

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 6 OF 2022

STATE

vs

JONE VAKARISE

Counsel:

Ms. Ramoala P and Ms. Ali N	-	for State
Ms. Mataika P, Mr. Navuni J	-	for Accused

JUDGMENT

1. **JONE VAKARISE**, you were charged by the Director of Public Prosecution on the following information with four counts under the **Crimes Act of 2009**, as below:

COUNT 1

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM contrary to section 275 of the Crimes Act 2009

Particulars of Offence

JONE VAKARISE JUNIOR alias "**JONE VAKARISI**" on the 26th day of December 2021 at Raiwaqa in the Southern Division assaulted **Catherine Smith** thereby causing actual bodily harm to the said **Catherine Smith**.

COUNT 2

Statement of Offence

ACTS INTENDED TO CAUSE GREIVIOUS HARM contrary to section 255 (a) of the Crimes Act 2009

Particulars of Offence

JONE VAKARISE JUNIOR alias "**JONE VAKARISI**" on the 26th day of December 2021 at Raiwaqa in the Southern Division with intent to cause grievous harm to **Catherine Smith** unlawfully wounded the said **Catherine Smith** by striking her with a knife.

COUNT 3

Statement of Offence

ASSAULT CAUSING ACTUAL BODILY HARM contrary to section 275 of the Crimes Act 2009

Particulars of Offence

JONE VAKARISE JUNIOR alias "**JONE VAKARISI**" on the 26th day of December 2021 at Raiwaqa in the Southern Division on an occasion other than that mentioned in Count 1 assaulted **Catherine Smith** thereby causing actual bodily harm to the said **Catherine Smith**.

COUNT 4

Statement of Offence

CRIMINAL INTIMIDATION contrary to section 375 (1) (a) (i) of the Crimes Act 2009

Particulars of Offence

JONE VAKARISE JUNIOR alias "**JONE VAKARISI**" on the 26th day of December 2021 at Raiwaqa in the Southern Division without lawful excuse threatened **Catherine Smith** with intent to cause the said **Catherine Smith** alarm.

2. Upon reading of the charges in Court on 4th of March 2022, **JONE VAKARISE** understood the charges and pleaded not guilty to the charges filed against you. At the trial, the Prosecution led the evidence of the victim, Catherine Smith and the evidence of two doctors in relation to injuries sustained by the victim. At the end of the Prosecution case, since the Court was convinced of the availability of a prima-facie case for the Prosecution, acting under **Section 231** of the **Criminal Procedure Act of 2009**, Defense was called from the Accused and all the available options were explained to the Accused. At this juncture, the Accused gave evidence for the Defense under cross-examination. At the end of the Defense case, the Court heard oral submissions from Counsel representing the Prosecution and the Defense on 13/03/2022. Having carefully considered the evidence presented at the trial, this Court now will proceed to pronounce the judgment in this matter, as below.

Elements of the Offences Charged

3. In relation to the charges filed against the Accused in this trial, the elements of the offenses can be detailed as, below:
 - Count 1: **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to section 275 of the Crimes Act 2009
 - i) The accused;
 - ii) Commits an assault;
 - iii) Resulting in actual bodily harm.
 - Count 2: **ACTS INTENDED TO CAUSE GREIVIOUS HARM** contrary to section 255 (a) of the Crimes Act 2009
 - i) The accused;
 - ii) Unlawfully wounds;
 - iii) Any person by any means;
 - iv) With the intent to cause grievous harm.
 - Count 3: **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to section 275 of the Crimes Act 2009
 - i) The accused;
 - ii) Commits an assault;
 - iii) Resulting in actual bodily harm.

- Count 4: **CRIMINAL INTIMIDATION** contrary to section 375 (1) (a) (i) of the Crimes Act 2009
- i) The accused;
 - ii) Without lawful excuse;
 - iii) Threatens another person with any injury to their person;
 - iv) With the intent to cause alarm to that person.

4. In order to establish the guilt of the Accused for Count 1, 2, 3 & 4, the Prosecution must prove beyond reasonable doubt all the elements as elaborated above.

Burden of proof

5. As recognised by **Section 14 (2) (a)** of the **Constitution** of Fiji, the accused should be presumed innocent until proven guilty according to law. As a matter of law, the onus or the burden of proof rests on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The Prosecution must prove the Accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the Court is not sure of the guilt of the Accused, or if there be any hesitation on the part of this Court of the establishment of the ingredients by the Prosecution, the Accused must be found not guilty of the relevant charge and accordingly acquitted. The Accused has given evidence in this case. Thus, if this court accepts any part or the defense evidence or the evidence entirely or is unable to reject or accept the defense evidence, then too the Accused is entitled to a finding in his favor in relation to that.

Prosecution Case

6. As mentioned above, for the Prosecution case the evidence of the victim Catherine Pauline Smith was lead, together with the evidence of two doctors who examined the injuries and subsequent bone injuries sustained by the victim. In this matter, the entire Prosecution case was based on the testimony made by the victim in the cause of the trial in Court. Therefore, this Court perceives that it is important to succinctly highlight the evidence of the victim Catherine Pauline Smith. In evidence in chief, she stated as below:

- I am 18 years old. I am not married, but I have one child who is 7 months old.
- On 26/12/2021 I was at Rewa Street, I stayed there with my ex- boyfriend at his house. I was at lot 56 Wilkinson Street, Rewa Street. My ex-boyfriend is **Jone Vakarise (Accused)**, I have been in a relationship with him for 7 months by that time.
- On that day I was assaulted by the Accused at his place at around 1-2 am.
- He stated punching me outside the house on my face multiple times near the car and continued when we entered the house. His punches also landed on my arm. Thereafter, he dragged me inside the house by my hand. He continued to punch me on the face.
- He started asking why we came home late that night. I was with his friend. He asked me why I was late and threw a kitchen knife at me. Kitchen knife hit me on my right arm. Thereafter, he came near me and punched me on my nose.
- Due to these injuries, I started bleeding from my right arm and my nose.
- I told him to stop and he didn't and took me to the room next and started beating me on the bed with a steel rod.
- Steel rod hit me on the back of my head and arms. Steel rod was long and he was holding that with both hands. I told him to stop this which he didn't stop. He switched on the lights and he took a knife next to the door and told me he is going to strike me with the knife 4 times.

- I was 3 months pregnant at this time, though I told him to stop he didn't and hit me with a cane knife which landed on my left arm. He hit me with the cane knife held by both hands. The side of the knife hit my hand. He hit me twice. He also hit my pinky finger of the left hand with the blunt side of the knife.
 - Then he struck me for the second time. I felt faintish and he started apologizing. This was around 3 to 4 in the morning the next day.
 - I felt very weak at this time. I was bleeding from some parts of the body.
 - After apologizing he took me to the other room. He was telling me he is sorry. Then he left me on the bed and left the room.
 - After an hour he came back with a stick. He started hitting me with the stick on my back and back of my head. He hit me multiple times and I kept telling him to stop.
 - He hit me because he accused me of having an affair. He was asking me and questioned whether I was having an affair and I was denying. He stopped hitting when I was on the floor.
 - He came close to me and he told me he was going to kill me and strangled me with both hands on my neck.
 - I felt helpless. His friends and family were in the house in the living room.
 - He stopped strangling all of a sudden and pulled me up and got me to sit on the bed and he started apologizing again. Then he left the room and a friend of his came to the room and cleaned my wounds. I remained in the room with the Accused. I couldn't scream because I was hurt.
 - I did not inform anyone after this incident. I was in that room for 2 days, since I couldn't go anywhere else, since I felt hard to walk.
 - 3rd day after the incident, the Accused got a call from the Raiwaqa police station, where the Accused left the house.
 - I was taken to Waimanu to the house of the cousin of the Accused during midday on 29/12/2021. I was in that house with a lady named Stela who was cleaning my wounds. At that time I told everything that happened to Stela. I got her phone and called my brother and told what happened.
 - Few minutes later my brother came with my mum and two police officers. I left with my mum and filed a complaint with Raiwaqa Police station. This was on the 29th of December 2021. I didn't complain earlier since the Accused would not let me leave the house.
 - After the complaint I was taken to the Raiwaqa medical Centre.
 - I was examined by a doctor, and I went home after that. Thereafter, I was also examined at the CWM hospital by a doctor. I had cement in my hand for two weeks.
7. In cross examination, she testified that during the 8 months of their relationship she lived in the house of the Accused with him, and the Accused would never let her return to her home. She claimed that Christmas 2021 she spent with the Accused and many others celebrated Christmas with them. In this regard, Ana the sister of Accuser's friend and Rita, Michael's girlfriend, had also been present. On that day, with the two above named girls she had planned to go nightclubbing and the Accused had given her permission, where Michael had accompanied them. There had been a curfew during these days from 11pm to 4 am and nightclubs had not been operating as normal. The Accused had called the victim after the close of the clubs and she had not answered the phone. She asserts that she didn't know that the Accused didn't want her to return home during curfew.
8. However, when they came home during the curfew, the Accused had been consuming liquor with his friends. Accused had questioned her about her whereabouts and he had been angry and expressed that he was concerned about her welfare, as she was pregnant. While repeatedly asking about her whereabouts he had punched her on her face. Accused had called her inside the house and he had

dragged her to the living room of their house. She had given a statement to the police 3 days after the incident. Referring to the police statement, she admitted that though she told the police that the Accused took the knife from a friend, the knife was beside the door next to his cousin. She also admitted that though she didn't tell the police about the Accused throwing a knife at her, he in fact threw a kitchen knife at her. She further admitted that she didn't tell the police that the Accused struck her with a steal rod. She also conceded not mentioning to the Police that the Accused strangled her.

9. Explaining the omissions in the statement she made to the police, she emphasized that she didn't mention about all what she went through that night to the police because she was in pain at that juncture, and she made a brief statement for the record. Though she didn't have any pain on her neck at that time, the Accused strangled her and threatened to kill her. She also divulged that the Accused wanted her to call her mother, which she had refused. Further, though the Accused wanted her to report this incident to the police, she had not done so because she was scared. Accused had been called to the police on 29/12/2021 for assaulting her brother and her brother had forced her to report this matter to the police. She had not reported this incident to the police on her own free will.
10. The second witness for the Prosecution was Dr. Nabati. According to him, he is a medical officer and he had been practicing medicine for 22 years. He was a general practitioner and not a specialist. He currently worked in the Ministry of Health of Fiji. Referring to **PEX1** he testified that it is the Medical Report of Catherine Smith dated 29/12/2021. He claimed that he examined this patient, where he has signed the medical report. According to him, at the time of examination the victim had not been in pain or fear but composed.
11. With regard to injuries, he mentioned A) multiple bruises on the lower back, and left upper back and left shoulder. B) Multiple abrasions on left lower forearm. He explained that bruising is trauma where the skin is intact, whereas due to damage small blood vessels are collected under the skin. Bruises are caused by some form of blunt force or trauma. By using a stick with force when it lands on the skin bruising can be caused. Bruising can be caused by a mop stick. If a bruise is not treated well at home, it will take a week to heal. A bruise will appear on the skin immediately after being hit by a blunt force.
12. He opined that an abrasion is an injury involving the rubbing on the top most layer of the skin by a blunt force, where a hit by a steel rod could cause an abrasion and a hit by the side of the blade of a cane knife can also cause an abrasion. He stated that he had also observed 2 incisions on this victim, one on the 4th finger and the other on the 5th finger on the left hand. Incision is a form of an injury where there is a tear to the underlying skin. Usually it is caused by a sharp force or sharp object. These incisions could have been caused by a cane knife. But these incisions were not deep, approximately less than 0.5cm.
13. This witness also had observed ecchymosis on both sides of both eyes of the victim and swelling on the left hand. The doctor confirmed that he had mentioned in this report that injuries observed by him are consistent with the use of blunt and sharp object with force. He claimed that when he observed this patient, these injuries would have happened about 3 to 4 days before. He informed the Court that when he examined this victim her left hand was swollen and he wanted to exclude any bone involvement, necessitating him to direct the victim for an x-ray with the use of the standard form at the health center.

14. The final witness for the Prosecution was Dr. Muniya, the radiologist who had examined the x-ray images of the left hand of the victim. According to her, she is a doctor working in the Ministry of Health since 2018 and now she is working in the CWM hospital in the Radiology Department since 2021. As a radiologist, once the x-ray is developed in a film they interpret it and on the request of the physician produce a report. A request was made for Catherine Smith on 30/12/2021 at 1.22 pm by a physician. **PEX3** is the report prepared for this patient by her.
15. In relation to the possible injuries, on the left had wrist of this patient, there had been a subtle oblique lucent line with associated cortical irregularity, which was suspicious for a fracture. In the Cortex she had noticed an irregularity suspicious of a fracture. Secondly, on the long borne of the palm of this patient an undisplaced fracture or a stress fracture had been noticed. An undisplaced fracture is a simple fracture line breaking the bones or breaking through the cortex of the bone. In her opinion, such an irregularity could have been cause by the application of some form of force on the bone. This has caused the fibers of the bone to be disrupted and causing such irregularity. Here she had observed an oblique line, some critical irregularity, so this may be due to some form of force applied to an awkwardly outstretched hand.
16. According to her, to cause a bone injury to a young person like the victim a considerable amount of force would be needed. The size, the angle, the sort of object used will also be relevant. She informed Court that bone injuries are painful, but it will depend on the person. Also bone healing is also a process. Even for this subtle injury, if immobilized, it will take 3 to 4 weeks. It will take further 3 to 4 weeks for surrounding tissues to heal. She mentioned that she had also noted a bulge dorsal radial aspect of the distal radius. This could have happened due to a fall or some kind of force being applied. It has affected the bone fibers that would cause pain. This is due to blunt force being used. As per her observations of the x-ray, this patient had no displacement or angulation, bones have not broken apart and there was no dislocation. However, considerable amount of force on this young healthy person would be needed to cause these fractures observed.

Amendment of Information filed in Court.

17. At the stage of final submissions in this matter, which is after the conclusion of the Prosecution case and the Defense case, Prosecution informs this Court that they wish to amend the charging sections in Count 2 and Count 4, where they are of the view that the Accused should have been charged under **Section 255 (a)** and not under **Section 255 (b)** of the **Crimes Act of 2009** in Count 2 and, in relation to Count 4, they are of the view that the Accused should have been charged under **Section 375 (1) (a) (i)** and not under **Section 375 (1) (a) (iv)**.
18. In support of this application, Prosecution submits the pronouncement made by the Court of Appeal of Fiji in the case of *Skipper v. Reginam* [1979] FJCA 6¹, where the Court had held that, *'the defect in the indictment was an irregularity and it was not a basic defect in the proceedings. The said defect was in relation to inserting the wrong section number on the indictment.'*

Evaluation of Prosecution Evidence

19. From the above elaborated evidence that was lead at the trial, there was no contestation in relation to the victim, Catherine Pauline Smith, sustaining injuries as per the altercations that took place

¹ Criminal Appeal 70 of 1978 (29 March 1979)

between her and her de-facto partner, **Jone Vakarise**. However, to convict the Accused as charged, the Prosecution will need to establish every element of every count charged beyond reasonable doubt. In this regard, there is no dissension between the parties in relation to the first element of all 4 counts, i.e. the identification of the Accused. In relation to the other elements that need to be established, this Court has to consider the evidence of the victim and ascertain how far her evidence as supported by independent medical evidence was sufficient to prove the charges, giving due consideration to the Defense case.

20. At the time of giving evidence at trial, Catherine Pauline Smith was 18 years of age. However, this witness was not questioned by the Prosecution of her birthday to ascertain her age exactly at the time of the incident in December 2021. In giving evidence, she appeared to be matured, sufficiently able to explain her story to Court. She was very attentive and composed in answering questions. Further, she didn't attempt to evade from questions, but promptly responded, where she admitted that she didn't complain against the Accused on her own free will, but her brother insisted that she complains. In this regard, this Court noticed the attachment the victim had to the Accused, especially she was pregnant with the child of the Accused at that time. Therefore, this Court was impressed with the demeanor and deportment of the victim and finds no reason to disbelief this witness.
21. Dr. Nabati was the medical officer who examined the victim on 29/12/2021, 4 days after the incident. He had observed multiple bruises on the lower back and left upper back and left shoulder of the victim. He emphasized that bruises are caused by blunt force trauma, and they can be caused by a mop stick. Further, he had observed multiple abrasions on left lower forearm of the victim. According to him, a hit by a steel rod or a hit by the side of the blade of a cane knife can also cause abrasions. Also, he had observed 2 incisions on this victim, one on the 4th finger and the other on the 5th finger on the left hand. He claimed that these injuries could be caused by a cane knife. In addition, this doctor had observed ecchymosis on both sides of both eyes of the victim and swelling on the left hand. Therefore, the evidence of this doctor is consistent with the claim of victim (PW1) that blunt and sharp objects were used by the Accused with force to cause injuries to her.
22. The testimony of the victim was given credence by Dr. Muniya, the radiologist, where she had noticed a subtle oblique lucent line with associated cortical irregularity, which was suspicious for a fracture on the left-hand wrist of the victim. Further, on the long bone of the palm of this patient an undisplaced fracture or a stress fracture had been noticed by this doctor. In expressing her opinion, she affirmed that considerable amount of force on this young healthy victim would be needed to cause these fractures, corroborating the evidence of use of force by the Accused on her.

Defense Case

23. In this trial, for the Defense case the Accused gave evidence under oath and was cross-examined by the Prosecution and no other witnesses were summoned for the Defense. The Defense case, though admitted the altercation in issue, endeavored to water down the complained violent conduct of the Accused, as highlighted by the victim.
24. In giving evidence in Court, Accused confirmed that on 26/12/2021 he was at home in Suva. On this day when this incident happened, he had problems with his girlfriend Catherine Smith. His cousins and their families were at home on that day, including many other people since it was Christmas. In the afternoon his girlfriend told him that she wanted to go out clubbing and he gave some money to her, but clubs were closing at 10 pm due to curfew that day. After they went clubbing, though he called Catherine several times, she did not answer the phone, where he was

worried since she was pregnant. His girlfriend came back home at curfew time around 11 pm, though he told them not to come home and stay in Nabua due to curfew.

25. Further explaining the incident that day, Accused verified that when his girlfriend came home, he was angry and he threw a punched on the face of Catherine outside the house. Then some of his relatives told him to stop and they went inside the house, where he told Catherine to come inside and she came voluntarily and he did not drag her inside the house, since she was pregnant. When she came inside the house, he punched her again because she didn't say anything when he questioned her where she was and she was drunk. When she went to the room she went to sleep and he was talking to his cousins, where his cousins informed him that the girls were not in town but in Nabua. Then he went inside the room and confronted Catherine and asker her again.
26. Accused provided further clarifications of the incident that day, where he was confident that he didn't use a knife at Catherine, especially since his family was at home. He further asserted that he did not hit her with any steel rod and if he did that he would have ended her life. He admitted that he did hit her with a mop stick on her back to wake her up, but not repetitively. He further confirmed that he did not strangle her at any time. He also confirmed that after he woke Catherine, he asked her why she lied to him, since they had not been in clubs. Then since Ana and Tausia came inside the room it all stopped and that was all what happened. He informed the Court that he apologized to Catherine and told her to call her mother and report to the police station. He was overly worried since she was pregnant. Later, he had been taken to Raiwaqa police on the allegation that he assaulted Catherine's brother. At the police station, Catherine had come there, and her brother had told her to report the matter in issue. He witnessed this because they were only 5 meters away. He repeated in stating that he did not hit Catherine with a knife.

Evaluation of the Defense Evidence

27. As per the above elaborated evidence of the Defense, the Accused had admitted to punching the victim several time, including on her face due to his anger for the victim not following his instructions and failing to respond to the inquiries made by him. Further he admits hitting the victim's back with a mop stick. However, the Accused maintains the position that he didn't assault the victim with a cane knife or a steel rod and that he didn't strangle the victim at any stage. Also he reverberated during his testimony that he was worried about the victim, since she was pregnant with his child. In realizing his mistake of assaulting the victim, he had apologized to her several times and informed her to notify her mother and complaint to the police. The Accused further emphasized that he couldn't have done so many violent things claimed by the victim, since on that night so many of his family members were present at his house celebrating Christmas.
28. In this background, when endeavoring to accept the above analyzed evidence given by **JONE VAKARISE** (Accused) in this matter for the Defense, this Court intends to apply the principle of "Divisibility of Credibility" as pronounced by the **Fiji Supreme Court** in the case of **Chandra v State [2015] FJSC 32; CAV21.2015 (10 December 2015)**. In this regard, **His Lordship Priyasath Dep** held as below:

*"In the past, the courts applied the maxim 'Falses in Uno Falses in Omnibus' - meaning "He who speaks falsely in one point will speak falsely upon all" - to a witness who gives false evidence. The present trend is instead of rejecting the totality of evidence, to act on that part of evidence which is true and reliable. This approach is known as **divisibility of credibility**.....the assessors should be informed that they are free to act on his/her evidence provided he/she had given a*

satisfactory explanation or can act on parts of evidence corroborated by independent evidence.”

29. Therefore, while accepting the evidence given by the Accused in the most part, especially in relation to his admissions of him assaulting the victim, both by his fist and by a mop stick, as corroborated by medical evidence, this Court finds the Accused claiming the non-use of a cane knife to be spurious and challenging the medical evidence lead in this Court by the Prosecution and the cogent evidence of the victim.

Conclusion and Finding of Court

a) Amendment of the Information

30. For the amendment of the information the current legal provision applicable in Fiji are clearly stipulated in **Section 214** of the **Criminal Procedure Act 2009**. In this regard, **Section 214 (2)** reads, as below:

“Where, before a trial upon information (or at any stage of such trial), it appears to the court that the information is defective, the court shall make such order for the amendment of the information as the court thinks necessary to meet the circumstances of the case, unless the required amendments cannot be made without injustice, having regard to the merits of the case.”

31. In this regard, the discretion has been given to Court by Parliament to make an order to amend the defective part of the information before or at any stage of the trial as the Court thinks necessary.

32. In considering that this application was made when the Prosecution and Defense cases were over and the matter was only pending for judgement, this Court has to determine whether this amendment could be made at this point of this trial. In this regard, **Black’s Law Dictionary (Tenth Edition) (Thomson Reuters)** defines trial, as below:

“A formal judicial examination of evidence and determination of legal claims in an adversary proceeding”

33. Since we haven’t approached the final determination of this matter when the Prosecution made the application to amend the information and since the Defense did not object to these amendments, this Court is of the view that we are still within the provided period for amendments by the statute and this Court allows the requested amendments by the Prosecution.

b) Count 1 and Count 3: ASSAULT CAUSING ACTUAL BODILY HARM contrary to Section 275 of the Crimes Act 2009

34. In this matter, the Accused had admitted punching the victim several times on her face. According to Dr. Nabati, he had observed ecchymosis on both sides of both eyes of the victim and the doctor has opined that this could have happened due to the use of a blunt object with force on the face of the victim. Therefore, these injuries are consonant with the Accused punching the victim on her face with his fist. In the light of this analysis, this Court finds that all the required elements for count 1 of **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 275** of the **Crimes Act 2009** against the Accused have been established beyond reasonable doubt.

35. Further, Accused in giving evidence has admitted that he did hit the victim with a mop stick on her back during the cause of the altercation on 26/12/2021. In this regard, during the medical examination, Dr. Nabati had observed multiple bruises on the lower back and left upper back and left shoulder of the victim, together with multiple abrasions on left lower forearm. In noticing these injuries, Dr. Nabatih had referred the victim to the radiologist to ascertain whether there were bone fractures. According to the radiologist, Dr. Muniya, she had noticed a subtle oblique lucent line with associated cortical irregularity on the left hand of the victim, which was suspicious for a fracture. She affirmed that to cause a bone injury on a young person like the victim a considerable amount of force would be needed. As a consequence, these injuries observed by the medical professionals tally with the Accused assaulting the victim with a mop stick on her back with force and the victim trying to defend with an outstretched hand. In the light of this analysis, this Court finds that all the required elements for count 3 of **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 275** of the **Crimes Act 2009** against the Accused, in addition to Count 1, have been established beyond reasonable doubt by the evidence lead in Court.

c) Count 2: **ACTS INTENDED TO CAUSE GREIVIOUS HARM** contrary to section 255 (a) of the Crimes Act 2009

36. In this matter, in considering the testimony of the victim (PW1) and the injuries sustained by the victim and opinions expressed by the medical officers as to the cause of these injurie at trial, this Court is convinced that the first 3 elements of this Count 2 have been established by the Prosecution beyond reasonable doubt. Therefore, what this Court needs to analyze and determine from the evidence available is the establishment of the fourth element by the Prosecution, i.e. whether the Accused wounded the victim with the intent of causing grievous bodily harm to her.

37. In making this determination, I intend to take guidance from the **United Kingdom House of Lords** full-bench decision in the case of **Hyam v Director of Public Prosecutions [1974]**², where His **Lordship Viscount Dilhorne has stated**, as below:

“A man may do an act with a number of intentions. If he does it deliberately and intentionally, knowing when he does it that it is highly probable that grievous bodily harm will result, I think most people would say and be justified in saying that whatever other intentions he may have had as well, he at least intended grievous bodily harm.”

38. The above position had been endorsed in our jurisdiction in the case of **Naosara v State [2007] FJHC 71**³, where **Justice Shameem** had observed, as below:

“Although greater analysis was called for after the review of the evidence, the issue was essentially a simple one. Did the Appellant strike at Cpl. Matau with a knife causing an injury and did he intend serious harm. Anyone who uses a knife on another in an aggressive way must be assumed to intend serious harm. That is the consequence of using potentially lethal weapon.”

² [1974] 2 All ER 41

³ HAA047J.075 (2 November 2007)

39. In this Count the Accused is charged for unlawfully wounding the victim with the intent to cause grievous harm by striking her with a knife. In the testimony of the victim, she mentioned that the Accused threw a kitchen knife at her which hit her right hand. However, as per the medical evidence, the victim had not sustained cut injuries on her right hand. Further, no kitchen knife was produced as a production by the Prosecution or no further description of this kitchen knife was elicited from the victim for this Court to determine whether the Accused should have known the probability of the degree of harm that could have been caused by this kitchen knife he threw at the victim.
40. According to the victim, subsequently, the Accused had hit her twice with a cane knife which landed on her left arm causing injuries to her 4th and 5th fingers. As per Dr. Nabani, he had noticed 2 incisions on the 4th finger and on the 5th finger on the left hand of the victim, which were less than 0.5 cm deep. In relation to this incident also, no cane knife was produced as a production by the Prosecution or no further description of this cane knife and the manner the Accused used this cane knife on the victim was elicited from the victim for this Court to determine whether the Accused should have known the probability of the degree of harm that the use of this cane knife could have caused on the victim.
41. In matters of this nature, especially when there are no supporting evidence of injuries depicting grievous harm with corroborating medical evidence or when the weapon that was used with the intention of causing grievous harm is not tendered to Court as a production at trial, Prosecution should produce detailed evidence of the knife or the weapon in question without expecting the Court to presume and interpret the type of weapon used by the Accused at the very extreme, i.e. the weapon was a lethal weapon that could have caused life threatening injuries to the victim, and convict an accused for an offence entailing life imprisonment.
42. Further, in this matter, the intention of the Accused to cause grievous bodily harm to the victim is brought into further doubt by the testimony made by the Accused in Court. In this regard, the Accused contended that he was worried about the victim on that night, since she was pregnant with his child. He further informed Court that he apologized to Catherine (victim) and told her to call her mother and report the incident to the police. This position was corroborated by the victim in her evidence.
43. Therefore, this Court perceives that the fourth element of this Count 2 has not been established by the Prosecution beyond reasonable doubt. In this light all the required elements to take home a conviction for Count 2 has not been established beyond reasonable doubt by the Prosecution.
- d) Count 4: **CRIMINAL INTIMIDATION** contrary to section 375 (1) (a) (i) of the Crimes Act 2009
44. In this matter, the victim had been living with the Accused in his house as his de-facto partner. No other family members of the victim had been living with her in this house with her. Giving evidence, victim categorically mentioned that the Accused took a knife and told her that he is going to strike her with the knife 4 times that night. This testimony of the victim was not challenged by the Defense. Therefore, this Court finds that all the required elements for this Count 4 has been established by the Prosecution beyond reasonable doubt.
45. In conclusion, this Court finds the Accused guilty for Counts 1 & 3 for **ASSAULT CAUSING ACTUAL BODILY HARM** contrary to **Section 275** of the **Crimes Act 2009**. Further, this Court finds the Accused guilty

for Count 4 for **CRIMINAL INTIMIDATION** contrary to section **375 (1) (a) (i)** of the **Crimes Act 2009**. However, as analyzed above, this Court finds the Accused not guilty for Count 2 for committing **ACTS INTENDED TO CAUSE GREIVIOUS HARM** contrary to section **255 (a)** of the **Crimes Act 2009** and acquit the Accused from Count 2.

46. You have thirty (30) days to appeal to the Court of Appeal of Fiji.



A handwritten signature in black ink, appearing to read "Thushara Kumarage", is written over a horizontal dotted line.

Hon. Justice Dr. Thushara Kumarage

cc: *Office of Director of Public Prosecutions*
Office of Director, Legal Aid Commission