

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 191 of 2019

STATE

V

1. TOMASI COVU [Now Acquitted]

2. MOHAMMED MUFEZ ALI

Counsel : Mr. Eoghn Samisoni for the State
Ms. Shantel Hazelman for the 1st and 2nd Accused

Date of Trial : 1 September 2020

Summing Up : 2 September 2020

SUMMING UP

Madam Assessor and Gentlemen Assessors,

- [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 2nd 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 2nd 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 sole prosecution witness said from the witness box.
- [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 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 State Counsel and Defence 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 the witness, basically the truthfulness and reliability of his evidence. It is for you to decide whether you accept the whole of what the 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 the witness is telling the truth and correctly recalls the facts about which he 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 witness's demeanour in the witness box when answering questions. How was he when he was being examined in chief and then being cross-examined? Was he forthright in his answers, or was he evasive? How did he conduct himself in Court? In general what was his 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 the 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 perceive (or 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 the witness's testimony.
- [15] Madam and Gentlemen 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 witness is truthful and reliable.
- [16] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by the witness 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.
- [17] 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 2nd Accused is guilty or not of the second count. 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.

- [18] 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 second charge.
- [19] 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.
- [20] 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. This is also referred to as circumstantial 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.
- [21] 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 facts and the inferences that could be drawn from them.
- [22] 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 2nd Accused.
- [23] This is because the 2nd 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.

- [24] 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?
- [25] For the prosecution to discharge its burden of proving the guilt of the 2nd Accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the 2nd 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.
- [26] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the second count, in order to find the 2nd Accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the 2nd Accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the 2nd Accused guilty.
- [27] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim or anger or prejudice against the 2nd 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [28] Let us now look at the charges contained in the Amended Information.
- [29] There are two charges preferred by the Director of Public Prosecutions (DPP), against the two accused:

[COUNT 1]

Statement of Offence

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

Particulars of Offence

TOMASI COVU, on the 18th day of May 2019, at Nasinu, in the Central Division, with intent to cause grievous harm to **KALIOVA QARAVANUA**, caused grievous harm to the said **KALIOVA QARAVANUA**, by striking his face with a broken bottle.

[COUNT 2]

Statement of Offence

COMMON ASSAULT: Contrary to Section 274 of the Crimes Act 2009.

Particulars of Offence

MOHAMMED MUFEZ ALI, on the 18th day of May 2019, at Nasinu, in the Central Division, unlawfully assaulted **KALIOVA QARAVANUA**, by striking the neck of the said **KALIOVA QARAVANUA** with a rod.

- [30] As you would observe Count 1 is a charge in respect of the 1st Accused, whereas Count 2 is a charge in respect of the 2nd Accused. As you are aware at the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the 1st Accused had committed the offence he is charged with in Count 1. Accordingly, the 1st Accused was found not guilty and acquitted of the said charge.
- [31] Therefore, it is no longer necessary for you to make any determination on the first count. What is remaining for your determination is the second count, which is a charge against the 2nd Accused.
- [32] At this stage I must direct you that the fact that the 1st Accused has been found not guilty and acquitted of the first count should have no bearing in your determination of the second count against the 2nd Accused. You must not believe that due to the fact that the 1st Accused has been found not guilty and acquitted of the first count that the 2nd Accused must also be found not guilty and acquitted of the second count as well. You must also not believe that due to the fact that the 1st Accused has been found not guilty and acquitted of the first count that by that reason the 2nd Accused must necessarily be guilty of the second count. You must make your decision purely based on the evidence present in Court during this trial.
- [33] I will now explain to you the elements of the offence of Common Assault as defined in Section 274 of the Crimes Act No 44 of 2009 ("Crimes Act").
- [34] In terms of Section 274 of the Crimes Act "A person commits a summary offence if he or she unlawfully assaults another person."
- [35] Therefore, in order for the prosecution to prove the second count of Common Assault, they must establish beyond any reasonable doubt that;
- (i) The 2nd Accused;
 - (ii) On the specified day (in this case the 18 May 2019);
 - (iii) At Nasinu, in the Central Division;

(iv) Unlawfully assaulted Kaliova Qaravanua, by striking his neck with a rod.

- [36] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that it was the 2nd Accused and no one else who committed the offence.
- [37] 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.
- [38] The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused unlawfully assaulted the complainant. The term "unlawfully" simply means without lawful excuse or without just cause. Therefore, to establish this element the prosecution should prove beyond reasonable doubt that the 2nd Accused unlawfully assaulted the complainant by striking him on his neck with a rod.
- [39] I must also direct you that it is not necessary for the prosecution to establish that any harm or injury was in fact caused to the complainant as a result of the said assault.
- [40] If you are satisfied beyond any reasonable doubt that the 2nd Accused, on 18 May 2019, at Nasinu, unlawfully assaulted Kaliova Qaravanua, then you must find him guilty of the second count of Common Assault.
- [41] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the 2nd Accused not guilty of the charge.
- [42] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

Case for the Prosecution

[43] The prosecution, in support of their case, called the complainant Kaliova Qaravanua, who was their sole witness.

[44] Evidence of Kaliova Qaravanua

- (i) *The witness said that he is currently residing at Navatuyaba, Toga, in Rewa. He is 34 years of age. He is a carpenter by occupation.*
- (ii) *The witness testified that currently he is working as a foreman at Nakasi. When he was asked to explain he said he is a leader at the worksite or construction site. He has been working as a foreman for about 3 years now.*
- (iii) *The witness testified to the incident which took place on 18 May 2019. He said at around 5.00 in the morning he was at the RB Patel car park, on the way to buy bread. He explained that the said RB Patel is*

located at Nakasi. He was going to Hot Bread Kitchen near RB Patel to buy bread.

- (iv) At the time one of his friend namely Solo was with him. He only knows that person as Solo. The witness said that he has heard that Solo has since passed away.
- (v) The witness testified that on the way to buy bread he heard a girl screaming like from the back of the RB Patel. He wanted to go and help and wanted to find out what was going on there.
- (vi) The witness said that he first saw this girl was crying and that blood was coming out from her nose. The girl was with two or three boys. One was an Indian boy and the other two were Fijian (Kai Viti or i-taukei). When asked if he knew of any of these people, the witness said that he did not know any of them.
- (vii) When asked if he could describe the girl that he saw, the witness said: "This time I can't remember the face of the girl and the boys too." He was unable to describe what the girl was wearing at that time. Later the witness said that the girl was of Fijian ethnicity and was about 17 to 19 years old.
- (viii) The witness said that the distance between himself and the group of people when he first saw them was about 2 metres. Later when asked to explain he said the distance was about 5 to 6 metres. When he first saw them, they were drinking.
- (ix) The witness said one of the boys was touching the girl and the girl was crying with blood coming out from her nose. He said: "Maybe they tried to do something to the girl."
- (x) When asked to explain what he meant by touching, the witness said: "When the time I was trying to help the girl and lay my hand on the girl and try to pull her, this boy he pulled her towards him".
- (xi) The witness confirmed that it was dark at that time and that there was no light at that place. So he was unable to see any of their faces.
- (xii) The complainant testified that when he saw this happening, he was trying to help the girl by trying to pull her away from the boys. However, he couldn't take her away from the boys. Thereafter, the boys took the girl away from the dark corner. When asked to explain, the witness said: "Like one of the boys was taking the girl's hand and pulling her from the corner".

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

Q. Tell us what happened thereafter?

A. After that I was trying my best to help the girl. And I didn't know that one of the boys he cracked an empty bottle and hide it on his hand.

Q. Which of the three boys hide the bottle?

A. One of the i-taukei boys.

Q. What kind of bottle was it?

A. it's like a wine bottle – a green bottle.

Q. How did he crack the bottle?

A. He take it like to the side of the supermarket – where people were selling outside the supermarket – the stalls beside the supermarket, and cracked the bottle there.

Q. What part of the stall did he crack the bottle on?

A. It's like a small stall. Outside like the long table – he cracked the bottle on that table.

Q. What were you doing at that time?

A. I am trying to save the girl Sir.

Q. What did the i-taukei boy do with that cracked bottle?

A. He hit me two times on the side of my head (witness shows the left side of his face). He hit me with the cracked bottle.

Q. How far away was he from you at the time he hit you with the cracked bottle?

A. He is like coming towards me.

Q. When he stuck you he must have been close – how far away was he from you?

A. I was almost to the boy (I was near to this boy). Like 2 steps away.

- Q. *Were you able to see his face?*
- A. *No.*
- Q. *What happened after that?*
- A. *I tried to defend myself and I started throwing my punch to that boy.*
- Q. *What was going through your mind at the time he struck you on the left side of your face?*
- A. *I was scared My Lord, because of the blood flowing from my head.*
- Q. *How did you try to defend yourself? How many times did you punch this boy?*
- A. *Only one time.*
- Q. *Where did you punch him?*
- A. *Right on the chin (The witness shows exactly where he punched the boy).*
- Q. *Could you tell us what happened after you punched this boy on the chin?*
- A. *The boy hit me again with the bottle.*
- Q. *Where did he hit you this time?*
- A. *On the back of my neck (Witness demonstrates).*
- Q. *Were you able to see his face at this time?*
- A. *No. Because there was blood on my face.*
- Q. *What happened next?*
- A. *One of them hit me with a rod.*
- Q. *Which boy hit you with a rod?*
- A. *The Indian one.*
- Q. *Can you describe what kind of rod you are talking about?*
- A. *The one used for sign boards on the streets.*

- Q. *Were you able to see the Indian boy's face?*
- A. *Yes.*
- Q. *How far away was this Indian boy when he struck you with the rod?*
- A. *I can't recall.*
- Q. *Where did he strike you with the rod?*
- A. *The back of my head (The witness demonstrates).*
- Q. *Was he standing in front of you or behind you at the time?*
- A. *Behind me.*
- Q. *How then were you able to see his face?*
- A. *The last time I saw this Indian boy, he ran on the road to get the rod.*
- Q. *How far away was he then at that point in time?*
- A. *It's like 4 to 5 metres away.*
- Q. *Initially you said this place was dark. So when you saw the Indian boy get the rod what was the lighting like at that time?*
- A. *At that time we were at the front of RB Patel. The light was on.*
- Q. *Could you describe what kind of light you are talking about?*
- A. *It's like two feet lights (tube lights).*
- Q. *How bright would you say the light was?*
- A. *It was like 3 tube lights there of 2 feet.*
- Q. *How bright would you say the light was?*
- A. *The light was clear – can see clearly.*
- Q. *Was it bright enough to see this Indian boy's face, whilst he was going to get that rod?*
- A. *Yes.*
- Q. *Can you tell us how long you saw this Indian boy's face for?*

A. *As he was leaning on the wall beside the Hair Saloon...I saw his face when he was leaning on the wall of the Hair Saloon.*

Q. *How many seconds did you see his face for?*

A. *Like 1 minute – 1 ½ minutes.*

Q. *You were able to see his face clearly?*

A. *Clearly Sir.*

Q. *Was there anything blocking your view of this Indian boy?*

A. *No. It's clear.*

Q. *Could you tell us what happened after you was struck on the neck with the rod?*

A. *I was fallen on the road.*

Q. *What happened after that?*

A. *And I heard one voice like he is telling me to run. If you don't run you will be dead.*

Q. *Do you know who said that to you?*

A. *No.*

Q. *At this point in time where were the other i-taukei boys?*

A. *I can't remember.*

Q. *What do you recall happening after that?*

A. *That is the last thing I am able to remember.*

(xiv) *The complainant said that he had woken up or regained consciousness only in hospital. He said it was at the Nausori Hospital.*

(xv) *The complainant identified the 2nd Accused in the dock, as the person who had struck him with the rod. However, he could not identify the other person (the Fijian boy) who had attacked him with the bottle.*

(xvi) *The witness was cross-examined by the Learned Counsel for the Defence.*

(xvii) *The following questions were, inter-alia, put to the witness in cross-examination:*

Q: *You said the Indian boy struck you with the rod?*

A: *Yes.*

Q: *And this was an iron rod?*

A: *Yes.*

Q: *You said when he struck you with the rod, I was fallen on the road?*

A: *Yes.*

Q: *For you to fall on the road, it must have been a hard hit?*

A: *Yes.*

Q: *And this hit made you blackout?*

A: *Yes.*

Q: *You know what blackout is?*

A: *Yes.*

Q: *So you would have sustained injuries at the back of your neck from this hit (blow)?*

A: *Yes.*

.....

Q: *I suggest to you that in fact you got into a scuffle with an i-taukei boy, you fell on the ground and the cracked bottle hit the side of your face.*

A: *Not true.*

Q: *I suggest to you that when you were on the ground you saw my client (the 2nd Accused) run with the rod and bang it on the road?*

A: *Not true.*

Q: *I suggest to you that when you saw him do this you stood up and ran?*

A: *Not true.*

Q. *I suggest to you that there are no injuries noted on your medical report on the back of your neck because you were never struck by an iron rod by the 2nd Accused?*

A. *Not true.*

- [45] That was the case for the prosecution. At the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the 1st Accused had committed the offence he is charged with in Count 1. Accordingly, the 1st Accused was found not guilty and acquitted of the said charge.
- [46] Court decided to call for the 2nd Accused's defence in respect of Count 2. You then heard me explain several options to the 2nd 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.
- [47] In this case, the 2nd Accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the 2nd Accused due to Court calling for his defence or of his choice to remain silent.

Analysis

- [48] The above is a brief summary of the evidence led at this trial. The prosecution relied on the sole evidence of the complainant, Kaliova Qaravanua, to prove its case. The 2nd Accused exercised his right to remain silent.
- [49] As I have informed you earlier, the burden of proving each ingredient of the second charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [50] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [51] I must also direct you with regard to the Medical Examination Report of the complainant which was marked for identification as Prosecution Exhibit MFI 1. Although, the said Medical Examination Report was so marked for identification the prosecution decided not to call for any medical evidence in this case. Therefore, the said Medical Examination Report cannot be considered as a production item in this case. As such, I urge you to disregard the said Medical Examination Report as a production item in this case and to also disregard the contents thereof.
- [52] In this case, it is clear from the evidence that the 2nd Accused was not known to the complainant, prior to the date of the alleged incident, which was 18 May 2019. It is

also clear from the evidence that according to the complainant he saw the 2nd Accused for the first time on the date of the alleged incident. Thereafter, the complainant identified the 2nd Accused in Court.

- [53] Identifying an accused for the first time in court after the alleged incident, when the accused is inside the accused box is known as 'dock identification'. Dock identification is unreliable in the absence of a prior identification in the investigation stage during an identification parade or photograph identification. Therefore, you should consider the evidence pertaining to identification of the 2nd Accused with caution. It is because the witness may identify the 2nd Accused merely because he is sitting in the 'dock'. The witness may assume that the 2nd Accused is the person who committed the crime merely because he is sitting in the dock. Therefore, it is for you to decide what weight you should give to the evidence of dock identification.
- [54] When you consider the evidence on the identification of the 2nd Accused in respect of the second count, please bear in mind that an honest and a convincing witness can still be mistaken with regard to identity. Mistaken recognition can occur even of close relatives and friends. Recognition may be more reliable than identification of a stranger; but, even when the witness is claiming to recognise someone whom he or she knows, I wish to remind you that mistakes in recognition of close relatives and friends are sometimes made.
- [55] Therefore, you should closely examine the following circumstances, among others, when you evaluate the evidence given by the complainant on identification of the 2nd Accused in relation to second count;
- a) Duration of observation of the 2nd Accused;
 - b) The distance within which the observation was made;
 - c) The lighting condition at the time the observation was made;
 - d) Whether there were any impediments to the observation or was something obstructing the view;
 - e) Whether the complainant knew or had seen the 2nd Accused before;
 - f) For how long had the complainant known or seen the 2nd Accused before;
 - g) If not known or seen before or only known or seen occasionally, is there any special reason to remember the 2nd Accused;
 - h) Duration between original observation and identification; and
 - i) Is there any material discrepancy between description given to the Police by the witness when first seeing the 2nd Accused and his actual appearance.
- [56] All these matters go to the quality of the identification evidence. If the quality is good and remains good during the case, the danger of a mistaken identification is lessened. However, the poorer the quality of the identification evidence, greater is the danger of a mistaken identification.

[57] The 2nd Accused denies having attacked the complainant with a rod. It has been suggested by the defence that in fact the complainant got into a scuffle with an i-taukei boy and as a result fell on the ground and that the cracked bottle hit the side of his face.

[58] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the 2nd Accused not guilty of the second 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 Common Assault, beyond any reasonable doubt.

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

- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the 2nd Accused not guilty of the second count of Common Assault;*
- ii. *If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charge of Common Assault has been established beyond reasonable doubt by the prosecution. If so you must find the 2nd Accused guilty. If not you must find the 2nd Accused not guilty.*

[60] Any re directions the parties may request?

[61] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately on the second charge against the 2nd Accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[62] Your possible opinions should be as follows:

Count Two

Common Assault - Guilty or Not Guilty.

[63] I thank you for your patient hearing.



A handwritten signature in blue ink, appearing to read "Riyaz Hamza".

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 2nd Day of September 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva.
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.