

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 128 of 2017

STATE

V

VIMLESH GOUNDAR

Counsel	:	Mr. A. Singh for the State.
	:	Mr. I. Khan and Mr. T. Kalou for the Accused.
Dates of Hearing	:	03, 04, 05, 06 November, 2020
Closing Speeches	:	10 November, 2020
Date of Summing Up	:	10 November, 2020
Date of Judgment	:	12 November, 2020
Date of Sentence Hearing:	:	27 November, 2020
Date of Sentence	:	01 December, 2020

SENTENCE

1. The accused was charged with the following offence:

Statement of Offence

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

Particulars of Offence

VIMLESH GOUNDAR, on the 9th of June, 2017 at Sigatoka in the Western Division, attempted to murder **NILESH GOUNDAR**.

2. In a judgment delivered on 12th November, 2020 this court found the accused guilty of the lesser offence of act intended to cause grievous harm and he was convicted accordingly.

3. The brief facts were as follows:

During the early hours of 9th June, 2017 the victim was walking home when he was assaulted by the accused with an iron rod on his neck. The accused was hiding in the dark waiting for the victim when he assaulted the victim.

4. As a result of the accused's assault the victim received injuries which resulted in the victim being admitted at the Lautoka Hospital. The accused was arrested, caution interviewed and charged.

5. The state counsel filed written sentence submissions and the defence counsel filed mitigation and five character affidavits in support:

Character Affidavit One: Muni Nilesh Goundar

In his affidavit Muni deposed that he is the victim and elder brother of the accused they have had a cordial relationship together. Due to a misunderstanding about giving food to their parents the accused had taken a DVRO against him.

The victim also deposed that the accused is a helpful person when he was hospitalized the accused had taken good care of him by staying whole night with him taking him to the washroom and feeding him.

The victim has forgiven the complainant and he wishes to maintain their brotherly relationship. The victim has not been psychologically or emotionally affected his injuries have healed and he had recovered within 6 months.

Character Affidavit Two: Ajen Prasad

In his affidavit Ajen deposes that the accused was working under his supervision as a Forklift Operator. The accused is a person of good character who is punctual to work and also the accused does not have any issues with any of the staff members and is a trust worthy member of the staff.

Character Affidavit Three: Shalendra Kumar

In his affidavit Pastor Kumar deposes that he has known the accused for the past five years. According to him the accused is a person of good character and a soft spoken person who is also a helpful and trustworthy member of the community and is not a trouble maker.

Character Affidavit Four: Leshni Devi

In her affidavit Leshni deposes that she is the youngest sister of the accused who is a hard working person and has helped her in her business through sales and marketing. According to Leshni the accused has financed her education as well and also used to help the members of the community by repairing their appliances free of charge.

Character Affidavit Five: Babita Goundar

In her affidavit Babita deposes that the accused is her youngest son. She mentions that the accused is a very decent, soft spoken and well manner person who has been looking after his father who suffers from a mental illness and he also looks after her.

6. In addition to the above, the accused counsel also presented the following mitigation:
 - a) The accused is 35 years of age;
 - b) Working as a Forklift driver;
 - c) He has contributed immensely towards his family;
 - d) He has a good standing in the community;
 - e) He is truly remorseful and regrets his actions;
 - f) He realizes his actions were unwarranted;
 - g) Seeks the leniency of the court and also promises that he will lead a crime free life from now onwards;
 - h) He has learnt his lessons;
 - i) Cooperated with the police during the investigations and the interview.

AGGRAVATING FACTORS

7. The following aggravating factors are obvious:
 - a) Breach of Trust

The victim and the accused are biological brothers who were living in the same house. The accused grossly breached the trust of the victim by his actions, the attack on the victim was unprovoked, which was carried out during darkness on an unarmed and unsuspecting victim. The victim was vulnerable, helpless and defenceless.

b) Planning

The accused planned to do what he did, both the victim and the accused were at the wedding ceremony the accused left earlier took an iron rod from his house and waited for the victim to come by.

c) Fleeing the scene

After hitting the victim the accused fled the scene to avoid detection and he also threw the iron rod in the river.

TARIFF

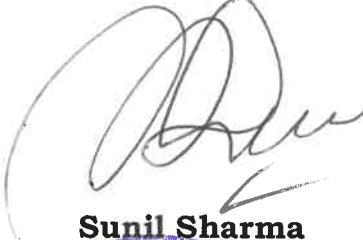
8. The maximum penalty for the offence of act intended to cause grievous harm is life imprisonment. The accepted tariff for this offence is between 2 years to 5 years imprisonment (*see State v Mokubula [2003] FJHC 164: HAA 0052 of 2003 (23 December, 2013)*).
9. Considering the objective seriousness of the offence committed I take 3 years imprisonment (lower end of the scale) as the starting point of the sentence. I add 3 years for the aggravating factors bringing an interim total of 6 years of imprisonment. I note that the accused has a previous conviction for assault causing actual bodily harm in 2014 hence he does not receive any discount for good character.
10. I have carefully considered the affidavits of the five character witnesses who had put in good words for the accused in their respective affidavits and the mitigation advanced by counsel for the accused. The sentence is reduced by 1 year and 6 months. The sentence is now 4 years and 6 months imprisonment.

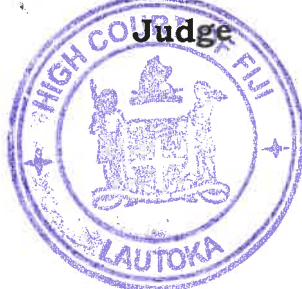
11. I also note that the office of the Director of Public Prosecutions had charged the accused with a count of attempted murder, before the hearing the learned counsel for the accused had indicated in court that a submission had been made to the office of the Director of Public Prosecutions to consider reducing the charge considering the complainant's police statement. The submission of the defence was refused.
12. I am sure the intention behind the submission was towards a progressive approach. In this regard, I further reduce the sentence by 6 months the sentence is now 4 years imprisonment.
13. The accused was remanded for 1 month 27 days in accordance with section 24 of the Sentencing and Penalties Act and in exercise of my discretion the sentence is reduced by 2 months as a period of imprisonment already served. The final sentence is 3 years and 10 months imprisonment.
14. The accused through his counsel is asking for a suspended sentence, in law the above sentence cannot be suspended. In any event a suspended sentence for such an offending will be too lenient and encourage people to use a weapon to settle their differences which will give a very wrong message to the community.
15. Considering the circumstances of the offending, and the level of the accused culpability an immediate custodial sentence is warranted. When a person uses a weapon on another he or she should be prepared to face severe consequences by way of an immediate custodial sentence.
16. Having considered section 4 (1) of the Sentencing and Penalties Act and the serious nature of the offence 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 is just in all the circumstances of the case and to deter offenders and other persons from committing offences of the same or similar nature.

17. Under section 18 (1) of the Sentencing and Penalties Act (as amended), I impose 2 ½ years as a non-parole period to be served before the accused is eligible for parole. I consider this non-parole period to be appropriate in the rehabilitation of the accused which is just in the circumstances of this case.
18. Mr Goundar I do not have any words to describe your action on your elder brother. Even though your elder brother has forgiven you due to his brotherly love for you unfortunately, this court does not share the same sentiment. The circumstances of the offending is very serious your brother could have died because of you.
19. You had no mercy for your brother at the time of the offending, no amount of repentance can save you from the inevitable you should have thought about your family before embarking on a journey of such a planned offending.
20. You are a coward, you should be ashamed of yourself you had no second thoughts about what you were doing. You do not deserve any mercy from this court. You are a pretender you knew what you had done yet you went to the Lautoka Hospital and asked the victim about the assault when you came to know the victim did not recognise his assailant you then acted as if nothing had been done by you. As a result of your assault the victim told the court he is not able to hear properly in his left ear.

21. You started to assist the victim at the hospital during the night, feeding him and doing all that you could, to show your brother that you really loved him but this was far from the truth. The long arm of the law finally caught up with you.
22. In summary the accused is sentenced to 3 years and 10 months imprisonment with a non-parole period of 2 ½ years to be served before the accused is eligible for parole.
23. Due to the closeness of the relationship between the victim and the accused a permanent non-molestation order is issued to protect the victim under the Domestic Violence Act.
24. 30 days to appeal to the Court of Appeal.


Sunil Sharma
Judge



At Lautoka
01 December, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.
Messrs Iqbal Khan & Associates for the Accused.