

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

SUMMING UP

Ladies and Gentleman Assessors

1. It is now my duty to sum up this case to you.

ROLE OF JUDGE AND ASSESSORS

2. In doing so, I will direct you on matters of law, which you must accept and act upon. On matters of facts, however, which witness to accept as reliable, what evidence to accept and what evidence to

reject, these are matters entirely for you to decide for yourselves. If I do not refer to a certain portion of evidence which you consider as important, you should still consider that evidence and give it such weight as you wish.

3. So, if I express an opinion on the facts of the case, or if I appear to do so, then it is entirely a matter for you whether you accept what I say or form your own opinions. You are the judges of facts.
4. You decide what facts are proved and what inferences you properly draw from those facts. You then apply the law as I explain it to you and form your own opinion as to whether the accused is guilty or not.
5. State and Defence Counsel have made submissions to you about how you should find the facts of this case. That is in accordance with their duties as State and Defence Counsel in this case. Their submissions were designed to assist you as judges of facts. However, you are not bound by what they said. You can act upon it if it coincides with your own opinion. As representatives of the community in this trial it is you who must decide what happened in this case and which version of the facts to accept or reject.
6. You will not be asked to give reasons for your opinions and your opinion need not be unanimous. Your opinions are not binding on me but it will assist me in reaching my judgment.

BURDEN OF PROOF AND STANDARD OF PROOF

7. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. Under our system

of criminal justice, an accused person is presumed to be innocent until he or she is proven guilty.

8. The standard of proof in a criminal trial is one of proof beyond reasonable doubt. This means you must be satisfied so that you are sure of the accused person's guilt, before you can express an opinion that he is guilty. If you have any reasonable doubt about his guilt, then you must express an opinion that he is not guilty.
9. Your decision must be based exclusively upon the evidence which you have heard in this court and nothing else. You must disregard anything you must have heard about this case outside of this courtroom.
10. You must decide the facts without prejudice or sympathy for either the accused or the complainant. Your duty is to find the facts based on the evidence without fear, favour or ill will.
11. Evidence is what the witnesses said from the witness box, documents or other materials tendered as exhibits. You have heard questions asked by the counsel and the court they are not evidence unless the witness accepts or has adopted the question asked.

INFORMATION

12. The accused is charged with the following offence: (a copy of the information is with you).

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**.

13. To prove the above count the prosecution must prove the following elements of the offence of attempted murder beyond reasonable doubt:
 - a) the accused;
 - b) engaged in a conduct; and
 - c) the said conduct was an attempt to cause the death of the complainant ;and
 - (d) the accused intended to cause the death of the complainant by his conduct.
14. In this case the prosecution is alleging that the accused intended to cause the death of the complainant by his conduct. The first element of the offence of attempted murder is concerned with the identity of the person who allegedly committed the offence of attempted murder.
15. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.
16. For the accused to be guilty of attempted murder, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.

17. The third element is that the said conduct of the accused was an attempt to cause the death of the complainant.
18. The final element is concerned with the state of mind of the accused that he intended to cause the death of the complainant. It is not possible to have direct evidence regarding an accused's state of mind since no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can construe the state of mind of the accused from the facts and circumstances you would consider as proved.
19. In order for you to conclude that the accused intended to cause the death of the complainant, you should be satisfied that the accused intended to kill the complainant as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the complainant.
20. In this trial the accused has denied committing the offence of attempted murder. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to kill the complainant and with that intention he did something which was more than merely preparatory.
21. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. You decide intention by considering what the accused did, you should look at his actions before, at the time of, and after the act.

22. The prosecution must also prove that with the intention to kill, the accused did something which was more than merely preparatory. Before you can find the accused guilty of the offence of attempted murder you must be satisfied beyond reasonable doubt of two things: first that the accused intended to commit the offence of murder and second, that, with that intention, he did something which was more than merely preparatory for committing that offence.
23. In other words, did he actually intend to commit the offence of murder, in which case he is guilty of attempting to commit murder, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
24. A person commits the offence of murder if:
- (a) the person engages in conduct; and*
 - (b) the conduct causes the death of another person; and*
 - (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct."*
25. The prosecution says the accused had left the wedding early where both the accused and the complainant were. He was hiding in the dark waiting for the complainant. As the complainant was walking towards his house the accused struck the complainant several times on his head with an iron rod before running away. If you accept the accused did this, then it is for you to decide whether what he did went beyond merely preparatory.
26. If you are satisfied that the prosecution has proved all the elements of the offence of attempted murder beyond reasonable doubt then you must find the accused guilty of attempted murder.

27. If on the other hand, you find that the prosecution has failed to prove any of these elements beyond reasonable doubt then you must find the accused not guilty of attempted murder.
28. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard I direct you that if you find the accused not guilty of attempted murder that is you are not sure whether the accused had intended to kill the complainant then you should consider the offence of act intended to cause grievous harm.
29. To find the accused guilty of the offence of act intended to cause grievous harm the prosecution must prove the following elements beyond reasonable doubt:
- a) The accused;
 - b) with intent to do some grievous harm;
 - c) unlawfully does grievous harm to the complainant by any means.
30. In law 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.*

31. The term harm has also been defined as 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).
32. The first element of the offence of act intended to cause grievous harm is concerned with the identity of the person who allegedly committed the offence.
33. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant.
34. The final element relates to the conduct of the accused that he did some grievous harm to the complainant by any means.
35. As I mentioned earlier you decide the intention of the accused by considering what the accused did, you should look at his actions before, at the time of, and after the act. Furthermore, unlawful means without lawful excuse and grievous harm means any dangerous harm to the body of another person.
36. If you are satisfied that the prosecution has proved all the above elements of the offence of act intended to cause grievous harm beyond reasonable doubt, then you must find the accused guilty of the lesser offence of act intended to cause grievous harm. However, if you have a reasonable doubt with respect to any element of the offence of act intended to cause grievous harm then you must find the accused not guilty of this lesser offence.

CIRCUMSTANTIAL EVIDENCE

37. The prosecution also relies on circumstantial evidence since there is no eye witness to prove that the accused was responsible for the assault on the complainant.
38. The law on circumstantial evidence is that if, upon considering a series of pieces of evidence, you are satisfied beyond reasonable doubt that the only reasonable inference to be drawn is the guilt of the accused and there is no other reasonable explanation for the circumstances which is consistent with the accused innocence, then you may find the accused guilty of the offence charged.
39. A case of circumstantial evidence relies on a variety of sources of evidence. One example of how it works is this. One day you find your house broken into. The item stolen is clearly identifiable by you because you have put your initial on your DVD recorder. The day after the burglary, your DVD recorder with your initials is found inside your neighbour's house. His son is seen to be spending a lot of money at a nearby shop. His fingerprints are found on your kitchen door. On the basis of all this evidence, you are entitled to draw a reasonable inference that your neighbour's son committed the burglary in your house, because there is no other reasonable inference that you can draw from the evidence which is consistent with the son's innocence.
40. However, if for instance you did not initial the stolen items and cannot be sure that this item in your neighbour's house is yours, and if there are no fingerprints found then the evidence of the neighbour's son's spending would not be sufficient for you to draw an inference of his guilt. This is because there are other possible reasonable hypotheses for his sudden wealth.

41. Therefore, with circumstantial evidence you must look at all the evidence together and ask yourselves whether the only reasonable inference you can draw from the evidence is the guilt of the accused. You must ask yourselves whether there can be any other explanation for the evidence which is also consistent with the accused innocence.
42. Remember that in considering circumstantial evidence you must be satisfied beyond reasonable doubt that the only reasonable inference available to you is the guilt of the accused person before you can find him guilty. If you find that there are other reasonable inferences you can draw which are consistent with the accused's innocence or if you have a reasonable doubt about it, then you should find the accused not guilty.
43. This is the law on circumstantial evidence.

ADMITTED FACTS

44. In this trial, the prosecution and the defence have agreed to certain facts which have been made available to you titled as admitted facts.
45. From the admitted facts you will have no problems in accepting those facts as proven beyond reasonable doubt and you can rely on it. The admitted facts are part of the evidence and you should accept these admitted facts as accurate, truthful and proven beyond reasonable doubt.
46. I will now remind you of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. It was not a very long trial and I am sure things are still fresh in your minds.

47. I will refresh your memory and summarize the important features. If I do not mention a particular piece of evidence that does not mean it is unimportant. You should consider and evaluate all the evidence in coming to your opinion in this case.

PROSECUTION CASE

48. The prosecution called seven (7) witnesses to prove the charge against the accused.
49. The complainant Nilesh Goundar informed the court that he is the eldest of four siblings. The accused Vimlesh Goundar is his younger brother who is also known as Sonu his relationship with his brother was good until Vimlesh got married. Their relationship thereafter was not good for about 2 or 3 months before the incident in that the accused had taken out a domestic violence restraining order (DVRO) against him.
50. In the year 2017 the complainant, his wife and the accused with his wife lived in the house owned by the accused but in different sections.
51. On 8th June, 2017 after work at about 5pm the complainant went to Malaqereqere the residence of his employer whose son was getting married. The complainant and the accused were both at the wedding.
52. The complainant left the wedding at about 11.30pm according to him the accused had left about 5 minutes earlier. The complainant was dropped at the Uluisila junction from there he walked to his house. He was wearing his work uniform, shorts and blue Nike slip-on flip-flops. The blue slip-on was marked and tendered as prosecution exhibit no. 1.

53. As the complainant was walking, before he could reach his house he heard a sound so he turned, at this time he was hit with an iron rod on his neck which was painful. The complainant was carrying some parcels in his hand which he threw on the ground. When he was hit with the iron rod his assailant was about 1 meter away from him.
54. After the first hit the complainant was trying to relax and think what had happened he shouted "*Hoye*", both started fighting the complainant punched the person in front of him who fell down. The complainant could not see the face of this person clearly because when they were fighting their hands were moving so he was not able to see the face of the other person. At this time he was hit from the back with a knife.
55. At one instance he was able to hold the knife as a result he received injuries to his hand, when the complainant fell, the knife was struck on his head several times. The complainant started saying "*don't hit me, I have money in my pocket, take the money*" since the complainant was trying to save himself he started calling for help saying "*help me*", "*help me*".
56. The complainant received injuries on his head at this time his neighbours came running he was taken to the Sigatoka Hospital and then transferred to the Lautoka Hospital where he was admitted for 8 days.
57. After he was discharged from the hospital he was at home relaxing, he forgot everything about his injuries and after 6 months he started working.

58. In cross examination the complainant stated that he was not sure of the time he told the court in his evidence since he was guessing it. He agreed he cannot be sure what time the accused had left the wedding. He agreed that two persons had attacked him and he was not able to recognize any of them.
59. The complainant also agreed that the accused used to come and stay with him in the hospital, the accused used to feed him and stay with him the whole night.
60. The second witness Archie Watkins stated that he is the neighbour of the accused and he knows the accused from about 2 to 3 years ago. The accused is also known as Sonam the witness recalled on 8th June, 2017 he was at home after about 12 midnight he went to sleep he woke up when he heard shouting so he came outside his house. When he was standing outside a young man ran past him from about 1 meter away.
61. The witness was able to recognize this person due to moonlight and lighting from his house. When he saw this person, he knew who that person was according to the witness this person was Vimlesh the accused.
62. The reason why he was able to recognize the accused was due to the light from his house and the moonlight and also the accused had gone from close by. He had seen the accused for about 4 to 5 seconds when he had gone past him. The witness recalled the accused was wearing a long sleeve blue t-shirt, brown $\frac{3}{4}$ shorts and he was also holding something in his right hand. The witness was able to see this because his vision was not obstructed. The witness identified the accused in court.

63. In cross examination the witness was referred to his police statement dated 9th June, 2017 he agreed that he did not tell the police that he had seen Vimlesh that night. The witness also stated that he had told the police officer writing his police statement that he had seen the complainant's younger brother.
64. When asked where this was written in the police statement, the witness said it was not in his statement. The witness also agreed that whatever he told police on the 9th was fresh in his mind. Upon further questioning the witness maintained he had seen the accused and that he had told the police officer writing his police statement that he had seen the complainant's younger brother but it was not in his statement.
65. The witness agreed the statement was read back to him, he did not tell the police officer to alter his police statement because he was shocked and terrified after he had seen the complainant he could not sleep that night. When further questioned why he did not have in his police statement everything he wanted to say, the complainant said he was under the impression that the police officer had written everything he had said.
66. The witness stated it was the truth that he had seen the accused that day. The following paragraph of his police statement was read as follows:

"The sound of two men struggling and I could just hear the sound like someone hitting something with a knife. I then opened the door of my house and it was just in time when a man ran past my front door. I saw this person wearing long sleeve blue in colour with a brown three quarter pants. This person is of slim built and from the angle I saw this person it was like Sonal who is my neighbour."

67. When it was suggested to the witness that he had told the police the person he saw was like Sonal who was his neighbour, the witness stated that he had told them that he saw the complainant's younger brother Sonal who is also known as Vimlesh.
68. When it was also suggested to the witness that when he gave his police statement he was guessing who had attacked the complainant, the witness disagreed and stated that he saw the accused who was the younger brother of the complainant.

Ladies and Gentleman Assessors

69. The learned counsel for the accused in this regard was cross examining the witness about some inconsistencies in the statement he gave to the police when facts were fresh in his mind with his evidence in court. I will now explain to you the purpose of considering the previously made statement of the witness with his evidence given in court. You are allowed to take into consideration the inconsistency in such a statement when you consider whether the witness is believable and credible. However, the police statement itself is not evidence of the truth of its contents.
70. It is obvious that passage of time can affect one's accuracy of memory. Hence you might not expect every detail to be the same from one account to the next.
71. If there is any inconsistency, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the issue that you're considering. If it is significant, you will need to then consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, you may then conclude that the underlying reliability of the evidence is

unaffected. If the inconsistency is so fundamental, then it is for you to decide as to what extent that influences your judgment about the reliability of the witness.

72. The police statement of Archie Watkins dated 9th June, 2017 was marked and tendered as defence exhibit no. 1.
73. In re-examination this witness clarified that the name Sonal or Sonam is attributed to Vimlesh who is his neighbour.

TURNBULL GUIDELINES

Ladies and Gentleman Assessors

74. The defence has taken the position that Archie Watkins had made a mistake in recognizing the accused for someone else.
75. This is a trial where the case against the accused depends wholly or to a large extent on the correctness of the identification of him which the defence allege to be mistaken. I must therefore warn you of the special need for caution before finding the accused guilty in reliance on the evidence of identification. That is because it is possible for an honest witness to make a mistaken identification. An apparently convincing witness can be mistaken and so can a number of apparently convincing witnesses. I wish to also remind you that mistakes in recognition, even of close friends and relatives, are sometimes made.
76. Examine carefully the circumstances in which the identification by Archie was made:

How long did he have the person he says was the accused under observation?

According to Archie the accused ran past him and he saw the accused for about 4 to 5 seconds.

At what distance?

Archie said he was one meter away from the accused.

In what light?

According to Archie it was a moonlit night and there was light from his house as well.

Did anything interfere with that observation?

Archie said there was no obstruction or interference with his observations.

Had the witness ever seen the accused before?

Archie said the accused was his close neighbour and he knows the accused for the last 2 to 3 years.

77. I must remind you of the following specific weaknesses which appeared in the evidence of Archie. He had seen the accused for about 4 to 5 seconds who had run past him.
78. The third witness Mohammed Yakub informed the court that he is a neighbour of the complainant Nilesh and his younger brother Sonu. He knows them from the last 8 to 10 years. However, Archie Watkins is the closest neighbour of the complainant Nilesh.
79. On 9th June, 2017 a police officer had shown to the witness a pompom. He told the officer he used to see Sonu wear this type of pompom on several occasions. The pompom was mixed coloured although he was not one hundred per cent sure whether the accused had worn the same pompom. The police officer was forcing him to say

that it was the same pompom the accused had worn. The witness pointed to the accused in court who he knew as Sonu.

80. In cross examination the witness agreed that what he told the police was that the accused was wearing a similar pompom and he cannot say if the pompom shown to him was the same one the accused was wearing. On 9th June the witness had not seen the accused wearing a pompom.
81. The fourth witness PC 4949 Pita Davuiqalita on 9th June, 2017 had attended to the crime scene at Cuvu, Sigatoka. He took photographs of the crime scene and prepared a booklet of photographs which was marked and tendered as prosecution exhibit no. 2.
82. At the crime scene the witness had uplifted a mixed coloured pompom which was marked and tendered as prosecution exhibit no. 3. He had also uplifted one right sided black flip flop which was marked and tendered as prosecution exhibit no. 4. The witness was also able to recognize a pair of blue, Nike slip-on which was prosecution exhibit no. 1. The witness had given all the exhibits to the investigating officer.
83. In cross examination the witness stated that no dusting for finger prints was done due to rain hence no finger prints were found on any of the exhibits.
84. The fifth witness Misidomo Baseisei was the interviewing officer, on 11th June, 2017 he had caution interviewed the accused at the crime office of the Sigatoka Police Station.
85. The witnessing officer was Cpl. Tobia Matai who was present throughout the interview. The interview was conducted in the English

language at the request of the accused which was conducted for two days. The caution interview of the accused was marked and tendered as prosecution exhibit no. 5.

86. The witness met the accused before the interview and the accused did not complain about anything but was remorseful of what had happened. Before the interview commenced the witnessing officer and the witness did not assault, threaten or put pressure on the accused. The accused was given his rights such as to consult a solicitor, a family member or any other person of his choice.
87. The witness also stated that he explained the allegation which was understood by the accused. The accused was also explained his right to remain silent but he did not explain the consequences of not remaining silent.
88. The accused signed the interview, thereafter the witnessing officer and then the witness. The accused was given sufficient breaks during the interview as well.
89. The accused was not threatened, assaulted or forced to answer the questions asked on both days of the interview. The accused also did not make any complaints about anything or lodge any formal complaint against the witness or any other officer involved in this case.
90. The witness confirmed during the caution interview he had amongst other items shown the accused the following:
 - a) One colored pompom with "NB" written on it;
 - b) One only right side black flip-flop.

91. In his answer the accused had stated that both the above items belonged to him. The accused was taken for a scene reconstruction where the accused had pointed to where he had hidden the clothes he was wearing on the night of the incident. The police team were able to recover a black t-shirt and ¾ pants which was marked and tendered as prosecution exhibit no. 6. When questioned by the witness the accused had informed the witness that both clothes were his.
92. In cross examination the witness denied that when the accused was brought to the Sigatoka Police Station from morning till 4.30pm he and the other police officers were assaulting the accused. The witness stated that the accused was fit for the interview, when it was put to the witness that the police officers had assaulted the accused before and during the interview the witness said this was not true.
93. He agreed that he had failed to tell the accused the consequences of not remaining silent because he had thought he had covered it when he cautioned the accused. The witness agreed he had not complied with the Constitution in this regard.
94. The witness was referred to the Constitution of Fiji which was read as *“every person who is arrested or detained to be told of the consequences of not remaining silent.”* The witness maintained that the cautionary words he had given to the accused were clear. The accused was interviewed without having his lunch because it was the accused’s request that he did not want to have lunch and therefore the witness did not force the accused to have his lunch. When it was suggested that the witness had intentionally not been given lunch to the accused since he wanted the accused to admit to everything the witness denied this.

95. Before the second day's interview the accused had seen his lawyer Angeline he was given the above information by the accused before the interview.
96. According to the witness the accused was taken for medical examination after the interview so that the police can be cleared of any allegation of assault on the accused whilst he was in their custody. The witness told the court the doctor did not find any injuries on the accused.
97. After the first day's interview the witness had informed the accused that they will be going for a scene reconstruction the following day and that the accused was told he was under caution before proceeding to the reconstruction. However, he did not tell the accused that he is not obliged to go for the reconstruction.
98. The witness also did not tell the accused to consult his solicitor or legal aid and that the accused was not forced or assaulted during the interview to make admissions. The witness maintained that the accused had told him during the interview that the black flip flop belonged to the accused.
99. When the witness was referred to Q.63 of the caution interview and asked to explain why the disclosed copy did not have his signature the witness explained that after the interview was complete the pages were printed and he had overlooked to sign that particular page.
100. The witness also denied that an iTaukei police officer had sworn at the accused and told him to admit the allegation or else he will get more beatings.

Ladies and Gentleman Assessors

101. The caution interview of the accused is before you, the answers in the caution interview are for you to consider as evidence but before you accept the answers, you must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for you to accept or reject the answers given in the caution interview.
102. During the cross examination of the police officers the counsel for the accused had asked questions of these officers suggesting that the answers given by the accused were obtained as a result of fear, assault, oppression, false promise, verbal abuse, and intimidation, during the time he was arrested and transported from Lautoka to the Sigatoka Police Station after his arrest, on the way, at the Vatudradra Police Post and the Sigatoka Police Station, and in breach of the accused Constitutional rights before and during his interview.
103. The defence counsel also suggested that the interviewing officer had fabricated the answers to match the incident. This meant counsel had put to these witnesses that the admissions made by the accused contained in the caution interview was not voluntarily given by him and therefore you should disregard those admissions.
104. It is for you to decide whether the accused made those admissions and whether those admissions are the truth. If you are not sure whether the accused made those admissions in his caution interview then you should disregard them. If you are sure that those admissions were made by the accused, then you should consider whether those admissions are the truth. What weight you choose to give to those admissions is a matter entirely for you.

105. The sixth witness Adriu Nadredre informed the court that he is the investigating officer in this case. A report was received of a stabbing at Uluisila, Sigatoka on one Nilesh Goundar.
106. The witness and the police team went to the Sigatoka Hospital and then proceeded to Uluisila during the investigation one of the witness Archie Watkins had identified the accused as the suspect in this case. When a check was conducted at the house of the accused he was missing.
107. As a result a house to house search was conducted on 11th June, 2017 the witness was instructed to see the complainant at the Lautoka Hospital and record his statement. However, upon doctor's advice this could not be done.
108. Upon receipt of information that the accused was at Jinnu road, Lautoka the witness went with Cpl. Tobia to the house of the accused's uncle. The accused was arrested by Cpl. Tobia and escorted to the police vehicle according to the witness, Cpl. Tobia had informed the accused the reasons of his arrest and his rights. From Jinnu road the team proceeded to the Sigatoka Police Station.
109. The team arrived at the Sigatoka Police Station at 15.30 hours where the accused was handed over to the crime officer. On 12th June the witness went for the reconstruction of the scene the accused did not make any complaints to him.
110. The accused was not assaulted, threatened or forced when he was brought from Lautoka to Sigatoka or during the reconstruction of the scene. After the interview and the charging process were complete, the accused was taken to the hospital for medical examination. The doctor did not find anything wrong with the accused. To date the

accused has not made any formal complaint against him or against any other police officer for assaulting him.

111. In cross examination the witness agreed the complainant did not mention the name of the accused as the person who had assaulted him. The witness maintained that Cpl. Tobia had given the accused his rights and the reason for his arrest but he did not have any written evidence to support this.
112. Upon further cross examination the witness stated that the accused was given his right to communicate with a lawyer, his next of kin, wife and the right to remain silent but not about the consequences of not remaining silent.
113. According to the witness after the accused was arrested there was no stop over at the Vatudradra Police Post since the accused was the only arrested person in the police vehicle. The witness denied that he and the other police officers had sworn at the accused in the police vehicle. The accused was also not threatened to admit the allegations by the witness or any other police officer in the police vehicle.
114. The witness also denied the accused was assaulted by the crime officer Insp. Bari and other police officers at the Sigatoka Police Station.
115. The final witness Dr. Suliana Makarita Saverio informed the court that she graduated with an MBBS degree from the Fiji National University in the year 2013. In the year 2018, she had also obtained a post graduate diploma in Public Health from the Fiji National University.

116. On 9th June, 2017 the witness had examined a patient by the name of Nilesh Goundar at about 1.20am. The witness had recorded her findings and other details in the Fiji Police Medical Examination form of the complainant which was marked and tendered as prosecution exhibit no. 7.
117. According to the doctor, the patient was semi-conscious and under the influence of alcohol because she could smell alcohol in his breath. The patient had to be carried into the Emergency Department.
118. The following specific medical findings were noted by the witness:
- a) Multiple incision wounds to the forehead and scalp approximately 10 wounds ranging from 2cm to 6cm with blood oozing. The witness explained incision wounds meant wounds with straight edges likely caused by sharp objects;
 - b) There was fresh blood oozing or flowing from the left ear, also there was dried blood in the nostril;
 - c) Bruising and swelling of the right eye as well as minor abrasion that is scripting of the skin over the right shoulder.
119. The witness explained the totality of the injuries could cause fractures to the skull which could have been life threatening. The witness had suspected a fractured skull, so the patient was transferred to Lautoka Hospital for specialist care.
120. In the professional opinion of the witness the incision wounds were consistent with injuries due to a sharp object or a sharp surface. The

pattern and distribution of the wounds cannot rule out the possibility of stabbing or stab wounds.

121. The witness agreed a knife could have caused these injuries. The witness had also illustrated her observations at appendix 1 of the medical report. The witness further stated that under appendix 1 the largest wound was approximately 6cm, gaping wound just above the neck.
122. In cross examination the witness stated that it was possible the wounds were possibly caused by a knife. She also agreed there was a possibility that some blood may have spilt on the attacker or his clothing or his face. From the nature of the injuries seen on the complainant, there is also a possibility of more than 2 people involved – one attacked from the back and the other one from the front.

Ladies and Gentleman Assessors

123. You have heard the evidence of the doctor who had examined the complainant after the alleged incident who was called as an expert witness on behalf of the prosecution.
124. Expert evidence is permitted in a criminal trial to provide you with information and opinion, which is within the witness expertise. It is by no means unusual for evidence of this nature to be called. The medical report of the complainant is before you and what the doctor said in her evidence as a whole is to assist you.
125. An expert witness is entitled to express an opinion in respect of his or her findings and you are entitled and would no doubt wish to have regard to this evidence and to the opinions expressed by the Doctor.

When coming to your own conclusions about this aspect of the case, you should bear in mind that if, having given the matter careful consideration, you do not accept the evidence of the expert you do not have to act upon it. Indeed, you do not have to accept even the unchallenged evidence of the doctor.

126. You should remember that the evidence of the doctor relates only to part of the case, and that whilst it may be of assistance to you in reaching your opinions, you must reach your opinion having considered the whole of the evidence.
127. This was the prosecution case.

DEFENCE CASE

Ladies and Gentleman Assessors

128. At the end of the prosecution case you heard me explain options to the accused. He has those options because he does not have to prove anything. The burden of proving the accused guilty beyond reasonable doubt remains on the prosecution at all times. The accused chose to give evidence under oath and be subjected to cross examination.
129. I now draw your attention to the evidence adduced by the defence during the course of the hearing. You must take into account what the defence adduced in evidence when considering the issues of fact which you are determining.
130. The accused informed the court that the complainant is his brother. On 11th June, 2017 he was at his uncle's house in Lautoka where he was arrested by police officer Matai Tobia when he came out of the

house this police officer grabbed his collar from the back and took him to the police vehicle.

131. There were four officers in total he was not explained his reasons for the arrest or given his right to consult a lawyer or his right to remain silent and the consequences of not remaining silent.
132. The accused was handcuffed, the police vehicle door was opened and he was pushed inside the van and punched on his back and then threatened. He was taken to the Vatudradra Police Post when he was sitting in the police post another police officer came pointed at him shouted and said "*Magaijinamu you assaulted your brother*", another prisoner was brought from the cell and both were handcuffed to each other.
133. While being escorted to the police van he was again threatened to the effect "*you will feel the pain in your backside*". On the way to the Sigatoka Police Station the accused was intimidated, assaulted and sworn at. At the police station he was escorted to the C.I.D office where about 8 to 10 police officers were waiting for him. He was told to sit in the middle of the room as he sat down a police officer came and kicked him on his side he fell down, as he got up he was again kicked on his back. His jaw was grabbed and his mouth was squeezed.
134. The police officers said "*you are the one, you assaulted your brother*" the accused replied he did not. Thereafter the accused was told to lie facing the floor and he was kicked from the back and when he was lying down one police officer from the back pulled his testicles saying "*you are becoming very manly I will break your testicles*", it was very painful.

135. When the accused was asked “*did you assault your brother*”, the accused said no, he was then told that they will hit him with a stick on his head. Instead of being hit on his head he was hit with the stick on his back because he had told the officer not to hit his head since he has already had an injury on his head in an accident, again the accused denied assaulting his brother.
136. The accused was asked to stand up he was then punched on his stomach, due to pain he knelt down at this time he told the police officers not to assault him and he will tell them everything. He said this because of the assault.
137. As the accused sat down he denied assaulting the complainant he was told no matter what story you tell it should match with what had happened. The accused then said yes to all the answers, this was before the interview.
138. The accused was then caution interviewed no rights were given to him such as his right to consult his counsel, right to remain silent and the consequences of not remaining silent. The answers in his caution interview are not correct. The accused was also told that he will be released and nothing will happen to him. All the answers in the caution interview are a made up story, he was told by the police officers if he does not admit the allegation he will be assaulted even more.
139. Before the reconstruction of the scene, no rights were given to him and he was not told that he was not obliged to go for the reconstruction of scene. The answer he had given was not correct, the pompom and the black flip flop is not his including the clothes recovered during the reconstruction. He was wearing different clothes that evening.

140. The accused explained he left the wedding at 10.30pm when he was walking on the road to his house he saw two strangers jumping out of the drain since it was dark he was not able to see their clothes when he saw them he was frightened and nervous so he ran back towards the road got into a vehicle and went to Olosara to his mother's place.
141. From his mother's house he went to work, in the morning he came to know his brother had been assaulted. He took leave from work and went to the Lautoka Hospital to visit his brother, at the hospital he asked his brother who had assaulted him he was told by his brother that he did not know or see.
142. During the night he used to be with his brother and he did everything to help his brother such as feed him and so on. The allegation against him is false, he has no reason to assault his brother they were staying together peacefully, his admissions in the caution interview are also false, he has taken oath in court and whatever he is telling the court is the truth.
143. In cross examination the accused agreed that he is also known as Sonu, the accused and his wife lived with the complainant and his wife in the same house but different flats.
144. About two to three months before the incident he had taken out a DVRO against his brother Nilesh Goundar. When it was suggested that he had taken out a DVRO because his relationship with his brother was not good the accused denied this.
145. In respect of this matter the accused had appeared in the Magistrate's Court he could not recall if his counsel had as part of

his bail submissions informed the court that he had obtained a DVRO against his brother.

146. The accused stated when he was arrested on 11th June, 2017 he was punched on his back which was a hard punch and painful. In the Sigatoka Police Station he was kicked on his right ribs a hard kick by a police officer with the base of his foot as a result it became reddish and a bit swollen which was very painful.
147. He was again kicked on his back about two or three times by more than one police officer. The kicks were a bit forceful and he had suffered a lot of pain. When his jaw was grabbed and mouth squeezed for a few seconds it was painful he had received a cut inside his mouth and it was swollen.
148. When he was lying down he was kicked about two to three times some were wearing canvas and shoes, his testicles were pulled for about four to five seconds, also on one occasion he was hit with a stick on his back. It was very painful, he was also punched on his stomach.
149. After receiving all the injuries he was not fit and the doctor had not checked him properly. When it was suggested that he was in bad shape the accused disagreed by saying the he had sustained the pain.
150. When questioned about the two strangers he had seen that night the accused said he was about five to ten metres into his drive way when the two strangers had jumped out of the drain and both were holding something in their hand despite it being night time he was able to see this.

151. The reason why he was frightened was because he thought they might hit him although the Cuvu Police Post was between Uluisila junction and Olosara he did not think of reporting what he had seen. When he saw the two strangers he did not call for help but ran past the junction and after a short while he was able to get a vehicle to go to his mother's house.
152. The accused had informed the police about the two strangers but they did not listen to him. The accused knows Archie Watkins who is his neighbour and also his workmate. The accused denied he had run towards Archie's house that night, whoever Archie may have seen was not him.
153. The answer contained in his caution interview is not the truth, police officers had told him to make up a story which matches with the incident. Although Yakub had said he had seen the accused wearing a similar pompom the accused denied having such a pompom.
154. During the reconstruction there were neighbours around but he could not alert them that he was assaulted by the police officers because he was told not to tell anyone about the assault. By this time his mouth was swollen.
155. The accused agreed before the commencement of the second interview he was visited by his lawyer. He told his lawyer about what the police officers had done to him, however his lawyer had not raise these issues in the Magistrate's Court according to the accused she must have forgotten to do so.
156. He was medically examined after the interview at the Sigatoka Hospital he did not tell the doctor what the police officers had done to him because police officer Tobia had warned him if he told the doctor

he will be assaulted more when he comes back. The accused was afraid so he did not tell the doctor anything.

157. The accused agreed the doctor had not seen any injuries on him because the doctor had not checked him properly he had told the doctor about the cut in his mouth, a police officer was present at the time of his medical examination. The clothes recovered by the police during reconstruction were not his.
158. The accused denied the allegation he stated the complainant is his brother and he has no reason to assault his brother. He went to see his brother in the hospital not because he was guilty.
159. In re-examination the accused stated the complainant is his brother and he wanted to go and be with his brother, his brother had told him two people had assaulted him.
160. The accused stated he was innocent, he did not assault his brother he was forced, threatened and assaulted to admit the allegation by police officers. A police officer was present during his medical examination and that was the reason why he did not tell everything that happened to him to the doctor. The doctor had examined him for a few minutes and he was never examined properly.
161. This was the defence case.
162. You heard the evidence of all the witnesses. If I did not mention a particular piece of evidence that does not mean it's unimportant. You should consider and evaluate all the evidence in reaching your opinion.

ANALYSIS

163. The prosecution alleges that during the early hours of 9th June, 2017 the complainant was going to his house when he was assaulted by the accused. The accused was hiding in the dark waiting for the accused with an iron rod he had struck the head of the complainant several times. The blows were so forceful that the complainant received serious injuries which could have been life threatening as per the medical examination of the complainant.
164. The accused after assaulting the complainant ran past his immediate neighbour Archie Watkins. Archie knows the accused and was able to recognize him due to the light from his house and the moon light. The accused after going past Archie went up a hill and went to his mother's house.
165. The prosecution further says on the way the accused had thrown the iron rod in the river at Nauta. At Olosara (his mother's house) the accused had thrown the clothes he was wearing into the bush. When the accused was caution interviewed by the police he had told the truth to the police. During the interview the accused had told the police everything he had done that early morning.
166. The accused wanted to take revenge against his brother so he did what he wanted to do. The police officers had not assaulted or threatened or forced or intimidated the accused to make the admissions. According to the police officers the accused was taken to the hospital after the interview and no injuries were seen by the doctor.
167. The prosecution also says the accused was able to see his lawyer before the start of the second day's interview if there was any

impropriety by the police as alleged by the accused he would definitely have told his lawyer who would no doubt have raised it with the police officers.

168. There was no complaint received from the accused lawyer when he was produced before the Magistrate's Court. The accused was represented in court by the same lawyer who had come to visit him before the second day's interview yet the court was not told about any complaints the accused had.
169. The prosecution is asking you to believe the prosecution witnesses by looking at all the exhibits presented in court which was uplifted during the police investigations which points to the involvement of the accused. It was the accused guilt of what he had done to the complainant that made him go and visit the complainant in the hospital and look after him. The accused had asked the complainant about the assault and when he came to know the complainant could not identify the accused he then started to act in a way as if he had not done anything.
170. On the other hand, the defence says the accused did not commit the offence as alleged there is no way the accused could have assaulted his brother because he was not at the scene where the alleged assault had taken place.
171. The accused and the complainant are biological brothers and the relationship between the two was good. The identification by Archie Watkins is mistaken since an honest witness can be mistaken and this is what had happened with Archie.

172. Archie could not have seen the accused at a fleeting glance of 4 to 5 seconds. The defence is also asking you consider the fact that Archie said the accused had ran past him this means things were happening fast and therefore the likelihood of a mistake is very high.
173. Furthermore, defence is also saying that Archie was mistaken since he told the court the accused was wearing a long sleeve blue t-shirt whereas the prosecution had exhibited a black t-shirt which they said was worn by the accused at the time of the assault and was recovered by the police during reconstruction of the scene.
174. Moreover, Archie should not be believed because when the facts were fresh in his mind he did not tell the police officer writing his police statement that he had seen Vimlesh and he had also not told the police he saw the complainant's younger brother. The defence submits the inconsistencies are significant and you should not give any weight to the evidence of this witness.
175. The pompom also cannot be said to belong to the accused because Mohammed Yakub had seen a similar pompom worn by the accused does not mean the pompom uplifted during the investigations belonged to the accused including the right sided black flip flop.
176. The defence is saying the admissions contained in the caution interview are not the truth because it was forced out of the accused due to the assaults, intimidation, force, and breaches of his Constitutional rights. Although he was visited by his lawyer before the second day's interview despite his instructions, his lawyer did not inform the Magistrate's Court of the above does not mean that what the accused said did not happen.

177. The accused should be believed when he told the court that he was treated badly by the police officers. The doctor at the hospital did not properly check the accused and also the accused was warned by the police officer escorting him to the hospital not to tell the doctor anything about the assault by the police otherwise when he comes back to the cell he will be assaulted more.
178. The defence is asking you to take into account the medical report of complainant that there were knife wounds on the forehead and the back of the complainant which is testimony of the fact that the perpetrator had a knife which he had used to assault the complainant. This aspect of the evidence is also confirmed by the complainant that there were two people who had assaulted him and not one person as suggested by the prosecution.
179. Finally, the defence is asking you not to give regard to the caution interview of the accused and give no weight to the admissions allegedly made by the accused and also to consider the fact that the allegation is false which cannot be supported by evidence.

Ladies and Gentleman Assessors

180. You have seen all the witnesses give evidence keep in mind that some witnesses react differently when giving evidence.
181. Which version you are going to accept whether it is the prosecution version or the defence version is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses give evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding

on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

182. In deciding the credibility of the witnesses and the 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 is correctly recalling the facts about which he or she has testified. You can accept part of a witness's evidence and reject other parts. A witness may tell the truth about one matter and lie about another, he or she may be accurate in saying one thing and not be accurate in another.
183. You will have to evaluate all the evidence and apply the law as I explained to you when you consider the charge against the accused have been proven beyond reasonable doubt. In evaluating evidence, you should see whether the story related in evidence is probable or improbable, whether the witness is consistent in his or her own evidence or with other witnesses who gave evidence or with his or her previous statement. It does not matter whether the evidence was called for the prosecution or the defence. You must apply the same test and standards in applying that.
184. It is up to you to decide whether you accept the version of the defence and it is sufficient to establish a reasonable doubt in the prosecution case.
185. If you accept the version of the defence you must find the accused not guilty. Even if you reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. Remember, the burden to prove the accused's guilt beyond

reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused at any stage of the trial.

186. The accused is not required to prove his innocence he is presumed innocent until proven guilty.

187. Your possible opinions are:-

1. Count One: **ATTEMPTED MURDER** - **ACCUSED - GUILTY OR NOT GUILTY.**

If you find the accused not guilty of attempted murder then you are to consider whether the accused is guilty or not guilty of **ACT INTENDED TO CAUSE GRIEVOUS HARM.**

Ladies and Gentleman Assessors

188. This concludes my summing up you may now retire and deliberate together and once you have reached your individual opinions please inform a member of the staff so that the court can be reconvened.

189. Before you do so, I would like to ask counsel if there is anything they might wish me to add or alter in my summing up.




Sunil Sharma
Judge

At Lautoka

10 November, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Messrs Iqbal Khan & Associates for the Accused.