IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 309 of 2020

BETWEEN : STATE

AND : DINESH CHAND

Counsel : Ms S Tivau for the State
Ms Kean and Ms Manueli for the Accused

Dates of Hearing : 26 & 27 October 2020
Closing speeches : 28 October 2020
Date of Summing up: 30 October 2020
Date of Judgment : 03 November 2020

JUDGMENT

1. The Accused is indicted for one count of attempted murder contrary to section 44 and section 237 of the Crimes Act. The particulars of offence are as follows;

> "Dinesh Chand on 22nd August 2019 at Suva in the Central Division attempted to murder Shakunthala Devi."

2. The Prosecution called two witnesses at the trial. After the closure of the Prosecution case the Accused decided to give evidence and no other witnesses were called for the Defence.

3. In my summing up the assessors were given directions on evaluating evidence, degree of proof, circumstantial evidence and elements of the offence, among other things. After a short deliberation the assessors returned with a unanimous opinion that the Accused is guilty of attempted murder.

4. At this point, before I pronounce the reasons for my judgment, I wish to note that after the closing submissions the State requested that directions may be given to the assessors for lesser offence of act with intent to cause grievous harm. The State indicated this when the counsel were asked whether they have any suggestions for the summing up. Since this Court has, in a previous occasion, decided that there is no provision to convict a person for a lesser offence in the Crimes Act except in instances stated in section 162 of the Criminal Procedure Act, the parties were requested to file submissions on this issue. Accordingly, both the State and the Legal Aid counsel filed their submissions.

5. Having considered the submissions I have declined to give a direction for act with intent to cause grievous harm and informed the parties that I will give my reasons in the judgment. Therefore, before I analyze the evidence in this case, I will state the reasons for declining to give a direction for act with intent to cause grievous harm.

6. Division 6 of the present Criminal Procedure Act deals with convictions for offences other than those charged. Upon perusal of those provisions it appears that there are three kinds of offences recognized in the provisions in Division 6, namely minor offences, lesser offences and alternative offences.

7. On the other hand, in the repealed Criminal Procedure Code no such categorization of offences was seen and section 169 provided for convicting persons of offences other than those charged. However, the said provision referred only to minor offences. Section 169 of the repealed Criminal Procedure Code stipulated this provision as follows;

> Section 169
>
> "1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the minor offence although he was not charged with it.
>
> 2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

8. It is also interesting to note that nowhere in the repealed Criminal Procedure Code (CPC) the phrases "lesser offence" and "alternative offence" were found. However, the courts have interchangeably used the phrases, minor offences and lesser offences, before the enactment of the present Criminal procedure Act: **State v Sorpapelu [2005] FJHC 454; HAM0068D.2005S (27 October 2005); Bulewa v State [2002] FJCA 15; AAU0036U.2002S (15 November 2002).**

9. The corresponding section to section 169 of the CPC is section 160 of the Criminal Procedure Act, 2009 and it reads as follows;

> 1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of the <u>minor offence</u> although he or she was not charged with it. [emphasis added]

2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, the person may be convicted of the minor offence although he or she was not charged with it.

10. Further the present Criminal Procedure Act introduces a new provision for specific instances where persons can be convicted for lesser or alternative offences when the court is satisfied that the evidence adduced in the trial supports only for a lessor or alternative offence.

"Conviction for lesser or alternative offences

162(1) Where a person is charged with an offence but the Court is satisfied that the evidence adduced in the trial supports a conviction only for a lesser or alternative offence, the Court may record a conviction made after due process for-

(a) the lesser offence for infanticide where the charge has been for murder of a child under the age of 12 months.

(b) the lesser or alternative offence of killing an unborn child where the charge has been for murder, manslaughter, infanticide or for unlawful abortion in relation to the unborn child.

(c) the alternative offence of unlawful abortion where the charge has been killing an unborn child.

(d) the lesser offence of concealment of birth where the charge has been for murder, infanticide or with killing an unborn child.

(e) the lesser offence or careless or dangerous driving where the charge has been for manslaughter.

(f) any sexual offence where the charge has been for rape.

(g) the alternative offence of carnal knowledge where the charge has been for incest.

(h) any other applicable sexual offence where the charge has been for defilement of a person under 16 years, by however such an offence may be termed.

(i) any other applicable property related offence where the charge has been burglary or any other property related offence including-

(i) the alternative charge has been receiving where the charge has been for theft.

(ii) the alternative offence of embezzlement where the charge has been for theft.

(iii) the alternative offence for theft where the charge has been for embezzlement.

(iv) the alternative offence by false pretenses' (however such an offence may be termed) where the charge has been for theft.

(v) an alternative offence of theft where the charge has been for an offence of obtaining by false presences (however such an offence may be termed).

(vi) an alternative offence of assault with intent to rob where the charge has been for robbery).

(2) The court may record convictions for certain offences in accordance with subsection (1) notwithstanding that no charge has been had for the lesser or alternative offence in accordance with the provisions of the Act".

11. While the present Criminal Procedure Act refers to three kinds of offences as minor offences, lesser offences and alternative offences, it provides a definition for minor offences in section 2 of the Act. But the repealed CPC does not provide a definition for minor offences and therefore the Courts had resorted to the said provision to convict persons for offences other than those charged without any limitation.

12. As opposed to the repealed CPC, the Criminal Procedure Act provides a definitive interpretation to "minor offences" in section 2 of the Act as follows;

> "Minor offence means any offence prescribed in the minor Offences Act 1971."

13. It should also be noted that except in section 160 of the Criminal Procedure Act it does not refer to minor offences anywhere else in the Act. Therefore, it is very clear that the legislature has specifically targeted section 160 when it gave a definition to minor offences. Although it creates an impasse for the Courts to convict persons for other offences under the Crimes Act than those charged, it is not clear as to why the legislature defined minor offences and distinguished offences as minor offences, lesser offences and alternative offences.

14. In any event this court is bound by the wording of the legislation and how the section is articulated, regardless of the futility of the provision. As a result of the definition given to minor offences in the Criminal Procedure Act, I am of the view that any other offence in the Crimes Act cannot be considered, apart from the offences in the Minor Offences Act for the purposes of section 160.

15. At this juncture it would be pertinent to quote N S Bindra on Interpretation of Statutes [12th ed. at p. 205] where it is stated that;

> "It is not competent for the court to proceed on the assumption that the legislature knows not what it says, or that it has made a mistake. We cannot assume a mistake in an Act of Parliament. If we think so, we should render many Acts uncertain by putting different constructions on them according to our individual conjectures. The draftsman of the Act may have made a mistake. If so, the remedy is for the legislature to amend it. The legislature is presumed not to have made a mistake even if there is some defect in the language used by the legislature, it is not

for the court to add to or amend the language or by construction make up deficiencies which are left in the Act."

16. Therefore, it is crystal clear that the most prudent solution would be for the legislature to make necessary amendments, if the legislature intends meaningful usage of section 160 similar to the corresponding provision in the repealed CPC. Until such time, I am of the view that except in the instances enunciated in section 162, a person cannot be convicted for any other offence in the Crimes Act, other than those charged within the ambit of section 160 of the Criminal Procedure Act. The only provision to convict for a lesser offence or an alternative offence would be section 162 of the Criminal Procedure Act as far as the offences under the Crimes Act are concerned.

17. Accordingly, the suggestion for a direction to be given with regard to act with intent to cause grievous harm was rejected.

18. I will now consider the evidence adduced in this case, having directed myself in accordance with the summing up.

19. The complainant gave evidence that on 22 August 2019 the Accused tried to strangle her neck with a scarf when she was sleeping. She also said that before she woke up, she felt someone was trying to choke her by covering her face. According to the complainant's evidence, later that night she had felt pain on her neck whilst she was sleeping. When she woke up, she had seen the Accused in front of her with a rod in his hand.

20. The Prosecution adduced evidence to prove that at the time of the offence there had been no one else inside the house apart from the complainant, Accused and their son. The complainant's evidence revealed that the Accused had been angry for some reason. It was also elicited that there had been a domestic violence restraining order already in place against the Accused.

21. However, the position of the Accused was that he only pulled out the rod from the complainant's neck and he denied that he stabbed her neck with the rod.

22. The medical evidence established that the complainant received life-threatening injuries. Further the medical witness stated that major blood vessels supply blood to the brain where she sustained the injury. Also, his evidence revealed that there were bruises on the complainant's face which are compatible with choking.

23. I have observed the manner in which the complainant gave evidence. She looked stressed and intimidated. However, she clearly gave evidence in respect of the offence and her credibility could not be impeached by the Defence. I have no hesitation in considering her as a reliable and credible witness.

24. On the other hand, I am of the view that the evidence given by the Accused was not reliable and probable. He stated that although the complainant was having extra marital affairs, he was not angry about it. But he said that there was a DVRO against him. He also stated that he does not know the reason as to why there was a domestic violence restraining order against him. The Accused denied that he tried to strangle the complainant. Instead he said that he was asked by a doctor to cover the complainant's mouth to stop her from screaming when he took her to get treatments for a toenail, prior to the incident. He also said that after pulling the rod out of the complainant's neck he did not go to the hospital with her as he was wearing shorts.

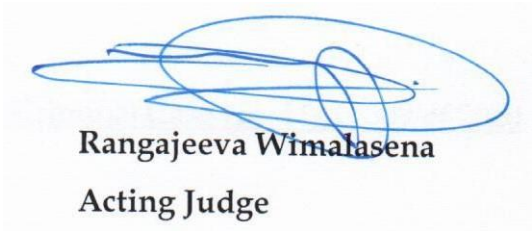
25. I am not satisfied that the Accused's evidence is reliable and truthful. Therefore, I am not inclined to accept his evidence. On the other hand, I accept the evidence given by the complainant.

26. Although the Prosecution did not adduce direct evidence that the Accused stabbed the complainant's neck with a rod, the assessors have drawn reasonable inferences with the evidence adduced by the Prosecution that it was the Accused and no one else who committed the offence.

27. It is my considered opinion that the Prosecution proved all the elements of the offence beyond reasonable doubt.

28. I have no reason to disagree with the unanimous opinion of the assessors.

29. Accordingly, I find the Accused guilty to attempted murder and convict him as charged.



At Suva
3 November 2020

Solicitors
Office of the Director of Public Prosecutions for the State
Office of the Legal Aid Commission for the Accused