

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 100 of 2018**

**STATE**

**V**

**AKAPUSI QALOBULA**

**Counsel** : Mr. Eoghn Samisoni for the State  
Mr. Mathew Young for the Accused

**Dates of Trial** : 23-24 March 2020

**Summing Up** : 25 March 2020

### **SUMMING UP**

Madam Assessors and Gentleman Assessor,

**[1]** It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

**[2]** As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and any admissions made by the parties by way of admitted facts.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted

the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both Defence Counsel and State Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may sometimes find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [16] This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable

explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

- [17] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [18] Madam and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [19] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [20] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [21] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [22] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.

- [23] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [24] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [25] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [26] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [27] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. It is not his task to prove his innocence.
- [28] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [29] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [30] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.

- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [32] Let us now look at the charge contained in the Information.
- [33] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

*Statement of Offence*

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary to Section 255 (a) of the Crimes Act 2009.

*Particulars of Offence*

**AKAPUSI QALOBULA**, on the 21<sup>st</sup> day of February 2018, at Vanuabalavu, Lau, in the Southern Division, with intent to cause grievous harm to **ILIESA TIKOMAINIUMEA**, unlawfully wounded the said **ILIESA TIKOMAINIUMEA**, by striking him on the face with a cane knife.

- [34] Section 255 (a) of the Crimes Act No 44 of 2009 (“Crimes Act”) reads as follows:

*A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or **to do some grievous harm to any person**, or to resist or prevent the lawful arrest or detention of any person—*

- (a) **unlawfully wounds** or does any grievous harm to any person by any means; or  
(b) .....

*[Emphasis is mine].*

- [35] As you would observe, in this case the prosecution has charged that the accused intended to cause grievous harm to the complainant; and with that intention unlawfully wounded the complainant with a cane knife.
- [36] Therefore, in order for the prosecution to prove the charge of Act with Intent to Cause Grievous Harm, they must establish beyond any reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 21 February 2018);
  - (iii) At Vanuabalavu, Lau, in the Southern Division;

- (iv) Unlawfully wounded Iliesa Tikomainiumea, by striking him on the face with a cane knife;
- (v) With the intention to cause grievous harm to the said Iliesa Tikomainiumea.

**[37]** Let me now elaborate on these elements in respect of the charge.

**[38]** The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

**[39]** The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

**[40]** The fourth element is that the accused unlawfully wounded, Iliesa Tikomainiumea, by striking him on the face with a cane knife. The word “unlawfully” simply means without lawful excuse or without just cause. The term “wound” has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is “exterior” for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the complainant as defined herein.

**[41]** The fifth and final element the prosecution must prove is that the accused intended to cause grievous harm to Iliesa Tikomainiumea. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove the fifth element, the prosecution should prove beyond reasonable doubt that the accused intended to cause grievous harm to the said Iliesa Tikomainiumea.

**[42]** I must also direct you that it is not necessary for the prosecution to establish that grievous harm was in fact caused to the victim or that the injuries caused to him were actually grievous in nature. What the prosecution must prove is that the accused had the intention to do or cause some grievous harm to the victim.

**[43]** Grievous harm has been defined at Section 4(1) of the Crimes Act as follows:

*“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.*

- [44] The term "dangerous harm" has been defined to mean as *"harm endangering life"*.
- [45] The term 'harm' has been defined to mean: *"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)."*
- [46] If you are satisfied beyond any reasonable doubt that the accused, on 21 February 2018, unlawfully wounded Iliesa Tikomainiumea, with a cane knife, with the intention to cause grievous harm to the said Iliesa Tikomainiumea, then you must find him guilty of the count of Act with Intent to Cause Grievous Harm.
- [47] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge.
- [48] However, if you find that the prosecution has proved all elements of the offence beyond any reasonable doubt, except the final element, that the accused intended to cause grievous harm to the said Iliesa Tikomainiumea; as an alternative, you are then allowed to look at the lesser offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act, though the accused is not formally charged in the Information for that offence.
- [49] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an assault occasioning actual bodily harm."
- [50] In order for the prosecution to prove the offence of Assault Causing Actual Bodily Harm, they must establish beyond any reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 21 February 2018);
  - (iii) At Vanuabalavu, Lau, in the Southern Division;
  - (iv) Assaulted the complainant, Iliesa Tikomainiumea; and
  - (v) Thereby caused actual bodily harm to the said complainant, Iliesa Tikomainiumea.
- [51] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.



- [52] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [53] The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused assaulted Iliesa Tikomainiuea.
- [54] With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to Iliesa Tikomainiuea, as a result of the assault.
- [55] As I informed you a few moments ago, the term ‘harm’ has been defined at Section 4(1) of the Crimes Act to mean: *“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).”*
- [56] However, I wish to emphasize that you need to go in this direction ONLY if you find that the prosecution has failed to establish the final element of the offence of Act with Intent to Cause Grievous Harm, namely that the accused intended to cause grievous harm to Iliesa Tikomainiuea beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offences of Act with Intent to Cause Grievous Harm beyond reasonable doubt, then you must find the accused guilty as charged.
- [57] In this case, the accused takes up the position that he acted in self-defence. 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.”*
- [58] 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.”*

**[59]** The witness Iliesa Tikomainiumea testified as to how the injury was caused to him. You have heard his testimony and also the testimony of the accused. I have summarised their evidence later in the summing up. It is for you decide based on all the evidence whether the accused acted in self-defence.

**[60]** 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.

**[61]** These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

**[62]** In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 (“Criminal Procedure Act”), the prosecution and the defence have consented to treat the following facts as “*Admitted Facts*” without placing necessary evidence to prove them:

1. The accused Akapusi Qalobula and the complainant Iliesa Tikomainiumea are known to each other.
2. The accused Akapusi Qalobula and the complainant Iliesa Tikomainiumea were residing at Mualevu Village, Vanuabalavu, Lau on the 21 February 2018.
3. On the date of the incident 21 February 2018, an argument occurred between the accused and the complainant concerning the dispute of a land boundary.
4. The complainant Iliesa Tikomainiumea was struck in the face with a cane knife.
5. The complainant was medically examined at the Lomaloma Hospital by Doctor Luke Ravula.
6. The medical report of the complainant is to be tendered by consent (Annexure 1).

**[63]** Since the prosecution and the defence have consented to treat the above facts as “*Admitted Facts*” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

### **Case for the Prosecution**

[64] The prosecution, in support of their case, called the complainant, Iliesa Tikomainiumea. The Medical Examination Report of Iliesa Tikomainiumea has been tendered by consent (Annexure 1).

### **[65] Evidence of Iliesa Tikomainiumea**

- (i) *The witness testified that he is currently residing at Delai Valelevu. He is currently employed as a security officer.*
- (ii) *It is an admitted fact that on the 21 February 2018, the accused Akapusi Qalobula and the complainant Iliesa Tikomainiumea were residing at Mualevu Village, Vanuabalavu, in Lau. It is also an admitted fact that the accused and the complainant were known to each other.*
- (iii) *The complainant testified that he recalls the 21 February 2018. He said that he was in his village in Mualevu, Vanuabalavu that day. He was in Mualevu Village to build his house which was destroyed in Hurricane Winston (Cyclone Winston).*
- (iv) *The witness said that he had woken up around 5.30 in the morning that day at his cousin's place. He had taken his pinch bar and his hammer and crossed over to his compound. He explained that by compound he meant the village residence where he had lived with his parents. This was the residence that had been destroyed by Cyclone Winston. From his cousin's place to his residence was about 10 metres.*
- (v) *The complainant said that the reason why he took the pinch bar and the hammer was to pull out nails from timbers.*
- (vi) *He testified that he was collecting debris from the base of the house and was stacking the timbers just beside the base of the house.*
- (vii) *The witness said that about 2 metres away from his house was the house which the accused was looking after. The owners of the house were said to be in Suva or overseas.*
- (viii) *It is an admitted fact that on the date of the incident, 21 February 2018, an argument occurred between the accused and the complainant concerning the dispute of a land boundary.*
- (ix) *The witness said that this argument took place around 6.00 a.m.*

(x) *The complainant was then asked the following questions and he answered as follows:*

*Q. Could you tell us how that argument began?*

*A. When I was stacking my timbers besides the house, when I looked up, I saw Qalo standing about one metre from me. Before that when I was stacking my timber and collecting the debris, I heard someone filing a knife. About 5 minutes later, I saw him standing in front of me.*

*Q. Was he holding anything at that time?*

*A. Yes.*

*Q. What was he holding?*

*A. A cane knife.*

*Q. Could you describe the cane knife?*

*A. It is a bit thinner and not wider, a bit longer. It is an old or used one and not a new one.*

*Using his arm the witness showed the length of the cane knife to be longer than one arm length (about 1 metre in length).*

*Q. Did the accused say anything to you?*

*A. He said to take the timber from the base of the house and put it back to where I had collected it from.*

*Q. Do you know why he said so?*

*A. I really don't know. He usually cleans the place I was stacking the timber. But it was my compound.*

*Q. Were you holding anything at that point in time?*

*A. No.*

*Q. Where was your hammer and pinch bar at the time?*

*A. It was left about 5 metres away from me near the steps.*

*Q. What did you say in response?*

*A. I told him that he was not supposed to say anything because he was in my compound. Telling me to remove timber from my compound.*

*Q. Did you say anything else to him?*

A. *Yes. If he wants to say anything to go and say it from his house, which is about 20 metres away from my compound.*

Q. *What happened next?*

A. *He swore at me, he said I am a big arse hole (Sona levu).*

Q. *What happened after that?*

A. *I told him he is not from our village, and he should not talk to me like that.*

Q. *Could you describe his demeanour or behaviour when you said that to him?*

A. *He said that I want to be something (Viavialevu to mean trying to be something I am not).*

Q. *What was the accused's behaviour towards you?*

A. *His face started to light up and his eye balls were wider like angry.*

Q. *What happened after that?*

A. *Actually, he threatened me again by telling me to remove the timbers.*

Q. *Did he say what will happen if you didn't remove the timbers?*

A. *No. I was looking at the cane knife he was holding. It was sharpened. I was a bit scared.*

Q. *What did you do?*

A. *Well, I told him to let go of the knife and let's fight. I asked him for a fist fight. He kept holding the knife. I asked if he threw down the knife let us have a fist fight.*

Q. *What did the accused do?*

A. *He just struck me at that time with the cane knife.*

Q. *Where did he strike you?*

A. *On the right side of my cheek, below my right eye, right across the edge of my nose.*

Q. *What was your reaction?*

A. *I was surprised. I really did not think he will use the knife.*

Q. *Could you describe the wound?*

A. *It was deep. It was cut from the corner of my right eye right down to my nose – with the tip of my nose, hanging out from my nose. The witness demonstrated the area on his face that was wounded.*

Q. *Was there bleeding?*

A. *Yes. The bleeding was so severe, that I applied pressure on the face with my right hand (the witness demonstrates). But the blood kept on bleeding between my fingers.*

Q. *How many times were you struck by the cane knife?*

A. *Only once.*

Q. *Could you tell us what you did thereafter?*

A. *I tried to block my eyes with my hands. But there was no cloth around. I was stained with blood. And blood was coming out like when you open a pipe (like a tap).*

Q. *What did you do after that?*

A. *I told him you wait there, we will see.*

(xi) *The complainant then explained as to how he had looked for transport to go to the hospital. He had gone to the village headman's house and informed him about the incident. The accused had followed him with the cane knife in hand right up to the road.*

(xii) *The village headman had called and informed the Police Quarters in Delana. Within about 5 minutes the police had arrived and taken him to the Lomaloma Hospital. He had been brought to the hospital around 7.30 a.m.*

(xiii) *The complainant had spent 2 days and 2 nights at the hospital. It is an admitted fact that complainant was medically examined at the Lomaloma Hospital by Doctor Luke Ravula.*

(xiv) *The witness identified Akapusi as the accused in the dock.*

(xv) *The complainant was cross-examined at length. He admitted that the reason for the land boundary dispute was because the complainant alleges that the property the accused is looking after is built on the complainant's land.*

- (xvi) *The complainant also agreed that the area he had placed or stacked the timber was the place that was subject of the disagreement between the complainant and accused.*
- (xvii) *The following questions were, inter-alia, put to the witness in cross-examination:*
- Q: *I put it to you that the accused had only approached you because of this boundary issue?*
- A: *Yes.*
- Q. *I put it to you that you were also angry that morning because the accused had claimed that was his piece of land or the family's piece of land?*
- A. *No.*
- Q. *I put it to you that you and the accused exchanged words loudly that morning?*
- A. *It is not true.*
- Q. *I put it to you that morning while being confronted by the accused, you had in your hand the hammer?*
- A. *It is not true.*
- Q. *I put it to you that while you were exchanging words you had also pointed the hammer at his direction?*
- A. *Not true.*
- Q. *I put it to you that the accused had in hand a cane knife?*
- A. *Yes.*
- Q. *I put it to you that only in self-defence that he tapped the hammer away from his face and it bounced back from the hammer and the blunt side struck your face?*
- A. *It is not true.*
- Q. *We have the medical report. It is stated there, that you had five stiches on the right side of your face. Is that correct?*
- A. *Yes.*
- Q. *I put it to you that if anybody would intend to hurt you by swinging a cane knife, it would result in more severe injury?*

A. *He didn't mean to strike me on my face. He was just trying to slap me on the side with the cane knife.*

Q. *Are you saying that the accused had no intent to hurt you?*

A. *I think so.*

*(xviii) In re-examination the witness was asked the following questions:*

Q. *How sure are you, when you say he (the accused) didn't mean to strike you on your face but he only meant to slap you with the side of the cane knife?*

A. *Because he was standing at arm's length and the tip of the knife was filed nicely. And when he lifted the cane knife to slap me on the face, I moved back a little bit. I wanted to dodge the cane knife. That's when the tip of the knife struck the corner of the eye down to my cheeks and to my nose.*

Q. *If you have not dodged, your wound would have been worst?*

A. *Yes.*

**[66]** That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

**[67]** In this case, the accused opted to offer evidence under oath. He also called a witness, Ropate Lopeti Vosavakadua, in support of his case.

**[68] Evidence of the Accused – Akapusi Qalobula**

(i) *The accused testified that he is currently residing in Raiwaqa. He is a farmer by occupation.*

(ii) *The accused Akapusi testified that he recalled the incident which took place on 21 February 2018. He was then asked the following questions and he answered as follows:*

Q. *What happened that day?*

A. *They had an argument (the witness said Veitaratara to mean contact or scuffle).*



- Q. *What do you mean?*  
A. *We had an argument over something.*
- Q. *We, meaning?*  
A. *Myself and Iliesa Tikomainiumea.*
- Q. *What was this argument about?*  
A. *We were arguing about him pulling out 4 x 2 timber and hitting it to the wall.*
- Q. *Why do you think Iliesa was doing this?*  
A. *The reason is that he did not like the building of the house which was over his compound.*
- Q. *Which house are you referring to that you saying was over the boundary?*  
A. *The two house that were in line with each other within that compound.*
- Q. *You said earlier that Iliesa was hitting to the wall the timber. What wall are you referring to?*  
A. *He was hitting the wall of the kitchen that was adjacent to the complainant's house.*
- Q. *How do you know it was Iliesa who was hitting the wall of the kitchen with the timber?*  
A. *I know it was him because he was inside the house that he was cleaning.*
- Q. *Did you confront Iliesa because he was hitting the wall with the timber?*  
A. *Yes.*
- Q. *What did you say to him?*  
A. *I told him not to throw the timber against the wall and to place it properly in a manner that would clear the passage for walking.*
- Q. *What did Iliesa say in reply to that?*  
A. *He said for me to shut up. That is not your compound and that compound belongs to him.*
- Q. *What happened after that?*

- A. *He was pointing at me using the hammer and he chased me away from there. He told me that I don't own anything in that property.*
- Q. *Can you show us how Iliesa was pointing at you with the hammer?*
- A. *Witness demonstrated by putting his left hand out. While he was pointing he was saying go away from there, you don't own anything.*
- Q. *In which hand was Iliesa holding the hammer with?*
- A. *Left hand.*
- Q. *How did you feel when he was pointing the hammer at you and saying you don't own anything here?*
- A. *The witness answered "Domobula" to mean that he was afraid.*
- Q. *What were you holding at the time?*
- A. *A knife.*
- Q. *Which hand were you holding the knife?*
- A. *Left hand.*
- Q. *Why were you holding the knife that morning?*
- A. *That morning I was going to the farm.*
- Q. *It is an agreed fact that the complainant was struck in the face with the cane knife. Can you explain why Iliesa was struck in the face with the cane knife?*
- A. *I did not strike his face. I wanted to block the hammer which he was using to point at me with the knife. The cane knife bounced and tipped his face.*
- Q. *How far were you standing at the time/what was the distance between you and Iliesa?*
- A. *About one metre.*
- Q. *What happened after the knife you were holding had tipped Iliesa's face?*
- A. *I saw blood pouring out from his face.*
- Q. *Then what happened after that?*

A. *After that then he walked away from there.*

Q. *What did you do when he walked away?*

A. *I followed him. Then I saw there was plenty of blood coming out of his face.*

Q. *Why were you following him?*

A. *I followed thinking that he might faint since there was a lot of blood coming out of his face and the same time I can help him to the main road for a vehicle to assist him to hospital.*

Q. *It is an agreed fact that the argument was due to a dispute concerning a land boundary. Why is there a dispute concerning a land boundary between Iliesa and yourself?*

A. *Whilst constructing the house that I am staying in, it has lapsed into his compound – gone beyond his boundary.*

Q. *Did you have any confrontation with Iliesa regarding this issue any time before 21 February 2018?*

A. *No.*

Q. *Did you intend to hurt Iliesa on 21 February 2018?*

A. *No.*

(iii) *The accused was cross-examined by the prosecution. It was suggested to him that the reason he had filed his cane knife that morning and the reason he had armed himself with the cane knife was to use it on Iliesa. It was also suggested to the accused that on 21 February 2018, he had intended to cause harm to Iliesa by striking him on his face with the cane knife. The accused denied these suggestions.*

**[69] Evidence of Ropate Lopeti Vosavakadua**

(i) *The witness is currently residing in Qauia in Lami. He is doing farming in his village in Mualevu in Vanuabalavu.*

(ii) *He said that he cannot forget the 21 February 2018, as that was the day he was going to the airport to pick up his niece who was returning to the village. She had spent her school holidays in Suva and she was returning to the village. He said he left to the airport around 6.30 in the morning.*

(iii) *The witness testified that on his way to the airport, he could see Iliesa. Iliesa was at his home. He saw Iliesa doing some work, as his house was partly damaged. He could see Iliesa at a distance of about 20 metres. He*

*said that he had also seen the accused Qalo. At the time he saw Iliesa he was doing work at his house holding onto a hammer. Qalo was sitting at the porch of his house sharpening his knife.*

- (iv) *In cross-examination, the witness stated that he had seen Iliesa and Qalo around 7.00 a.m. Thus it was suggested to him that he did not see anything that morning.*

### **Analysis**

- [70] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Iliesa Tikomainiumea, to prove its case. The defence relied on the evidence of the accused himself and witness Ropate Lopeti Vosavakadua.
- [71] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [72] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [73] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused, the date of incident and the place of incident are not in dispute. However, the prosecution must establish beyond reasonable doubt that the accused unlawfully wounded Iliesa Tikomainiumea, by striking him on the face with a cane knife and that the accused did so with the intention to cause grievous harm to the said Iliesa Tikomainiumea.
- [74] In this case, the accused takes up the position that he acted in self-defence. If you believe that the accused acted in self-defence then he cannot be found guilty for Act With Intent To Cause Grievous Harm, or even for the lesser charge of Assault Causing Actual Bodily Harm.
- [75] The prosecution denies that the accused acted in self-defence. The prosecution version is that the accused intended to cause grievous harm to Iliesa and thereby unlawfully wounded him by striking him on his face with the cane knife.
- [76] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, Iliesa Tikomainiumea, 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 charge, 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 offence of Act with Intent to Cause Grievous Harm, beyond any reasonable doubt.

**[77]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on 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.

**[78]** If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.

**[79]** However, I must caution you that even 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.

**[80]** In summary and before I conclude my summing up let me repeat some important points in following form:

- i. If you believe the evidence of the accused, then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- ii. If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- iii. If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- v. If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charge of Act with Intent to Cause Grievous Harm has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

vi. *As an alternative to the charge of Act with Intent to Cause Grievous Harm, you may consider whether the accused is guilty or not guilty of the lesser charge of Assault Causing Actual Bodily Harm.*

[81] Any re directions the parties may request?

[82] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[83] Your possible opinions should be as follows:

Act With Intent To Cause Grievous Harm - Guilty or Not Guilty.

If not guilty,

In the alternative,

Assault Causing Actual Bodily Harm - Guilty or Not Guilty.

[84] I thank you for your patient hearing.



**Riyaz Hamza**

**JUDGE**

**HIGH COURT OF FIJI**

AT SUVA

Dated this 25<sup>th</sup> Day of March 2020

**Solicitors for the State : Office of the Director of Public Prosecutions, Suva**  
**Solicitors for the Accused : Chand & Young Lawyers, Barristers & Solicitors, Suva.**