be assisted by expert evidence from a psychologist or psychiatrist. However, we reject the submission that it is always essential for the sentencer to consider expert evidence before deciding whether a victim has suffered severe psychological harm. On the contrary, the judge may make such an assessment, and will usually be able to make such an assessment, without needing to obtain expert evidence.”*

At paragraph 19:

*The cases of R v Dalton [2016] EWCA Crim 2060, R v Egboujor [2018] EWCA Crim 159 and R v Boyle [2018] EWCA Crim 2567 provide recent examples of the application in practice of the principle that expert evidence is not a necessary precondition of a finding of severe psychological harm. We note that counsel for the defendants have not cited any authority to the contrary effect. In Dalton the point was made that the judge had presided over the trial, heard the victim give*

*evidence and seen the effect of the sexual abuse upon her. It was held on appeal that he was entitled to make a finding of severe psychological harm, even without a psychiatric report upon the victim. In Egboujor it was held on appeal that a judge's assessment of whether severe psychological harm has been caused may be based upon expert evidence, but may be reached without an expert's opinion. In that case also the point was made that the judge had been able to observe the victim when she gave evidence during the trial. In Boyle the judge had, on the basis of the VPS\*, made a finding of severe psychological harm caused by the offence, notwithstanding that there was evidence that the victim had suffered from at least minor mental health issues before the offence. On appeal, it was held that the judge was entitled to reach the conclusion that she did. The VPS was not contradicted by any of the other evidence and showed that the offence had resulted in a general deterioration in the victim's psychological and psychiatric condition.*

\*VPS means Victim Personal Statement.

Again at paragraph 22:

*“Save where there is an obvious inference to be drawn from the nature and circumstances of the offence, a judge should not make assumptions as to the effect of the offence on the victim. The judge must act on evidence. But a judge will usually be able to make a proper assessment of the extent of psychological harm on the basis of factual evidence as to the actual effect of the crime on the victim. Such evidence may be given during the course of the trial, and the demeanor of the victim when giving evidence may be an important factor in the judge’s assessment. The relevant evidence will, however, often come, and may exclusively come, from the VPS. The*

*court is not prevented from acting on it merely because it comes from a VPS”.*

And at paragraph 30, the court raised an important point that:

*“We should add that where there is no VPS, the sentencer must not assume that the absence of a VPS indicates an absence of harm. Whether there is evidence of psychological harm and, if so, of its degree, will depend on the facts and circumstances of the case.”*

13. Section 44(1) of the Crimes Act states:

*44. — (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.*

14. The sentence for the offence of murder is fixed by law which is mandatory life imprisonment. This court, however, has discretion to determine a minimum term to be served before the offender is eligible for a pardon.

15. Section 17 of the Sentencing and Penalties Act states:

*“If an offender is convicted of more than one offence founded on the same facts, or which form a series of offences of the same or a similar character, the court may impose an aggregate sentence of imprisonment in respect of those offences that does not exceed the total effective period of imprisonment that could be imposed if the court had imposed a separate term of imprisonment for each of them.”*

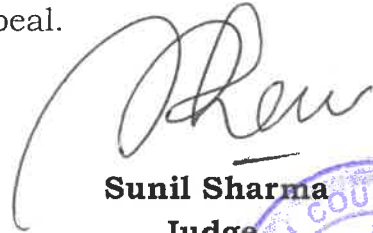
16. I am satisfied that both the offences for which the accused stands convicted are offences founded on the same facts. Therefore, taking into account section 17 of the Sentencing and Penalties Act I prefer to impose an aggregate sentence of imprisonment for both the offences.
17. I note from the court file that the accused was remanded for about 1 year 4 months and 10 days. When an accused is found guilty and convicted for the offence of attempted murder the sentence of life imprisonment becomes mandatory the only discretion the sentencing court has is in respect of the minimum term to be imposed.
18. Considering the objective seriousness of the offences committed I take 9 years as the starting point of the minimum term, for the aggravating factors I add 2 years. The interim minimum term is 11 years, for the mitigating factors I reduce the minimum term by 3 years bringing the minimum term to 8 years imprisonment. The minimum term is further reduced in accordance with section 24 of the Sentencing and Penalties Act by 1 year 4 months and 10 days as a period of imprisonment already served.
19. Under the aggregate sentence regime of section 17 of the Sentencing and Penalties Act the accused is sentenced to mandatory life imprisonment with a minimum term of 6 years 7 months and 20 days to be served before a pardon may be considered.
20. The purpose of a minimum term is to assure the community and the public at large that offenders for such an offence serve a definite and meaningful period of imprisonment.




21. In arriving at the minimum term this court has taken into account the aggravating factors, mitigation of the accused and the remand period which is just in all the circumstances of this case.
22. Mr. Faiyash you have committed a very serious offence against the victim who was your friend. The victim was unsuspecting, it was an unprovoked, uncalled and senseless conduct by you. You used your car to put your intentions to kill the victim into action only to be stopped by the telephone booth. You cannot be forgiven for what you have done, during the trial, you also did not show any remorse for what you had done.
23. From the evidence adduced, it is obvious to me that the accused needs help in controlling his anger. He had made up his mind to use his car as a lethal weapon against the victim to demonstrate his anger on her. This court recommends that the Commissioner of the Correction Services makes provisions for the accused to undergo counselling and anger management courses to help him in controlling his anger.
24. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offences committed on the victim compels me to state that the purpose of this sentence is to punish offenders to an extent and in a manner which was just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.
25. In summary, I pass an aggregate sentence of mandatory life imprisonment with a minimum term of 6 years 7 months and 20 days to be served before a pardon may be considered. Due to the closeness of the relationship between the accused and the victim a

permanent non-molestation and non-contact orders are issued to protect the victim under the Domestic violence Act.

26. 30 days to appeal to the Court of Appeal.

  
**Sunil Sharma**  
Judge



**At Lautoka**

28 June, 2019

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Messrs. Fazilat Shah Legal for the Accused.**