

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 164 of 2022

STATE

vs.

DILAISA TINAIBABA

Counsel: Ms. B. Kantharia for the State
Ms. A. Prakash for Accused

Date of Hearing: 25th August 2022

Date of Closing Submission: 29th August 2022

Date of Judgment: 31st August 2022

JUDGMENT

1. The Accused is charged with one count of Act Intended to Cause Grievous Harm, contrary to Section 255 (a) of the Crimes Act. The particulars of the offence are;:

FIRST COUNT

Statement of Offence

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

Particulars of Offence

DILAISA TINAIBABA on the 1st day of May, 2022 at Nasinu in the Southern Division, with intent to cause some grievous harm to ADI TEWA

LIKISOVENI, unlawfully wounded the said ADI TEWA LISIKOVENI by striking her left arm and stabbing her back with a chopper.

2. The Accused pleaded not guilty to the offence; hence, the matter proceeded to the hearing. The hearing commenced on the 25th of August, 2022 and concluded on the same day. The Prosecution presented the evidence of four witnesses, including the Complainant. The Accused gave evidence for the Defence. The Court then heard the closing submissions of the Counsel. In addition to their respective oral submissions, the learned Counsel for the Prosecution and the Defence filed comprehensive written submissions detailing the legal issues pertaining to this matter. Having perused the evidence adduced during the hearing and the submissions made by the parties, I now proceed to pronounce the judgment as follows.

Burden and Standard of Proof

3. I first draw my attention to the burden and standard of proof. The Accused is presumed to be innocent until she is proven guilty. The burden of proof of the charge against the Accused is on the Prosecution. It is because the Accused is presumed to be innocent until she is proven guilty.
4. The standard of proof in a criminal trial is "proof beyond reasonable doubt". The Court must be satisfied that the Accused guilty of the offence without any reasonable doubt.

Elements of the Offences

5. The main elements of the offences as charged in the Information are:
 - i) The accused,
 - ii) With intent to maim, disfigure, disable or to do some grievous harm to the victim,
 - iii) Unlawfully wounds or does any grievous harm to the victim by any means.

6. Section 4 (1) of the Crimes Act has defined “grievous harm” as:

“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 extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense”*

7. Grievous harm simply means serious or dangerous or permanent harm to someone.

8. The Prosecution and the Defence tendered the following admitted facts pursuant to Section 135 of the Criminal Procedure Act:

- a) The person charged is Dilaisa Tinaibaba (herein after referred to as “Dilaisa”) and she is a school teacher by profession.*
- b) The Complainant is Adi Tewa Lisikoveni (hereinafter referred to as “Adi Tewa”) whose DOB is 23/09/1992. She is a Police Officer by profession.*
- c) Dilaisa and Adi Tewa lived together as partners in a house in Vunisinu Road, at the time of the alleged incident.*
- d) The alleged incident took place at Dilaisa and Adi Tewa’s house in Vunisinu Road, on the morning of 1st May, 2022.*
- e) Dilaisa and Adi Tewa had an argument as Adi Tewa had used the money in Dilaisa’s purse without her consent.*

- f) *To prevent Adi Tewa from coming inside the house and because Adi Tewa was throwing glasses and plates at Dilaisa, Dilaisa picked up a silver chopper from the dish rack next to the door and swung it at Adi Tewa and struck her multiple times on her left arm and on her left shoulder.*
- g) *Adi Tewa received multiple lacerations mostly on her left arm and on her left shoulder from being struck by the chopper by Dilaisa.*
- h) *Adi Tewa was taken to the Valelevu Health Centre on the same day which was 1st May 2022 and then later to CWM Hospital for further treatment.*
- i) *Dilaisa was interviewed by WPC 6203 Pola on 02/05/2022 and then formally charged by PC 5953 Leone with one count of Act with Intent to Cause Grievous Bodily Harm at the Valelevu Police Station.*
- j) *It is admitted that the contents of the following documents are not in dispute and will be tendered by consent:*
 - a) *Medical Examination Form of Adi Tewa Lisikoveni conducted by Dr. K. Chand at the Valelevu Health Centre on 01/05/2022.*
 - b) *Photographic booklet of Lot 12, Vunisinu Road, photographed by WPC 6821 Jiko on 02/05/22.*

The Prosecution's Case

9. The Complainant and the Accused were partners and living in the same abode. On the early morning of the 1st of May 2022, they had an argument over the money, which led them to swear at each other. They were on their way back home from a friend's place. The Accused had told the Complainant to leave the house. The Accused had gone to the house, and the

Complainant followed her. While swearing at each other, the Complainant started throwing kitchen utensils at the Accused. She had thrown two plates, one bowl, and one mug at the Accused, who was standing near the TV rack, closer to the bedroom.

10. Meanwhile, the Accused had packed the Complainant's clothes and put some of them out of the house, demanding her to leave. The Complainant went out of the house but then wanted to come back. However, she could not enter the house because the Accused had closed the door and pushed it from inside, preventing the Complainant's entry. According to the evidence given by the Complainant and the Accused, the door cannot be locked from the inside but only from the outside.
11. The Complainant had kicked and pushed the door and eventually managed to open the door, overpowering the Accused. When she entered the house, she saw the Accused holding the chopper that was on the kitchen rack. The Complainant tried to get hold of the chopper, but in that process, the chopper hit her back. The Court heard the evidence of the Complainant, where she said that the Accused had no intention of causing her grievous harm, but she acted in defending herself from the Complainant. The Complainant further said she was infuriated with the Complainant and wanted to assault her. That was why she tried to enter the house by forcefully opening the door. The Complainant further said that she intended to hurt the Accused when she threw kitchen utensils at the Accused.

Defence's Case

12. The Accused adduced evidence consistent with the evidence presented by the Complainant. According to the Accused, she tried to stop the Complainant from entering the house by pushing the door from inside, but the Complainant kicked and pushed the door until she overpowered the Accused. The Accused wanted to save herself from the Complainant as she knew the Complainant would assault her if she managed to enter the house. To scare off the Complainant, she wanted to pick something. The chopper was the only object on the kitchen rack; hence, she picked it up and swung at the Complainant to scare her off, but during that process, she hit the Complainant on her shoulder and the arm with the chopper.

13. Accordingly, the Accused claims that she wounded the Complainant with the chopper in order to defend herself from the aggression of the Complainant. That being the case, the Defence relies on the "defence of self-defence" to exonerate her criminal liability of causing harm to the Complainant.

Self - Defence

14. Section 42 of the Crimes Act has defined the defence of "self-defence".

- i) *A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.*
- ii) *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."

15. The Privy Council in **Sigismund Palmer v The Queen (Jamaica) [1970] UKPC 31 (23 November 1970)** has defined the scope of the defence of self-defence in an inclusive manner, where Lord Morris held that:

"The defence of self-defence is one which can be and will be readily understood by any jury. It is a straightforward conception. It involves no

abstruse legal thought. It requires no set words by way of explanation. No formula need be employed in reference to it. Only common-sense is needed for its understanding. It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances. Of these a jury can decide. It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack it would not be common-sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with a necessity of defence."

16. Accordingly, the Accused has to carry out the alleged conduct constituting the offence to claim the defence of self-defence. The Accused must establish that she believed the conduct was necessary and reasonable to defend herself based on her perceived circumstances. The Accused bears the burden of proving that defence. (*vide; section 59 (2) of the Crimes Act*). The burden of discharging this onus of the Accused is the evidential burden, which means adducing or pointing to evidence that suggests a reasonable probability that the defence of self-defence existed (*vide; Section 59 of the Crimes Act*). The Prosecution still holds the burden of disproving the said defence provided by the Accused. (*vide; section 57 (2) of the Crimes Act*).
17. The Court has to determine, firstly, whether the Accused had believed that her conduct was necessary and then whether it was a reasonable response under the circumstances that the Accused perceived. It is not wholly an objective test. It is a subjective belief founded on the perceived circumstances of the Accused. Furthermore, the Accused's subjective belief and

conduct should be objectively reasonable. (*vide* : *Narayan v State* [2020] FJCA 189; AAU0610.2017 (6 October 2020))

18. Having discussed the laws relating to the defence of self-defence, I now proceed to evaluate the evidence adduced in the hearing.

Evaluation of Evidence


19. In evaluating the evidence, the Court must first look into the credibility or the veracity of the evidence given by the witness and then proceed to consider the reliability or accuracy. In doing that, the Court should consider the promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in Court and the evidence of corroboration where it is relevant. (*vide*; *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Quran (HC Criminal - HAC 14 of 2022)*).
20. The Court observed consistencies *per se* and *inter se* in the evidence given by the Complainant and the Accused. The Complainant specifically stated that she entered the house intending to assault the Accused; hence, the Accused swung the chopper to save herself from the aggression of the Complainant. The Police officer who arrested the Accused had witnessed the broken pieces of the plates and mugs on the floor, thus corroborating the evidence of the Complainant and the Accused.
21. Be that it as may, there are contradictions *inter se* in the evidence given by Ratu Inoke and the Complainant, where Ratu Inoke said that he saw the Accused stab the Complainant and push her out of the house. Whereas the Complainant testified, as explained above, that the chopper hit on her back when the Accused tried to save herself from the Complainant's aggression. According to the Complainant, she came out of the house of her own volition and was not pushed out by the Accused. The Court heard no evidence explaining how Ratu Inoke witnessed this incident besides merely stating that he was in the house. Hence, Ratu Inoke

could have been mistaken in his observation and understanding of the event. Therefore, I find the evidence of Ratu Inoke unreliable.

22. I observed the Complainant, and the Accused answered their questions promptly and spontaneously, illustrating the quality of credible and reliable witnesses. Both were straight and coherent in narrating the events that took place that morning. Hence, I find them credible and reliable witnesses.
23. The Accused claimed that she had no alternative but to get the chopper to scare off the Complainant if she entered the house by opening the door forcefully. The Accused had pushed the door from inside to prevent the Complainant's entry when the Complainant angrily kicked and pushed the door. The Complainant, in her evidence, specifically admitted that she was furious and wanted to assault the Accused. That was the reason she kicked and pushed the door to open forcefully. Further, the Complainant said that the Accused never had an intention of causing any grievous harm to her, but she only swung the chopper to save herself from the Complainant.
24. The Court heard the evidence of the Complainant, and the Accused, where both explained that the argument started over the money and the Accused instigated it by swearing at the Complainant, demanding her to leave the house. The law allows even the instigator of an incident to rely on the defence of self-defence if the violent reaction of the victim to the said instigation placed the Accused in circumstances where she reasonably believed that she was in an immediate danger from which she had no other means of escape. (*vide; Vasuitoga v State [2016] FJSC 1; CAV001.2013 (29 January 2016)*). Even though the Accused started the commotion over the money, her conduct had always been limited to verbal aggression. On the contrary, the Complainant went ahead and started to throw items at the Accused. The Complainant wanted to return to the house by kicking and pushing the door as she intended to assault the Accused. In contrast, the Accused wanted to keep the Complainant away as she knew that the Complainant would assault her if she managed to enter the house. The Court heard the evidence of the Complainant, admitting that she had assaulted the Accused on previous occasions.

25. Accordingly, I am satisfied that the subjective belief of the Accused that she was in immediate danger based on the circumstances that she had perceived is objectively reasonable. Her conduct is proportionately within the scope of reasonable response under the circumstances that prevailed then.
26. In view of the reasons discussed above, I find that the Accused successfully discharged her evidential burden establishing the defence of self-defence, thus exonerating her from criminal liability for her alleged conduct, which the Prosecution failed to disprove beyond a reasonable doubt.
27. In conclusion, I find the Accused is not guilty of the offence of Act Intended to Cause Grievous Harm, contrary to Section 255 (1) of the Crimes Act and acquit of the same accordingly.
28. Thirty (30) days to appeal to the Fiji Court of Appeal.




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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

31st August 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Accused.