

**IN THE HIGH COURT OF FIJI**

**AT SUVA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 69 of 2016**

**STATE**

**V**

**SHAHISTA SHEWANI DEVI**

**Counsel** : Mr. S. Shah with Mr. Z. Zunaid for the State  
Mr. A. K. Singh for the Accused

**Dates of Trial** : 14-15 September and 18-21 September 2017

**Date of Summing Up** : 22 September 2017

### **SUMMING UP**

Madam Assessors and Gentleman Assessor,

- [1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinion. You must take all evidence into consideration, before you proceed to form your opinion. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the charge against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charge against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] The evidence is what the witnesses said from the witness box and the documents marked as prosecution exhibits.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the State Counsel or the Counsel for the accused are not evidence either. A thing suggested by Counsel, during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening addresses and



closing submissions made by both State Counsel and Counsel for the accused are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, another matter which will be of concern to you is the determination of the credibility of witnesses, basically the truthfulness and 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 correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may find Court environment stressful and distracting. Consider also the likelihood or probability of the witness's account.
- [14] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.
- [15] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.



- [16] You may also have to consider whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony or to an exhibit.
- [17] Ladies and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.
- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge against her. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence.



There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.

- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you will understand the relationship between primary fact and the inferences that could be drawn from them.
- [24] I must emphasize, it does not matter whether that evidence was given by the prosecution witnesses or by the accused. You must apply the same standards, in evaluating them.
- [25] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [26] This is because the accused is presumed to be innocent. She may be convicted only if the prosecution establishes that she is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon her to prove her innocence. It is not her task to prove her innocence.
- [27] I have said that it is the prosecution who must prove the allegation. Then what is the standard of proof or degree of proof, as expected by law?
- [28] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict, you must be sure that the prosecution has satisfied beyond reasonable doubt of every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason.
- [29] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence and the other matters of which you must be satisfied, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [30] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainants or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.

[31] Let us now look at the charges contained in the information.

[32] There were originally two charges preferred by DPP, against the accused:

**FIRST COUNT**

***Statement of Offence***

**CRIMINAL INTIMIDATION:** Contrary to Section 375 (1), (a)(i) and (iv) of the Crimes Decree, 2009.

***Particulars of Offence***

**SHAHISTA SHEWANI DEVI** on the 2<sup>nd</sup> of February, 2016 at Nasinu in the Central Division, without lawful excuse, threatened **MANDUR LATA** with a knife with intent to cause alarm to the said **MANDUR LATA**.

**SECOND COUNT**

***Statement of Offence***

**ATTEMPTED MURDER:** Contrary to Section 44 (1) and Section 237 of the Crimes Decree, 2009.

***Particulars of Offence***

**SHAHISTA SHEWANI DEVI** on the 2<sup>nd</sup> of February, 2016 at Nasinu in the Central Division, attempted to murder **DIVYAN DAKSH PRASAD**.

[33] As I explained to you during the hearing, this Court has made a Ruling that the accused has no case to answer in respect of Count 1. Therefore, the charge that is remaining against the accused is Count 2.

[34] Section 237 of the Crimes Act No. 44 of 2009 (Crimes Act) provides the definition of Murder as follows:

*"A person commits an indictable offence 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."*



[35] Section 44 of the Crimes Act deals with Attempts, which is in effect an extension of criminal responsibility. Sections 44(1) and 44(2) are particularly relevant. The two sub Sections read as follows:

*“(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.*

*“(2) for the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.”*

[36] Therefore, in order to prove the Second Count of Attempted Murder, the prosecution must establish beyond reasonable doubt that;

- (i) The Accused;
- (ii) On the specified day (in this case the 2 February 2016);
- (iii) At Nasinu, in the Central Division;
- (iv) Engaged in a conduct; and
- (v) The said conduct was an attempt to cause the death of Divyan Daksh Prasad; and
- (vi) The Accused intended to cause the death of Divyan Daksh Prasad; or the Accused was reckless as to causing the death Divyan Daksh Prasad by the conduct.

[37] The first element is concerned with the identity of the person who committed the offence. The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[38] The fourth element relates to the 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 any reasonable doubt that the conduct of the accused was deliberate and not accidental. 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 conduct is more than merely preparatory to the commission of the offence is one of fact.

[39] When dealing with the fifth element, the prosecution must establish beyond any reasonable doubt that the said conduct of the accused was an attempt to cause the death of Divyan Daksh Prasad.

- [40] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond any reasonable doubt, either, that the accused intended to cause the death of Divyan Daksh Prasad or that the accused was reckless as to causing the death of Divyan Daksh Prasad. The prosecution should prove only one of the two limbs of this element. It is not possible to have direct evidence regarding an accused's state of mind as no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, you can deduce the state of mind of the accused from the facts and circumstances you would consider as proved.
- [41] In this case the prosecution is only relying on intention. Therefore, it would not be necessary for me to explain that the accused was reckless as to causing the death of Divyan Daksh Prasad. In order for you to conclude that the accused intended to cause the death of Divyan Daksh Prasad, you should be sure that she meant to bring about his death or that she was aware that death will occur in the ordinary course of events as a result of her conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of Divyan Daksh Prasad.
- [42] If you are satisfied that the prosecution has established all the above elements beyond any reasonable doubt, then you must find the accused guilty of the Attempted Murder of Divyan Daksh Prasad.
- [43] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond any reasonable doubt, then you must find the accused not guilty of Attempted Murder.
- [44] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

### **Case for the Prosecution**

- [45] In support of their case, the prosecution led the evidence of the following witnesses:
1. Madhur Lata
  2. Manish Priyant Prasad
  3. Divyan Daksh Prasad
  4. Police Sergeant 2110 Pradip Lal
  5. Woman Detective Constable (WDC) 3483 Ana Likulagi and
  6. Detective Corporal (D/Cpl) 3541 Isikeli Rokodreu



**[46] Evidence of Madhur Lata**

- (i) The accused is her daughter in-law. The accused is married to her son Manish Priyant Prasad. Divyan Daksh Prasad is her eldest grandchild.*
- (ii) She testified that on 2 February 2016, which was a Tuesday, she had woken up in the morning. Her grandson Divyan and granddaughter Rysha had wanted breakfast. But breakfast was not ready at the time. It was around 8.00 in the morning.*
- (iii) She had then given her grandchildren tea, biscuits and butter. The accused had then woken up. Since the children were eating butter, she had asked who took out the butter. The witness had said that she had given the children butter to eat with biscuits. After that an argument had started as to why she had touched the butter.*
- (iv) The witness testified that the argument was between the accused and her son as to why she had touched/taken the butter.*
- (v) Thereafter, her son had left for work. The accused had gone to her bedroom with her children.*
- (vi) Later she had heard the accused talking on her phone with Manish. The accused had been swearing at the witness over the phone. The accused had told Manish I will do what I told you the last time.... I will kill the children and kill myself.*
- (vii) The accused had then gone back to her room and started to wake up her daughter. The accused had then started tearing a bed sheet. The witness had then gone to the room and asked the accused what she was doing. The accused had asked her to go away.*
- (viii) Thereafter, the accused held her children's hand and went outside (to the terrace). She said "let's go I am gonna hang you". The witness testified that she was trying to stop the accused from going outside, while the children were crying.*
- (ix) The accused went outside (to the terrace), stood on a chair and tied the bed sheet on the rafter. She was holding onto Divyan's hand and was pulling him towards her. Divyan was holding onto her at the time while the accused was pulling him by his hand. The witness said that she was trying to stop the accused. The accused had told her to go away and had pushed her. The witness had fallen and got up again. She had then held onto the accused and told her not to do this. The accused had told her if you don't go away I will cut you (chapak dega).*



- (x) *The witness testified that she had got afraid and run away to her landlord's house to seek help.*
- (xi) *In cross-examination it was suggested to the witness that she was the root cause of all the problems between the accused and her husband. It was also suggested that the witness was brainwashing the accused's children, in particular Divyan, and preventing them from going to their mother. It was also suggested that the witness was attempting to chase the accused away from home without the children.*
- (xii) *It was put to the witness that she had not told the Police in her statement that the accused had held onto the children's hand and gone outside, while saying "Let's go, I am going to hang you". The witness stated that she had said so to the Police.*

**[47] Evidence of Manish Priyant Prasad**

- (i) *He is the husband of the accused and a Hairdresser by occupation. They have three children – Divyan Daksh Prasad (5 years and 9 months); Rysha Reshika Devi (4 years) and Ankush Laskh Prasad (3 years).*
- (ii) *He has been residing at Lot 19, Nakasi Road for the past 5 years.*
- (iii) *He testified that he recalls the events of 2 February 2016. When he woke up that morning there was an argument regarding the butter. The argument has been between his mother and his wife. The accused had been shouting "why you touch my stuff". This was around 8.00 a.m. that day.*
- (iv) *He had asked the accused why you are fighting over the butter. The accused had said that Divyan had an asthma attack last night and that is why she had got angry.*
- (v) *His mother had been shouting at him saying "what type of a lady are you married to, who is fighting with me just because of the butter". The witness said that he had got very angry/frustrated and had gone and scolded his wife.*
- (vi) *He had then proceeded to work.*
- (vii) *While at work his mother had called him twice and wanted him to call his sister-in-law and to tell her to take the accused away. He says he finally complied and called his sister-in-law.*



- (viii) *Thereafter, the accused had called him over the phone and swore at him. The accused had said that she is tired of the problems at home and that they should separate and stay on their own. She had also said if I get angry I am going to do what I told you earlier – meaning to kill the children and kill herself.*
- (ix) *After a while he had returned home in a taxi. When he came home, the side gate was locked. He saw his children standing outside in the terrace, while his wife was in the kitchen.*

**[48] Evidence of Divyan Daksh Prasad**

- (i) *The witness is 5 years of age and the eldest child of the accused.*
- (ii) *He said in evidence that he was sleeping when his mum woke him up. She had then put a chair and was trying to hang them. He further testified that after he woke up, he was crying and his mother was tearing cloths.*
- (iii) *The witness further stated as follows: “she was trying to hang us. My grandmother saved me. Then she pushed my grandmother and said I am going to use a knife and cut you. Grandma went outside”.*
- (iv) *In cross-examination it was suggested that the witness had been brainwashed by his grandmother.*
- (v) *When asked “is it correct that your grandmother has been telling you what to tell in Court?”; the witness answered as follows “Yes. She told me that your mum woke you up and was trying to hang you.”*
- (vi) *The Defence tendered the statement made by the witness to the Police, on 2 February 2016, as **Defence Exhibit D1(a) and D1(b)**. The Defence did so to try and establish that the statement made by Divyan to the Police did not contain certain issues that he referred to in his evidence.*

**[49] Police Evidence**

- (i) *The investigations in this case were conducted by the Crimes Branch of the Nakasi Police Station.*
- (ii) *The prosecution led the evidence of Police Sergeant 2110 Pradip Lal, Woman Detective Constable (WDC) 3483 Ana Likulagi and Detective Corporal (D/Cpl) 3541 Isikeli Rokodreu, in support of their case.*
- (iii) *Detective Corporal (D/Cpl) 3541 Isikeli Rokodreu, was the investigating officer assigned for the case.*



- (iv) *The officers testified to the investigations carried out by them, the visit made to the scene of the crime and to the items recovered from the scene.*
- (v) *The Prosecution tendered in evidence as exhibits **P1(a), P1(b), P1(c) and P2**, which were the pieces of cloth (parts of a bed sheet recovered from the scene of the crime) and as **P3**, a rough sketch plan of the scene.*

**[50]** That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to her that she could give sworn evidence and call witnesses on her behalf. She could also address Court. The accused could have even remained silent. She was given these options as those were her legal rights. The accused need not prove anything as she is presumed innocent until proven guilty. The burden of proving her guilt rests entirely on the prosecution at all times. However, the accused opted to offer evidence under oath.

**[51] Evidence of the Accused – Shahista Shewani Devi**

- (i) *The accused testified that she is married to Manish Priyant Prasad. They have 3 children.*
- (ii) *At the time they got married they were staying at 8 miles, with her mother-in-law, Madhur Lata.*
- (iii) *She testified that her son Divyan was born on 13 December 2011. When Divyan was 2 weeks old, they were asked by her mother-in-law to leave the house. This was around 9.00 in the night. Her husband arranged for some money for them to go to Nadi. They had stayed in Nadi for 4 months at her eldest sister's house.*
- (iv) *On their return they stayed with her husband's cousin at Nakasi. They had moved to Lot 19 Nakasi Road in the month of July 2012. Her mother-in-law had joined them the same month.*
- (v) *She testified that two weeks prior to 2 February 2016, there was an argument between herself and her mother-in-law. The argument was regarding her son Divyan. The accused was telling her mother-in-law not to spoil Divyan. She said that her mother-in-law used to spoil her son. She used to always take him out with her where ever she went. Divyan would not be able to stay without her mother-in-law. Even if the mother-in-law went to the wash room, Divyan would stand outside the wash room. Even if her mother-in-law is out in the terrace washing clothes, Divyan would be with her. Her son wouldn't want to stay with the accused and her husband.*



- (vi) *Her mother-in-law would always bring fear in her son by saying to him "if you do this, mum will hit you".*
- (vii) *Her son used to always sleep with her mother-in-law.*
- (viii) *Even when the accused was going to visit her relatives, her mother-in-law would tell her husband not to take Divyan with her. Her husband Manish would then come and say to her not to take Divyan.*
- (ix) *To solve this problem, she had decided to tell her husband that they should move out and live in a separate flat. However, her husband had kept on postponing this request. He used to say "if we move out, his mother would not want to see his face again and even if she dies he would not be welcomed at the funeral".*
- (x) *The accused testified to the events that took place on 2 February 2016.*
- (xi) *After her husband had gone to work that day, she had received a call from her sister-in-law. This was around 10.30 in the morning. She had got to know that her husband had wanted her to leave the house but without taking the children with her. She said she was very angry.*
- (xii) *Therefore, she called her husband and swore and at him. She said she is tired of his mother creating problems at home and to come home and to sort things out. She had told him if you don't come home and solve the problem that she would hang the kids and hang herself. She testified that she said so to scare her husband.*
- (xiii) *Thereafter, she had gone inside her room and pulled the bed sheet to change it. At that time her mother-in-law came to the room and started arguing with her. She had said "now even your husband doesn't want you in the house, so you should leave". She had asked her mother-in-law to leave the room but she had not done so. She testified that she felt very angry at that time.*
- (xiv) *Therefore, to scare her mother-in-law, she had begun to tear the bed sheet. While tearing the bed sheet she went outside to the terrace. Her mother-in-law had followed her and Divyan was behind.*
- (xv) *She had climbed a chair and tied a piece of the bed sheet on the rafter. The other end of the bed sheet she hung it on the other side of the rafter. She testified that this was similar to the way in which WDC Ana had stated, in*

*her evidence, that the bed sheet had been hung on the rafter. She denies having torn the bed sheet more than once. She testified that her mother-in-law was about 4 meters away at the time, holding onto Divyan.*

*(xvi) After tying the cloth on the rafter, she had told her mother-in-law to leave her son. She said she was standing on the floor at the time. However, her mother-in-law did not let go of him. So she had walked towards her and pushed her. When she pushed her mother-in-law, she (her mother-in-law) had got up and gone outside the gate to the landlord's house.*

*(xvii) She denies that she tried to pull Divyan towards her while standing on the chair. She also denies that any time after tying the cloth on the rafter that she tried to hold Divyan's hand or touch him. The accused also denies that at no time did she have the intention to kill Divyan. She stated that she was only trying to scare her mother-in-law.*

### **Analysis**

**[52]** The above is a brief summary of the evidence led at this trial.

**[53]** As I have informed you earlier, the burden of proving each ingredient of the charge rests entire and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

**[54]** In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.

**[55]** You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witnesses is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence against the accused, beyond any reasonable doubt.

**[56]** It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability of the prosecution evidence, also when you are assessing the evidence of the accused. You must consider her evidence also for its consistency and also the probability of her version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.



[57] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and she should be found not guilty of the charge.

[58] However, I must caution you that even if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

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

- i. *If you believe the evidence of the accused, then you must find the accused not guilty of the charge;*
- ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge;*
- iii. *Even if you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Attempted Murder in Count Two has been established beyond any reasonable doubt. If so you must find the accused guilty.*

[60] Any re directions the parties may request?

[61] Counsel for the defence referred to an omission in the police statement of Madhur Lata to the effect that the witness did not mention in her statement that "the accused was standing on the chair pulling the hand of Divyan". This is explained to the Assessors.

[62] In reference to the evidence given in Court by Divyan Daksh Prasad, the State Counsel wanted me to direct the assessors to two portions of his evidence given in cross examination.

1. Question: Whatever you told in Court today is what your grandmother told you?

Answer: No

2. Question: This is what your grandmother told you?

Answer: No

[63] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[64] Your possible opinions should be as follows:

**Second Count**

Attempted Murder- Guilty or Not Guilty

[65] I thank you for your patient hearing.



Riyaz Hamza

**JUDGE**

**HIGH COURT OF FIJI**

AT SUVA

Dated this 22<sup>nd</sup> Day of September 2017



**Solicitor for the State**  
**Solicitor for the Accused**

**: Office of the Director of Public Prosecutions, Suva.**  
**: Messrs A.K. Singh Law, Nausori.**