

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

Judgment : 30 March 2020

JUDGMENT

[1] According to the Information filed by the Director of Public Prosecutions (DPP), the accused, Akapusi Qalobula, is charged with the following offence:

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 21st 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.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 2 days.
- [3] At the conclusion of the evidence and after the directions given in the summing up, by their unanimous decision, the three Assessors found the accused not guilty of the charge. However, by their unanimous decision the Assessors found the accused guilty of the alternative charge of Assault Causing Actual Bodily Harm.
- [4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.
- [5] During my summing up I explained to the Assessors the salient provisions of Section 255 (a) of the Crimes Act No. 44 of 2009 (Crimes Act).
- [6] In terms of Section 255 (a) of the Crimes Act “*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].*
- [7] 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 by striking him on his face with a cane knife.
- [8] Accordingly, I directed the Assessors that 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 Tikomainiamea, by striking him on the face with a cane knife;
 - (v) With the intention to cause grievous harm to the said Iliesa Tikomainiamea.
- [9] The above individual elements were further elaborated upon in my summing up in respect of the said charge.

[10] 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 two complainants as defined herein.

[11] Grievous harm has been defined in the same Subsection 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.*

[12] The term ‘harm’ has been defined in the same Subsection 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).”* Whereas, “dangerous harm” has been defined to mean as *“harm endangering life”*.

[13] However, the Assessors were further directed that if they 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 Tikomainiuea; as an alternative, they were 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.

[14] 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.”

[15] Therefore, the Assessors were further directed that 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 Tikomainiuea; and

(v) Thereby caused actual bodily harm to the said Iliesa Tikomainiumea.

[16] The above individual elements were further elaborated upon in my summing.

[17] 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).

[18] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “*Admitted Facts*” without placing necessary evidence to prove them they must, therefore, treat the above facts as proved beyond reasonable doubt.

[19] 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).

[20] The accused testified on his own behalf and also called a witness, Ropate Lopeti Vosavakadua, in support of his case.

[21] I have summarized the evidence of all the witnesses in my summing up.

[22] It is an admitted fact that on the date of the incident, 21 February 2018, an argument had occurred between the accused and the complainant concerning the dispute of a land boundary, at Vanuabalavu, in Lau.

[23] The complainant has clearly testified in Court as to how the accused had caused injury to him around 6.00 in the morning on the said day. He said that at the time of the

argument the accused was standing about one metre away from him, with a cane knife in hand. About 5 minutes earlier he had heard the accused sharpening the knife.

[24] The accused had sworn at the complainant and then struck him on his face with the cane knife. The complainant described that he was struck on the right side of his cheek, below his right eye, and the cut extended right across to the edge of his nose. He was bleeding profusely as a result of the injury.

[25] The complainant had been taken by the police to the Lomaloma Hospital for treatment. He 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. In the Medical Examination Report it is stated that there was a laceration on the right maxillary region from the right eye to the right nostril. The wound had required 5 stitches.

[26] The accused takes up the position that he acted in self-defence. He testified that during the course of the argument between the complainant and himself the complainant was pointing at him using a hammer and that he had chased the accused away from there. The complainant had said to him that he doesn't own anything in the property. The complainant was said to be holding the hammer in his left hand.

[27] The accused testified that he did not strike the complainant's face. He had only wanted to block with the knife, the hammer which the complainant was using to point at him. The cane knife is said to have bounced and tipped the complainant's face.

[28] 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."*

[29] 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."

[30] I now turn my attention to Section 59 of the Crimes Act. For ease of reference, the Section is reproduced below:

“59. — (1) Subject to section 60, a burden of proof that a law imposes on a defendant is an evidential burden only.

(2) A defendant who wishes to deny criminal responsibility by relying on a provision of this Decree (other than section 28) bears an evidential burden in relation to that matter.

(3) A defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

(4) The exception, exemption excuse, qualification or justification need not accompany the description of the offence.

(5) The defendant no longer bears the evidential burden in relation to a matter if evidence sufficient to discharge the burden is adduced by the prosecution or by the court.

(6) The question whether an evidential burden has been discharged is one of law.

*(7) In this Decree —
"evidential burden", in relation to a matter, means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.*

[31] Section 59 (6) of the Crimes Act provides that the question whether an evidential burden has been discharged is one of law. It is my opinion, considering all the facts and circumstances of this case that the defence has failed to discharge the evidential burden as required by law to establish self-defence.

[32] However, I am also of the opinion, considering all the facts and circumstances of this case, that the prosecution has failed to establish beyond reasonable doubt that the accused had the intention to cause grievous harm to Iliesa Tikomainiumea, at the time he caused the injury to him.

[33] The Learned State Counsel submitted that the very fact that the accused armed himself with the cane knife, then sharpened it and came close to the complainant and attacked him with the said knife, shows that he had the intention to cause grievous harm to the complainant.

[34] However, it is agreed that the injury to the complainant had been caused during the course of an argument between the complainant and the accused. The complainant himself has testified that the accused did not have the intention to cause grievous harm to him. During the course of his cross-examination, the complainant testified as follows:

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.

[35] Therefore, in my view, the unanimous opinion of the Assessors in finding the accused not guilty of the charge of Act with Intent to Cause Grievous Harm was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of the said charge.

[36] In the circumstances, I find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm.

[37] However, considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved beyond reasonable doubt the alternate count of Assault Causing Actual Bodily Harm by adducing truthful and reliable evidence satisfying all elements of the said offence.

[38] In the circumstances, I find the accused guilty of the alternate count of Assault Causing Actual Bodily Harm.

[39] Accordingly, I convict the accused of Assault Causing Actual Bodily Harm.



Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 30th 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.**