

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case No.: HAC 128 of 2017

STATE

V

VIMLESH GOUNDAR

Counsel	:	Mr. A. Singh for the State.
	:	Mr. I. Khan and Mr. T. Kalou for the Accused.
Dates of Hearing	:	03, 04, 05, 06 November, 2020
Closing Speeches	:	10 November, 2020
Date of Summing Up	:	10 November, 2020
Date of Judgment	:	12 November, 2020

JUDGMENT

1. The Director of Public Prosecutions charged the accused by filing the following information:

Statement of Offence

ATTEMPTED MURDER: contrary to section 44 (1) and 237 of the Crimes Act of 2009.

Particulars of Offence

VIMLESH GOUNDAR, on the 9th of June, 2017 at Sigatoka in the Western Division, attempted to murder **NILESH GOUNDAR**.

2. The three assessors returned with a mixed opinion by a majority of two is to one that the accused is guilty of attempted murder as charged.
3. I adjourned to consider my judgment. I direct myself in accordance with my summing up and the evidence adduced at trial.
4. The prosecution called seven witnesses and the defence called the accused.
5. The complainant Nilesh Goundar informed the court that he is the eldest of four siblings. The accused Vimlesh Goundar is his younger brother who is also known as Sonu his relationship with his brother was good until Vimlesh got married. Their relationship thereafter was not good for about 2 or 3 months before the incident in that the accused had taken out a domestic violence restraining order (DVRO) against him.
6. On 8th June, 2017 after work at about 5pm the complainant went to Malaqereqere the residence of his employer whose son was getting married. The complainant and the accused were both at the wedding.
7. The complainant left the wedding at about 11.30pm according to him the accused had left about 5 minutes earlier. The complainant was dropped at the Uluisila junction from there he walked to his house. He was wearing his work uniform, shorts and blue Nike slip-on flip-flops.

8. As the complainant was walking, before he could reach his house he heard a sound so he turned, at this time he was hit with an iron rod on his neck which was painful. The complainant was carrying some parcels in his hand which he threw on the ground. When he was hit with the iron rod his assailant was about 1 meter away from him.
9. The complainant punched the person in front of him who fell he could not see the face of this person clearly at this time he was hit from the back with a knife. When the complainant fell, the knife was struck on his head several times.
10. The complainant received injuries on his head at this time he was taken to the Sigatoka Hospital and then transferred to the Lautoka Hospital where he was admitted for 8 days.
11. The second witness Archie Watkins stated that he is the neighbour of the accused and he knows the accused from about 2 to 3 years ago. The accused is also known as Sonam the witness recalled on 8th June, 2017 he was at home after about 12 midnight he went to sleep he woke up when he heard shouting so he came outside his house. When he was standing outside a young man ran past him from about 1 meter away.
12. The witness was able to recognize this person due to moonlight and lighting from his house. When he saw this person, he knew who that person was according to the witness this person was Vimlesh the accused.
13. The reason why he was able to recognize the accused was due to the light from his house and the moonlight and also the accused had gone from close by. He had seen the accused for about 4 to 5 seconds when he had gone past him. The witness recalled the accused was wearing

a long sleeve blue t-shirt, brown ³/₄ shorts and he was also holding something in his right hand. The witness was able to see this because his vision was not obstructed. The witness identified the accused in court.

14. The third witness Mohammed Yakub informed the court that he is a neighbour of the complainant Nilesh and his younger brother Sonu. He knows them from the last 8 to 10 years.
15. On 9th June, 2017 a police officer had shown to the witness a pompom. He told the officer he used to see Sonu wear this type of pompom on several occasions. The pompom was mixed coloured although he was not one hundred per cent sure whether the accused had worn the same pompom.
16. The fourth witness PC 4949 Pita Davuiqalita on 9th June, 2017 had attended to the crime scene at Cuvu, Sigatoka. He took photographs of the crime scene and prepared a booklet of photographs.
17. At the crime scene the witness had uplifted a mixed coloured pompom, one right sided black flip flop and he was also able to recognize a pair of blue, Nike slip-on. The witness had given all the exhibits to the investigating officer.
18. The fifth witness Misidomo Baseisei was the interviewing officer, on 11th June, 2017 he had caution interviewed the accused at the crime office of the Sigatoka Police Station.
19. The witnessing officer was Cpl. Tobia Matai who was present throughout the interview. The interview was conducted in the English

language at the request of the accused which was conducted for two days.

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

was wearing on the night of the incident. The police team were able to recover a black t-shirt and ¾ pants. When questioned by the witness the accused had informed the witness that both clothes were his.

26. The sixth witness Adriu Nadredre informed the court that he is the investigating officer in this case. A report was received of a stabbing at Uluisila, Sigatoka on one Nilesh Goundar.
27. The witness and the police team went to the Sigatoka Hospital and then proceeded to Uluisila during the investigation one of the witness Archie Watkins had identified the accused as the suspect in this case. When a check was conducted at the house of the accused he was missing.
28. As a result a house to house search was conducted on 11th June, 2017 the witness was instructed to see the complainant at the Lautoka Hospital and record his statement. However, upon doctor's advice this could not be done.
29. Upon receipt of information that the accused was at Jinnu road, Lautoka the witness went with Cpl. Tobia to the house of the accused's uncle. The accused was arrested by Cpl. Tobia and escorted to the police vehicle according to the witness, Cpl. Tobia had informed the accused the reasons of his arrest and his rights. From Jinnu road the team proceeded to the Sigatoka Police Station.
30. The team arrived at the Sigatoka Police Station at 15.30 hours where the accused was handed over to the crime officer. On 12th June the witness went for the reconstruction of the scene the accused did not make any complaints to him.

31. The accused was not assaulted, threatened or forced when he was brought from Lautoka to Sigatoka or during the reconstruction of the scene. After the interview and the charging process were complete, the accused was taken to the hospital for medical examination. The doctor did not find anything wrong with the accused. To date the accused has not made any formal complaint against him or against any other police officer for assaulting him.
32. The final witness Dr. Suliana Makarita Saverio on 9th June, 2017 had examined a patient by the name of Nilesh Goundar at about 1.20am.
33. According to the doctor, the patient was semi-conscious and under the influence of alcohol because she could smell alcohol in his breath. The patient had to be carried into the Emergency Department.
34. The witness explained the totality of the injuries could cause fractures to the skull which could have been life threatening. The witness had suspected a fractured skull, so the patient was transferred to Lautoka Hospital for specialist care.
35. In the professional opinion of the witness the incision wounds were consistent with injuries due to a sharp object or a sharp surface. The pattern and distribution of the wounds cannot rule out the possibility of stabbing or stab wounds. The witness agreed a knife could have caused these injuries.
36. On the other hand the accused informed the court that on 11th June, 2017 he was at his uncle's house in Lautoka where he was arrested by police officer Matai Tobia when he came out of the house this police officer grabbed his collar from the back and took him to the police vehicle.

37. There were four officers in total he was not explained his reasons for the arrest or given his right to consult a lawyer or his right to remain silent and the consequences of not remaining silent.
38. The accused told the court about how he was assaulted, forced, threatened and treated in breach of his Constitutional rights to confess.
39. The answers in his caution interview are not correct. The accused was also told that he will be released and nothing will happen to him. All the answers in the caution interview are a made up story, he was told by the police officers if he does not admit the allegation he will be assaulted even more.
40. The accused explained he left the wedding at 10.30pm when he was walking on the road to his house he saw two strangers jumping out of the drain. It was dark he was not able to see their clothes but he saw them holding something in their hands. He got frightened and nervous so he ran back towards the road got into a vehicle and went to Olosara to his mother's place.
41. From his mother's house he went to work, in the morning he came to know his brother had been assaulted. He took leave from work and went to the Lautoka Hospital to visit his brother, at the hospital he asked his brother who had assaulted him he was told by his brother that he did not know or see.
42. The allegation against him is false, he has no reason to assault his brother they were staying together peacefully, his admissions in the caution interview are also false, he has taken oath in court and whatever he is telling the court is the truth.

43. It is not in dispute that the complainant was assaulted by two persons during the early hours of 9th June, 2017 one person had an iron rod and the other a knife. There is no evidence before the court that the accused used the knife on the complainant. The doctor who had examined the complainant at the Sigatoka Hospital made reference to serious injuries.
44. Before going any further it is important to consider whether it was the accused or someone else who had assaulted the complainant that early morning. In this regard it is important to look at the evidence of Archie Watkins whether he had correctly recognised the accused.
45. I have carefully considered the evidence of Archie Watkins and I accept his evidence of recognition of the accused as believable. I have no doubt in my mind that this witness told the truth in court, he was able to recognise the accused although it was a fleeting glance of about 4 to 5 seconds and that the accused had run past him. This witness knew the accused from about 2 to 3 years and they were also work mates.
46. Although this witness did not correctly tell the court about the colour of the t-shirt worn by the accused this does not affect his evidence he had, however, correctly mentioned the colour of the $\frac{3}{4}$ shorts worn by the accused that early morning.
47. The weakness in the circumstances that led to the recognition of the accused is not that significant to cast doubt on the correctness of his recognition. I am convinced from the evidence of this witness that he did not make any mistake in recognizing the accused. This witness was referred to his police statement which was written by a police officer and in my view the inconsistencies between the evidence of this witness and his police statement was not significant to adversely affect

his credibility. Passage of time can also result in inconsistencies and omissions this witness was an independent witness who was forthright and also not evasive during cross examination.

48. Archie maintained throughout his evidence that he had told the police officer writing his police statement that he had seen the younger brother of the complainant that day. Despite vigorous cross examination this witness was steadfast in his recognition of the accused.

49. The Court of Appeal in *Nadim v State* [2015] FJCA 130; AAU0080.2011 (2 October 2015) made the following pertinent observations in respect of inconsistencies and omissions between evidence in court and previous statement as follows:

[13] Generally speaking, I see no reason as to why similar principles of law and guidelines should not be adopted in respect of omissions as well. Because, be they inconsistencies or omissions both go to the credibility of the witnesses (see R. v O'Neill [1969] Crim. L. R. 260). But, the weight to be attached to any inconsistency or omission depends on the facts and circumstances of each case. No hard and fast rule could be laid down in that regard. The broad guideline is that discrepancies which do not go to the root of the matter and shake the basic version of the witnesses cannot be annexed with undue importance (see Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280)

50. In my judgment the inconsistencies that came out during the cross examination of this witness did not shake the basic version of this witness evidence. Furthermore, during his caution interview the accused gave an honest account of what he had done to the complainant and I accept that he told the truth. I do not accept that the accused was assaulted or forced by the police to confess.


51. Furthermore, the supposed failure by the interviewing officer to tell the accused the consequences of not remaining silent did not in my view lead to any prejudice or unfairness or injustice to the accused. A perusal of the caution interview does show that the cautionary words were put to the accused and he had understood the same.
52. In any event the accused had met his lawyer before the second day's interview and if there were any complaints by the accused I am sure his lawyer would have immediately taken it up with the police officers and also would have informed the Magistrate's Court when the accused was first produced. I reject the accused assertion that he had informed his lawyer about the treatment he had received in custody but she had forgotten to tell the court is unworthy of any belief.
53. In respect of scene reconstruction I accept that at the end of day one the accused was informed about the scene reconstruction so he was fully aware of this and I also accept that he was cautioned before the reconstruction of scene began.
54. I do not accept that there was any obligation upon the interviewing police officer to tell the accused that he was not obliged to go for the reconstruction of the scene for which he had been cautioned. Moreover, the accused prior to the second day's interview had received legal advice hence it can be inferred that he knew what he was expecting and in my view he was prepared for the same.
55. The issues raised by the accused against the police officers are an afterthought if he was indeed assaulted in the manner he described to the court I am sure he would have sustained visible serious injuries. I also reject the accused evidence that the doctor did not examine him properly.

56. In this respect the accused gave two versions, in one breath he said he did not tell the doctor anything because a police officer was present during the medical examination and in another instance he said the doctor did not examine him properly dispute telling the doctor he was assaulted by the police officers. In my view none of the above versions are reliable and credible.
57. I am satisfied beyond reasonable doubt that the accused was present at the scene of the crime during the early hours of 9th June, 2017 and he was the one who had assaulted the complainant with an iron rod.
58. I also accept the opinion of the doctor that serious injuries were suffered by the complainant. The evidence of the complainant does shed some light in respect of this issue, according to the complainant the person with iron rod had struck him on his neck and then there was a fist fight between the two until he was hit by the person with a knife.
59. The caution interview also reinforces the fact that it was the accused who had assaulted the complainant with an iron rod, since the iron rod was thrown away by the accused there is no evidence before the court that the iron rod had a sharp edge.
60. Taking into consideration the evidence adduced by the prosecution and the defence and on the totality of the evidence I am not satisfied beyond reasonable doubt that the accused had intended to kill the complainant with the iron rod, however, this does not mean that the accused did not assault the complainant with the iron rod.

61. I accept the complainant's evidence when he said the first strike on him was by the iron rod leads me to the inescapable conclusion that the accused had assaulted the complainant with an iron rod with the intention to cause grievous harm.
62. I accept the evidence of all the prosecution witnesses as honest and reliable. The complainant had mentioned there were two people one with an iron rod and the other with the knife. I accept it was the accused who struck the complainant with the iron rod and thereafter the person with a knife had struck the complainant several times. The medical report also supports this contention.
63. On the other hand the accused did not tell the complete truth in court it is beyond comprehension that when he saw two strangers that night, he could not see what these two persons were wearing but he did see that they were holding something in their hand is implausible. In my view this story was made up to shift focus away from the accused.
64. I reject the accused evidence that he confessed because of the assault by police officers. If he was assaulted in the manner he had described to the court he would have most certainly received very serious visible injuries. I also reject the accused assertion that the doctor did not examine him properly this is again another afterthought. The accused demeanour was not consistent with his honesty.
65. The defence has not been able to create a reasonable doubt in respect of the lesser offence of act intended to cause grievous harm. This court is satisfied beyond reasonable doubt that the accused on 9th June, 2017 assaulted the complainant with an iron rod with the intention to cause grievous harm.

66. In view of the above, I overturn the majority opinion of the assessors that the accused is guilty of the offence of attempted murder. The accused is found not guilty and he is acquitted of the charge of attempted murder.
67. I also overturn the minority opinion of one assessor that the accused is not guilty of the lesser offence and find the accused guilty of the lesser offence of act intended to cause grievous harm and I convict him accordingly.
68. This is the judgment of the court.




Sunil Sharma
Judge

At Lautoka
12 November, 2020

Solicitors

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Messrs Iqbal Khan & Associates for the Accused.