

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 143 of 2016

STATE

V

RAKESH NARAYAN

Counsel : Ms. Kimberly Semisi for the State
Accused appears in person

Dates of Trial : 21 July and 24-28 July 2017

Date Summing Up: 31 July 2017

SUMMING UP

Madam Assessor and Gentlemen Assessors,

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

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your 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 accused are not evidence either. As you are aware, in this case, the accused opted to undertake his own defence. A thing suggested by State Counsel or accused, 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 address by learned State Counsel and closing submissions made by both State Counsel and 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. 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] Lady and Gentlemen Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense and with knowledge of the world you might like to consider in assessing whether the evidence given by the 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 charges against him. 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 offences 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. He may be convicted only if the prosecution establishes that he is guilty of the offence charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his 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 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 offences 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 offences 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 are two charges preferred by DPP, against the accused:

FIRST COUNT

Statement of offence

ATTEMPTED MURDER: Contrary to Section 44 and 237 of the Crimes Act No. 44 of 2009.

Particulars of the Offence

RAKESH NARAYAN on the 16th day of March 2016 at Nakasi, Suva, in the Central Division, attempted to cause the death of Sakindra Devi, and at the time, intended to cause her death.

SECOND COUNT

Statement of offence

ACT WITH THE INTENTION TO CAUSE GRIEVOUS HARM: Contrary to Section 255(a) of the Crimes Act No. 44 of 2009.

Particulars of the Offence

RAKESH NARAYAN on the 16th day of March 2016 at Nakasi, Suva, in the Central Division, with the intent to do some grievous harm to Rakash Roashan Deo, unlawfully wounded the said Rakash Roashan Deo with a kitchen knife.

[33] 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.*"

[34] 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."

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

- (i) the accused;
- (ii) on the specified day (in this case the 16th day of March 2016);
- (iii) at Nakasi, Suva, in the Central Division;
- (iv) engaged in a conduct; and
- (v) the said conduct was an attempt to cause the death of Sakindra Devi; and
- (vi) the accused intended to cause the death of Sakindra Devi; or
the accused was reckless as to causing the death Sakindra Devi by the conduct.

[36] 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 reasonable doubt.

[37] 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 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.

- [38] When dealing with the fifth element, the prosecution must establish beyond reasonable doubt that the said conduct of the accused was an attempt to cause the death of Sakindra Devi.
- [39] With regard to the final element which concerns the state of mind of the accused, the prosecution should prove beyond reasonable doubt, either, that the accused intended to cause the death of Sakindra Devi or that the accused was reckless as to causing the death of Sakindra Devi. 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.
- [40] In order for you to conclude that the accused intended to cause the death of Sakindra Devi, you should be sure that he meant to bring about her death or that he was aware that death will occur in the ordinary course of events 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 Sakindra Devi.
- [41] In the event you find that the accused did not have the intention to cause the death of Sakindra Devi or you are not sure whether he had that intention, you should then consider whether the accused was reckless as to causing the death of Sakindra Devi. The accused will be reckless with respect to causing the death of Sakindra Devi, if;
- a. He was aware of a substantial risk that death will occur due to his conduct; and
 - b. Having regard to the circumstances known to him, it was unjustifiable for him to take that risk.
- [42] What you have to consider with regard to this particular state of mind is whether the accused did foresee or realise that death was a probable consequence or the likely result of his conduct; and yet he decided to go ahead and engage in the conduct regardless of that consequence. The accused must foresee that death was a probable consequence or the likely result of his conduct and after realising that, if he decided to go ahead and engage in that conduct regardless of the likelihood of death resulting, then he was reckless as to causing the death of Sakindra Devi. In order to constitute the offence of Attempted Murder by recklessness, actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt.
- [43] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of the Attempted Murder of Sakindra Devi.

[44] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Attempted Murder.

[45] However, if you find that the accused had no intention to cause the death of Sakindra Devi or you find that the accused was not reckless as to causing the death Sakindra Devi by the conduct, or you have any doubt in that regard; as an alternative, you are then allowed to look at the lesser offence of 'Act with Intent to Cause Grievous Harm to Sakindra Devi', though the accused is not formally charged in the information for that offence.

[46] In terms of Section 255(a) of the Crimes Act:

"A person commits an indictable offence of Act with Intent to Cause Grievous Harm if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

(a) unlawfully wounds or does any grievous harm to any person by any means;

(b)"

[47] The term grievous harm has been defined at Section 4(1) of the Crimes Act as follows:

"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.

[48] The term harm has been defined in the same Section to read: "harm" means 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).

[49] Therefore, in order to prove that the accused committed an Act with Intent to Cause Grievous Harm, the prosecution must establish beyond reasonable doubt that;

(i) the accused;

(ii) on the specified day (in this case the 16th day of March 2016);

- (iii) at Nakasi, Suva, in the Central Division;
- (iv) intended to maim, disfigure or disable Sakindra Devi or to do some grievous harm to the said Sakindra Devi; and
- (v) unlawfully wounded or did any grievous harm to Sakindra Devi by any means.

[50] Here too, 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 reasonable doubt.

[51] The fourth element relates to the intention of the accused. The prosecution must establish beyond reasonable doubt that the accused intended to maim, disfigure or disable Sakindra Devi or to do some grievous harm to the said Sakindra Devi.

[52] The final element relates to the conduct of the accused. The prosecution must prove beyond reasonable doubt that the accused unlawfully wounded or did any grievous harm to Sakindra Devi by any means.

[53] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of Acting with Intent to Cause Grievous Harm to Sakindra Devi.

[54] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Acting with Intent to Cause Grievous Harm to Sakindra Devi.

[55] I wish to remind you once again that you need to go in this direction *ONLY* if you find that the prosecution has failed to establish any of elements constituting the offence of Attempted Murder beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Attempted Murder beyond reasonable doubt, then you must find the accused guilty of the Attempted Murder of Sakindra Devi.

[56] In order to prove the Second Count of Act with Intent to Cause Grievous Harm to Rakash Roashan Deo, the prosecution must establish beyond reasonable doubt that;

- (i) the accused;
- (ii) on the specified day (In this case the 16th day of March 2016);
- (iii) at Nakasi, Suva, in the Central Division;
- (iv) intended to maim, disfigure or disable Rakash Roashan Deo or to do some grievous harm to the said Rakash Roashan Deo; and

- (v) unlawfully wounded or did any grievous harm to Rakash Roashan Deo by any means.

[57] In respect of the Second Count; 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 reasonable doubt.

[58] The fourth element relates to the intention of the accused. The prosecution must establish beyond reasonable doubt that the accused intended to maim, disfigure or disable Rakash Roashan Deo or to do some grievous harm to the said Rakash Roashan Deo.

[59] The final element relates to the conduct of the accused. The prosecution must prove beyond reasonable doubt that the accused unlawfully wounded or did any grievous harm to Rakash Roashan Deo by any means.

[60] If you are satisfied that the prosecution has established all the above elements beyond reasonable doubt, then you must find the accused guilty of Acting with Intent to Cause Grievous Harm to Rakash Roashan Deo.

[61] If you find that the prosecution has failed to establish any of these elements in relation to the charge beyond reasonable doubt, then you must find the accused not guilty of Acting with Intent to Cause Grievous Harm to Rakash Roashan Deo.

[62] In this case, the accused has stated that he acted in self-defence against Rakash Roashan Deo. Section 42(1) of the Crimes Act sets out: *"A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence."*

[63] In terms of Section 42(2) of the Crimes Act:

"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."

- [64] The position of the Prosecution is that there was no necessity for the accused to act in self-defence, because there was no threat emanating from the complainant Rakash Roashan Deo at the given time.
- [65] This is matter for you to decide based on all the facts and circumstances of the case. It is for you to decide whether the conduct of the accused, in the given circumstances was necessary and a reasonable response to the circumstances as perceived by him.
- [66] 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

[67] In support of their case, the prosecution led the evidence of the following witnesses:

1. Sakindra Devi
2. Rakash Roashan Deo
3. Payal Preetika Narayan
4. Rakesh Rishi Kapoor
5. Jason Kean Autar
6. Joash Herald Prakash
7. Dr. Amit Sewak
8. Dr. Osea Volavola
9. DC 4791 Jone Tupua
10. Detective Sergeant 1785 Sakaraia Tuberi
11. DC 4509 Mesulame Narawa
12. DC 4344 Amani Bosenawai

[68] Evidence of Sakindra Devi

- (i) *She testified that she is 43 years of age. Currently she is married to Rakash Roashan Deo. She had married the said Rakash Roashan Deo*

three days prior to this incident. Previously she had been married to the accused. She had two daughters with the accused, namely Shayal Sonika Narayan (24 years) and Payal Preetika Narayan (21 years).

- (ii) For the past three years she has been working at the Shop N Save Restaurant located at Nakasi.
- (iii) On 16 of March 2016, she was at work at the said Shop N Save Restaurant. Around 8.40 p.m, her brother, Rakesh Rishi Kapoor, called her and informed that the accused had gone to her brother's residence and told him that he is going to kill Sakindra Devi. Her brother had told her not to get out of the restaurant.
- (iv) However, her husband Rakash Roashan Deo had come to pick her up from work. On seeing him near the door of the restaurant, she came out.
- (v) She and her husband were walking to get into their car. They were just about to get into the car when the accused had pushed her husband Rakash Roashan Deo from behind.
- (vi) She said that this incident took place in the parking lot in front of the Shop N Save restaurant.
- (vii) Thereafter, the accused had held her hand and pulled her away from the car. When her husband got up and tried to come to her assistance, the accused had stabbed him on his forehead. She testified that when her husband tried to hold her, the accused stabbed her husband. Her husband had fallen down.
- (viii) The accused had then started stabbing her with a knife. He had stabbed her on her head, upper left hand/elbow and on the left side of the neck.
- (ix) She had felt blood all over her body. She doesn't clearly remember what happened thereafter. She had been taken to the hospital. She remembers only that when she opened her eyes, she was in the Intensive Care Unit (ICU) of the CWM Hospital.
- (x) The witness testified that her jaw had shifted to one side permanently and when it is cold she still feels a lot of pain in the place where the injuries were caused.

[69] Evidence of Rakash Roashan Deo

- (i) He is a construction supervisor by occupation.*
- (ii) He had got married to Sakindra Devi on 13 March 2016, three days before the alleged incident.*
- (iii) On 16 March 2016, he was at home after work. He had been drinking grog with nephew. He had received a call from Rakesh Rishi (his brother in-law) around 8.40 in the evening. Rakesh Rishi had told him to lock his door and lock the gates and stay inside. He had realised that something was wrong. He had immediately called Sakindra Devi and told her to stay inside the restaurant where she works.*
- (iv) The witness had then left with his nephew to pick his wife up from the Shop N Save Restaurant. His nephew had parked the vehicle in the parking lot right in front of the Shop N Save Restaurant.*
- (v) The witness had then gone inside to bring Sakindra Devi. As they came out of the restaurant and were about to open the car door, he had been pushed by the accused. When he was pushed, the witness was thrown to a side but did not fall down. The accused had then grabbed Sakindra Devi's hand and pulled her around the car.*
- (vi) Rakash Roashan Deo had followed in an attempt to assist Sakindra Devi. The accused had told him to back off. When the witness tried to grab Sakindra, the accused had punched him on his jaw. However, the witness had attempted again to get Sakindra Devi. The accused had then punched him again and stabbed him above his left eye (the witness clearly demonstrated in Court how exactly that incident took place). The witness had then fallen down.*
- (vii) When he got up, he had noticed a cut over the eye and blood oozing out. He had seen Sakindra and the accused a short distance away. The accused had been grabbing Sakindra by her T-shirt/work uniform. Sakindra had tried to save herself by putting up her arm and the bag she was carrying. He then saw the accused stabbing Sakindra twice on her neck. The accused had then taken off in his taxi.*
- (viii) Sakindra came running to him. She was bleeding profusely (blood was gushing out). At that time a taxi came by, and they got into the taxi and went to the CWM Hospital. On the way to the hospital he had applied pressure by putting his hand on her neck so as to stop the bleeding. Sakindra had lost consciousness on the way to the hospital.*

[70] Evidence of Payal Preetika Narayan

- (i) She is the younger daughter of Sakindra Devi and the accused.*
- (ii) On 16 March 2016, she had been staying at her maternal grandparents place in Narere.*
- (iii) Around 8.30 in the evening of 16 March 2016, one of her cousin brothers had come and told her that somebody was calling her outside. She had then gone outside, to see who it was. Her father, the accused was sitting in his taxi inside their compound.*
- (iv) The witness had then gone to talk with the accused. She testifies that he was drunk and his eyes were all red. The accused held her hand and asked about her mother. The accused had said "I heard that your mother got married". He said he is going to kill my mother and the whole family. The witness had not said anything in reply as she was frightened.*
- (v) The accused had then left the compound in his taxi.*
- (vi) She testified that her uncle, Rakesh Rishi was standing nearby at the time.*
- (vii) About 5 or 10 minutes later, one of their neighbours had said that someone had stabbed her mum at Shop N Save, Nakasi.*

[71] Evidence of Rakesh Rishi Kapoor

- (i) He is a brother of Sakindra Devi. He is a taxi proprietor by occupation.*
- (ii) The witness confirms the testimony of Payal Preetika Narayan.*
- (iii) He had heard a car coming into their compound, and then someone calling out for Payal. He too had gone outside to see who it was. He had seen the accused sitting in his taxi inside their compound. The accused had been talking to Payal.*
- (iv) The witness testified that he came near the taxi to ask what was happening. The accused had growled at him and said in the Hindi language "what do you want"?*
- (v) The witness testified that from his reaction, he knew that the accused was fully drunk.*

- (vi) *The accused had told Payal that he was first going to chop her mother and then he will come back and chop all the family members.*
- (vii) *The accused had then driven away from the compound.*

[72] Evidence of Jason Kean Autar

- (i) *Around 8.40 in the evening of 16 March 2016, he had gone with his mother to buy some things from the Shop N Save Supermarket in Nakasi. He had remained in his vehicle in the car park, while his mother went into the supermarket.*
- (ii) *It was around 9.00p.m., when he heard someone or something hit his car. When he turned towards the passenger side/left side of the car, he saw a man pulling a woman towards direction of the supermarket. While he was pulling her, she was pulling herself back and refusing to go.*
- (iii) *He had then seen the man attempt to stab her in the mid-section of her body. Then he had seen the man stab the woman in the neck with a kitchen knife (the witness clearly demonstrated how the incident took place).*
- (iv) *After the stabbing, the man had left the woman and ran towards the supermarket. That is where he had parked his taxi. He got into the taxi, reversed and took off.*
- (v) *The witness stated that he could recognise the accused by his face. He said by his intoxicated face. The witness testified that his eyes were red and he was not acting normal.*

[73] Evidence of Joash Herald Prakash

- (i) *He is a taxi driver by profession and a friend of the accused. He has been driving taxis for the past 17-18 years. He is also referred to by the nick name Joja. He had known the accused for the past 10 years or more.*
- (ii) *Around 5.55 in the evening of 15 March 2016, he had called the accused to have a chat with him. He had mentioned to the accused that his wife had got married. The witness had told the accused that it is high time now for the accused to look after the welfare of his two daughters. The accused had promised him that he will take the responsibilities of his daughters and that he will be ^agood father from now onwards.*

[74] Evidence of Dr. Amit Sewak

- (i) He is a medical officer based at the Emergency Department of the CWM Hospital.*
- (ii) He is the medical officer who had attended to Sakindra Devi on her admission to CWM Hospital.*
- (iii) The Medical Examination Form of Sakindra Devi was tendered to Court as Prosecution Exhibit P1.*
- (iv) The witness testified that he remembers this case very well because it is one of the most critical cases he had dealt with. Sakindra Devi had been very unstable and critically ill at the time of her admission and she required urgent resuscitation. She had bled quite a lot at the scene of the incident.*
- (v) He testified as to the injuries suffered by Sakindra Devi. Emergency surgery had to be carried out on her. The said surgery had been carried out by Doctor Samuela Nanovu.*

[75] Evidence of Dr. Osea Volavola

- (i) He too is a medical officer attached to the Emergency Department of the CWM Hospital.*
- (ii) He testified to the medical examination conducted on Rakash Roashan Dea by Doctor Korina and the suturing done on him by Doctor Hiku Taukave.*
- (iii) The Medical Examination Form of Rakash Roashan Dea was tendered to Court as Prosecution Exhibit P2.*

[76] Evidence of DC 4791 Jone Tupua

- (i) He was the caution interviewing officer in this case. He is currently attached to the Criminal Investigation Department of the Nakasi Police Station. He testified that he had been instructed by the Divisional Crimes Officer to caution interview the accused. The caution interview had commenced at 11.00 a.m. on 17 March 2016. The interview had concluded at 10.30 a.m. on 18 March 2016. The caution interview had been conducted inside the Crime Officer's room at the Nakasi Police*

Station. The witnessing officer was Detective Sergeant 1785 Sakaraia Tuberi.

- (ii) The caution interview was conducted in the English language. The accused had signed to acknowledge that he wished to be interviewed in the English language. At the commencement of the caution interview the accused had been informed that the interview will be conducted by the use of a personal computer and that he will be given the chance to read throughout the interview. The accused had not indicated any objection to this mode of recording of the caution interview.
- (iii) DC Tupua further testified that the accused was afforded all his rights in terms of the Constitution and did not have any complaints to make at the time. He was given the opportunity to consult a lawyer of his choice or the Legal Aid Commission or for any other person to be present whilst he was being interviewed. However, the accused had informed that he will liaise with the Legal Aid in Court. The accused had signed to acknowledge that he did not want to have any lawyer or any other person present during the interview.
- (iv) The original caution interview statement made in the English language was marked as Prosecution Exhibit P3.
- (v) Copies of the Station Diary of the Nakasi Police Station for the period 16 March 2016 to 18 March 2016 has been tendered to Court. The Station Diary of the Nakasi Police Station (showing entries for the period 5 March 2016 - 4 April 2016) was produced in Court as Prosecution Exhibit P5.

[77] Evidence of Detective Sergeant 1785 Sakaraia Tuberi

- (i) He is currently attached to the Criminal Investigation Department of the Nakasi Police Station. He is the Crimes Officer at the Nakasi Police Station.
- (ii) He testified that he was the witnessing officer during the recording of the accused's caution interview. He corroborated the evidence given by DC 4791 Jane Tupua in all material particulars.

[78] Evidence of DC 4509 Mesulame Narawa

- (i) He is currently attached to the Criminal Investigation Department of the Nausori Police Station. He testified that he is part of the task force team based at the Nausori Police Station. He had received instructions from the Division Crimes Officer, ASP Lemaki Nawalu, to be the charging officer in this case.*
- (ii) Accordingly, on 18 March 2016, he together with DC 4344 Amani Bosenawai, had proceeded to the Nakasi Police Station to record the formal charge statement of the accused.*
- (iii) The charge statement had commenced at 11.35 a.m. on 18 March 2016. The charge statement had been concluded at 11.55 a.m. on 18 March 2016. The charge had been conducted inside the Crime Officer's room at the Nakasi Police Station. DC 4344 Amani Bosenawai was present as the witnessing officer during the recording of the charge statement.*
- (iv) The charge statement was conducted in the English language. The accused had signed to acknowledge that he wished to be charged in the English language. At the commencement of the charge statement the accused had been informed that the charge will be conducted by the use of a personal computer and that he will be given a copy to read after it has been printed. The accused had not indicated any objection to this mode of recording of the charge statement.*
- (v) DC Mesulame further testified that the accused was afforded all his rights in terms of the Constitution and did not have any complaints to make at the time. He was given the opportunity to consult a legal practitioner of his own choice or a legal practitioner under the legal aid scheme. The accused was also given the right to communicate with or be visited by any other person prior to the recording of the charge statement. However, the accused had informed that he will consult with the Legal Aid later.*
- (vi) The original charge statement made in the English language was marked as Prosecution Exhibit P6.*

[79] Evidence of DC 4344 Amani Bosenawai

- (i) He is currently attached to the Criminal Investigation Department of the Nausori Police Station. He testified that he was the witnessing officer during the recording of the accused's charge statement.*
- (ii) He corroborated the evidence given by DC 4509 Mesulame in all material particulars.*

[80] 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 him that he could give sworn evidence and call witnesses on his behalf. He could also address Court. The accused could have even remained silent. He was given these options as those were his legal rights. The accused need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times. However, the accused opted to offer evidence under oath.

[81] Evidence of the Accused – Rakesh Narayan

- (i) At the time of the alleged incident, he was staying at No. 9 Gari Place, Nadawa. This is the house of Mr Rambir Singh who is his cousin brother.*
- (ii) After work on 16 March 2016, he had come home with 6 bottles of beer. He and Rambir's son Jasvir Singh had been drinking the beer.*
- (iii) He testified that around 7.45p.m., his friend Jojo had called him and informed him that his wife had got married to a guy from overseas and told him that he has to take care of his two daughters. He had promised Jojo, that he would take care of his two daughters.*
- (iv) He had been shocked on hearing that his wife had got married and he was worried as to where his daughters will be staying.*
- (v) Then he had got into his taxi and come to Narere where his daughters were staying. They were staying with their grandparents.*
- (vi) He then testified as to how he had met Payal his daughter and spoken to her.*
- (vii) He had then come to the Shop N Save Restaurant at Nakasi. He had parked in front of the Shop N Save Supermarket. He had wanted to talk to Sakindra Devi when she gets out of the work place.*

- (viii) *When Sakindra Devi came out, he went to her and held onto her hand and pulled her. There was another person with her who intervened. He had come in the middle. The witness had then pushed that man away.*
- (ix) *The man had come a second time towards him. The witness had told him that it is not your problem, you back off.*
- (x) *When on the third time he came to me he had left Sakindra's hand and punched him on the face. Then the man had fallen down.*
- (xi) *The witness testifies that he saw the man trying to take something out of his pocket. It was a knife. Then with his right leg the witness had stomped on the man's chest. When the man completely fell on the ground, he had used his left leg and stepped on the man's right hand. The man had then released the knife.*
- (xii) *The witness had then taken the same knife from him and stabbed the man in self defence. He had stabbed him just above the left side of the eye brow.*
- (xiii) *After stabbing the man, when he lifted his hand, Sakindra Devi had held on to his right hand. The other man was also getting up at the time. The witness had then put more power to free his hand from Sakindra Devi. He had jerked his hand one or two times. Suddenly, Sakindra Devi had released his hand. Since he was pulling his hand to get it free, the knife had gone straight inside Sakindra's chin area. He says suddenly the knife went there, he didn't know.*
- (xiv) *He saw that Sakindra was hurt. He left her and went away to where his car was parked. There was garden opposite his car. He had thrown the knife there. He had then got into the car and driven away to his mother's place.*
- (xv) *He testifies that he had no intention to cause harm to Sakindra Devi. The witness testified that although he had consumed beer prior to the incident, he was not in a state of intoxication and he was aware as to what he was doing.*
- (xvi) *The witness explained as to how he had been arrested and brought to the Nakasi Police Station, around 10.20 p.m. on 16 March 2016.*

- (xvii) *He testified that during the recording of the caution interview statement and the charge statement it was DC John Tupua, DC Mesulame and DC Amani who were present. They had threatened him and assaulted him. He stated that he had been badly threatened and assaulted by the officers. As a result of the said assault he had received injuries on his body.*
- (xviii) *He denies having been given any of his rights in terms of the Constitution. He had requested for Legal Aid assistance during the recording of his caution interview statement. However, DC Tupua had informed that Legal Aid is busy.*
- (xix) *The witness stated that he was not asked as to which language he wanted the caution interview to be conducted. He objects to the taking of the caution interview statement and the charge statement on a personal laptop, as he does not have any knowledge of computers. He had not been given the chance to read the caution interview statement or the charge statement.*
- (xx) *The witness further testified that he did not sign the caution interview statement or the charge statement. He denies that the signatures appearing on the said statements are his.*

Analysis

- [82] The above is a brief summary of the evidence led at this trial.
- [83] Firstly, 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 charges, 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 offences against the accused, beyond reasonable doubt.
- [84] 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 his evidence also for its consistency and also the probability of his 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. However, I must caution you that 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.

- [85] In this case the prosecution is also relying on the admissions made by the accused in his caution interview statement and charge statement.
- [86] Any admission made by an accused in his caution statement and charge statement is admissible and sufficient evidence to prove his guilt to a charge. However, there are some applicable principles of law in relation to this evidence. The prosecution must prove that the caution interview statement and charge statement were made by the accused voluntarily. The prosecution must establish this fact beyond a reasonable doubt.
- [87] Whether the accused gave his statements voluntarily and whether the statements set out a set of events in relation to the offences on which you can rely and accept, is a matter for you. Of course if you believe that the interview is false, that it was made up either by the police, you may think that you cannot put any weight on it. However, if you believe that the accused gave his caution interview statement and charge statement without force or fabrication, you may think that they set out a version of the evidence which will assist you in deciding on the guilt or otherwise of the accused. However, the question of what weight you can put on the admissions made in the said statements is a matter of fact for you to decide.
- [88] The prosecution says that the caution interview statement and charge statement were not obtained under pressure or inducement and that the accused told the police the truth in it. You have heard from the police officers that there were no threats or force or any form of intimidation of any kind by anyone on the accused and his statement was freely and voluntarily given and that they correctly recorded what the accused said. I reiterate that what weight you put on the accused's statement to the police is entirely a matter for you.
- [89] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you accept the accused's version, then you must find the accused not guilty of the charges;*
 - ii. *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;*
 - iii. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charges;*

- iv. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charges of Attempted Murder in Count One and Act with Intent to Cause Grievous Harm in Count Two have been established beyond reasonable doubt. If so you must find the accused guilty.*
- v. *As an alternative to Attempted Murder in Count One, you may consider whether the accused is guilty or not guilty of the offence of Act with Intent to Cause Grievous Harm.*

[90] Any re directions the parties may request?

[91] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions separately 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.

[92] Your possible opinions should be as follows:

First Count

Attempted Murder- Guilty or Not Guilty


OR in the alternative

Act with Intent to Cause Grievous Harm- Guilty or Not Guilty

Second Count

Act with Intent to Cause Grievous Harm- Guilty or Not Guilty

[93] I thank you for your patient hearing.


Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



AT SUVA
Dated this 31st Day of July 2017

Solicitor for the State
Solicitor for the Accused

: Office of the Director of Public Prosecutions, Suva.
: Accused appears in person.