

**IN THE HIGH COURT OF FIJI AT SUVA**

**CASE NO: HAC. 377 of 2019**  
[CRIMINAL JURISDICTION]

**STATE**

**V**

**APISAI TAMANIKOROLEVU**

**Counsel** : Ms. M. Konrote for the State  
Ms. L. Manulevu and Ms. R. Nabainivalu for the Accused

**Hearing on** : 22 - 25 February 2021

**Judgment on** : 26 February 2021

**JUDGMENT**

*The charges*

1. The Director of Public Prosecutions has charged the accused for the following offences as per the amended Information dated 14/10/20;

**FIRST COUNT**

*Statement of Offence*

**Acts Intended To Cause [Grievous] Harm:** contrary to Section 255 (a) of the Crimes Act, 2009.

*Particulars of Offence*

**APISAI TAMANIKOROLEVU** on the 19<sup>th</sup> day of November 2019 at Nasinu, in the Central Division, with intent to do grievous harm to LOSENA LEDUA unlawfully wounded her by stabbing her on the head and neck with a knife.

**SECOND COUNT**

*Statement of Offence*

**Assault Causing Actual Bodily Harm:** contrary to Section 275 of the Crimes Act, 2009.

*Particulars of Offence*

**APISAI TAMANIKOROLEVU** on the 19<sup>th</sup> day of November 2019 at Nasinu, in the Central Division, assaulted **JIESA QALOBULA** by stabbing him on the left shoulder with a knife causing him actual bodily harm.

**THIRD COUNT**

*Statement of Offence*

**Serious Assault:** contrary to Section 277 (b) of the Crimes Act, 2009.

*Particulars of Offence*

**APISAI TAMANIKOROLEVU** on the 19<sup>th</sup> day of November 2019 at Nasinu, in the Central Division, assaulted **Police Constable 6064 VONOKULA TORIBAU** in the due execution of his duty.

2. When the accused's plea was taken on 05/11/20 in relation to the aforementioned charges, he pleaded guilty to the second count and not guilty to the first and the third counts. Then when the charges were read over to him at the commencement of the trial, the accused pleaded guilty to counts two and three and pleaded not guilty to count one. However, during the trial it became obvious from the line of questioning when the prosecution witnesses were cross-examined, that especially the fault elements of the second and third counts are not admitted by the accused. Being inquired on this, the defence counsel informed on 24/02/21 that the accused wishes to retract his plea of guilty on counts two and three. Consequently, a not guilty plea was recorded on the said counts.

***The burden and the standard of proof***

3. Section 57 of the Crimes Act 2009 provides thus;
  - (1) *The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.*
  - (2) *The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.*

4. Therefore, the prosecution has the a legal burden not only of proving every element of each offence, the prosecution also has a legal burden of disproving any matter in relation to which the accused had discharged an evidential burden of proof imposed on the accused.
  
5. In this case the accused had given evidence raising self defence in relation to count three. Self defence is provided as a general defence under section 42 of the Crimes Act as a means of denying criminal responsibility and in terms of section 59(2) of the Crimes Act the accused bears an evidential burden in that regard. The said section 59(2) reads thus;  

*“A defendant who wishes to deny criminal responsibility by relying on a provision of this Decree (other than section 28) bears an evidential burden in relation to that matter.”*
  
6. In Blackstone’s Criminal Practice 2007, the legal burden is described in the following terms;  

*“The legal burden is sometimes referred to as the persuasive burden or the risk of non-persuasion, phrases which indicate that a party bearing the legal burden on a fact in issue will lose on that issue if the burden is not discharged to the required standard of proof.”*
  
7. Section 58 of the Crimes Act provides that a legal burden on the prosecution must be discharged beyond reasonable doubt. In terms of section 59(7) of the Crimes Act, an evidential burden in relation to a matter means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

***Admitted facts***

8. The following facts are admitted in this case;
  1. *Apisai Tamanikorolevu is 28 years of Age.*
  2. *Losena Ledua is in a defacto relationship with the Apisai Tamanikorolevu.*
  3. *On the 9<sup>th</sup> of November, 2019 Apisai Tamanikorolevu was at Tuirara Police Post.*

4. *On the 9<sup>th</sup> of November 2019, Losena Ledua received a phone call informing her to come to the Tuirara Police Post as her partner Apisai Tamanikorolevu was at the post.*
5. *Losena Ledua accompanied by her brother Qalo Bula went to the Tuirara Police Post after receiving the phone call.*
6. *At the Police Post Losena Ledua met the Apisai Tamanikorolevu.*
7. *Apisai Tamanikorolevu asked Losena Ledua to repay him money which he had given her the previous week and Losena Ledua told him she could not pay him right now.*
8. *Apisai Tamanikorolevu was arrested and taken to Nasinu Police Station.*

### ***Cases for the prosecution and the defence***

9. The prosecution case is that the accused stabbed the first prosecution witness ("PW1") who was his de facto wife at that time on her head and the neck with a kitchen knife with the intention to cause grievous harm while they were at the Tuirara Police Post. Further, according to the prosecution, the accused also stabbed the second prosecution witness ("PW2"), who was a police officer who was on due execution of his duty and also the third prosecution witness ("PW3"), the brother of PW1, when both PW2 and PW3 tried to restrain the accused to prevent him from stabbing PW1.
10. The defence case is that the accused was assaulted by the police officer PW2 and then jointly by PW2 and PW3 at the police post, and PW1, PW2 and PW3 got injured while he was trying to free himself from PW2 and PW3. He claims that he did not get hold of the knife consciously and also that he only came to know that PW1 had got injured after he managed to free himself from PW2 and PW3.
11. Thus, the accused had raised self defence in relation to count three and he disputes the voluntariness of his conduct in relation to counts one and two. In terms of section 16 of the Crimes Act, conduct could constitute a physical element of an offence only if that conduct was voluntary.

### *Summary of the evidence adduced*

12. The prosecution called four witnesses and the accused gave evidence in his defence.
13. According to PW1, when she told the accused that she will repay the money later, the accused got angry and ran into the kitchen and got hold of a kitchen knife [PE1]. She then ran into the senior officer's office and the accused came running towards her and stabbed her on her head. She said that she was at that time standing and was facing the accused. Then the police officer [PW2] and the brother [PW3] arrived and they tried to arrest the accused. Initially she said that, while PW3 was trying to get hold of the knife, the accused struck her neck. Later she said that she did not know who was holding the knife when the knife struck her neck on the right side and PW3 was in between her and the accused. She said that after she was struck on the neck, PW3 took her outside. Two broken pieces of a blade of a knife was tendered through PW1 marked as PE1 as the knife the accused used.
14. During cross-examination, PW1 agreed with the suggestion that the accused told PW2 that as a police officer PW2 was supposed to protect everyone equally and not just listen to ladies. However, the next question was whether she would agree that after the accused said that to PW2, PW2 stood up and punched the accused on the forehead and her answer was; *"I can't recall"*. She admitted that she told PW2 and PW3 to stop assaulting the accused. She agreed with the suggestion that PW2 and PW3 got injured when the accused was trying to free himself. She also agreed with the suggestion that the accused realized that she had got injured after he managed to free himself and then the accused dropped the knife, came to her, knelt down next to her and held her. Again when it was suggested that the accused was handcuffed by a police officer in civilian clothing who came there while the accused was holding her and after the accused stretched his hands towards that police officer, her answer was; *"I can't recall"*. When it was suggested to her that the accused did not intend to cause her grievous harm on

09/11/19, she said *"I don't know"*. Her answer to the suggestion that she sustained the injuries as a result of the accused trying to free himself from PW2 and PW3 was, *"only the injuries that I received on my neck"*. She agreed with the suggestion that she sustained the injuries on 09/11/19 by accident.

15. During re-examination she said that the reason she agreed to the suggestion on her sustaining the injuries by accident was because the accused came to know that she was injured after everything had happened. She again said that the accused stood in front of her and stabbed her on the head.
  
16. According to PW2 (the police officer who was on duty at Tuirara Police Post), there was a conversation between the accused and PW1, and during this conversation the accused started raising his voice and he told the accused to calm down. After continuing with the conversation with PW1, the accused raised his voice again. Then the accused told him *"you bunch of police officers, always take the women's side"* and ran to the kitchen, came back with the kitchen knife and ran after PW1 who ran inside the senior officer's office saying *"I will kill you"*. PW2 said that the accused started stabbing PW1 who was crouching beside the cabinet, on her back 2 - 3 times near the neck. He said that then he grabbed the accused from the back and the accused swung the knife over the accused's shoulder where the knife struck his left shoulder blade. But in the uniform he was wearing at that time which was tendered as PE2, the cut he pointed out was in the left sleeve. PW2 said that the kitchen knife the accused was holding broke after it got caught between the cabinet drawers when the accused stabbed him for the second time. He said that this was the same cabinet PW1 was 'crouching under'. Thereafter PW3 came and pulled the accused and those two (PW3 and the accused) started fighting. Then he took PW1 outside towards the back entrance. When he came back he saw the accused running towards the front entrance and he managed to get the accused back into the police post with the help of people standing outside. He then handcuffed the accused. According to him PW3 was seated inside the police post behind the accused and towards the

main entrance when the conversation between the accused and PW1 take place. The uniform PW2 was wearing at the material time was tendered marked as PE2, and PW2's medical report which was an agreed document was tendered marked as PE3, a rough sketch plan of the Tuirara Police Post PW2 drew during his evidence was tendered as PE4.

17. During cross-examination he admitted stating in his police statement that; *"I then with my power pulled Apisai out but he turned and stabbed me on my left shoulder then ran out of the main door. With the help of Losena's brother we managed to apprehend Apisai again inside the post."*
18. PW3 (PW1's brother) said in his evidence that after he went to the police post with PW1, he was seated outside the police post near the main entrance. He came inside the police post when he heard someone running. He saw PW2 standing up and running towards the room and he ran to help PW2. He said the accused ran and stabbed PW1 with a knife and PW2 then held on to the accused. He also heard the accused saying *"come, I will kill you"* when this was happening and the accused said this to PW1. He said that the accused stabbed PW1 twice; that was on the top of the head and on the neck and this took place inside the senior officer's office as shown in PE4. PW3 again said that when the accused stabbed PW1, PW2 was holding the accused and was trying to move the accused away from PW1. Then he ran inside to help PW2 restrain the accused. When he reached the door, the accused had just stabbed PW1. He said that, when he tried to hold the accused to restrain the accused, the accused stabbed him. When the accused tried to stab him as he was trying to grab the accused from the waist, he dodged towards his left and then the accused stabbed on his right shoulder. He then managed to lay the accused down inside the same office, near the door. He said that PW2 was also with him at that time and they were trying to restrain the accused as the accused wanted to run to PW1 who was at that time seated near the main entrance of the police post. Thereafter the neighbours came into the police post to assist in arresting the accused. He again said that PW1 left the office

where she was stabbed, when the accused was already down. Then the medical report of PW3 which was an admitted document was tendered as PE5. According to that report an injury had been observed on the left shoulder and not the right shoulder. Then he said that the accused stabbed him on the left shoulder.

19. During cross examination he agreed with the suggestion that PW1 was injured that morning by accident. During re-examination he said that he thought that PW1 was injured by accident because the accused was heavily intoxicated at that time. Thereafter when PW3 was asked by court as to whether PW2 was holding the accused when he saw the knife struck PW1's head, he said "*yes, he was holding onto the accused*".
20. The next witness ("PW4") was the doctor who had medically examined PW1 on 09/11/19. She tendered the medical report of PW1 as PE6. She said she had observed an injury on PW1's scalp and on the left neck. The injury on the scalp was a penetrating wound with clear borders. In her opinion this injury would have been caused by a knife which would have smooth borders. She said that the wound was not that deep and it would have been about 1mm in depth and 1.5mm to 2mm in length. The second injury on the neck was a superficial laceration which was about 3mm in length and it was not bleeding that much. In her opinion that would have been caused by the blade of a knife.
21. During cross examination PW4 admitted that the dimensions of the injuries are not stated in the medical report. When she was asked whether she would agree that the injury PW1 would have received will be more serious than what was noted by her if a person runs up and then stabs, her answer was; "*it could have been*".
22. During re-examination she said that she had written down the dimensions of the injuries in the register that is maintained at the health centre. She said that if the patient had stopped [the accused] using one of her hands then the impact the



knife made on the flesh would have been slowed. Thereafter when questioned by the court, PW4 said that if there was no resistance [by the patient] the injury would have been more than 1mm and therefore the injury she observed on PW1's head is not consistent with an injury caused by a stabbing without any resistance.

*The elements of the offences*

23. The elements of the offence of *act intended to cause grievous harm* contrary to Section 255 (a) of the Crimes Act, 2009 ("Crimes Act") as follows;
  - a) The accused unlawfully wounded or did any grievous harm to any person;  
and
  - b) With the intention of doing some grievous harm to any person.
  
24. In relation to the first element which consists of a result of a conduct, pursuant to section 23(2) of the Crimes Act, 'recklessness' is the fault element. Thus the said fault element could be satisfied by proving intention, knowledge or recklessness in terms of section 21(4) of the Crimes Act.
  
25. The elements of the offence of *assault causing actual bodily harm* contrary to Section 275 of the Crimes Act as follows;
  - a) The accused used unlawful force on another person; and
  - b) The said conduct occasioned actual bodily harm to that other person;
  
26. Section 275 of the Crimes Act does not specify a fault element for the above two physical elements. In relation to the first element which consists only of conduct, it should be proved that the accused intended to use unlawful force (i.e. assault is the use of unlawful force). This is in terms of section 23(1) of the Crimes Act.
  
27. In relation to the physical element, 'occasioning actual bodily harm' which is an element that consists of a result of a conduct, pursuant to section 23(2) of the Crimes Act, 'recklessness' is the fault element. Thus the said fault element could

be satisfied by proving intention, knowledge or recklessness in terms of section 21(4) of the Crimes Act.

28. The elements of the offence of *serious assault* contrary to Section 277 (b) of the Crimes Act as far as the third count in this case is as follows;
  - a) The accused used unlawful force on another person; and
  - b) That person is a police officer who at the time was on due execution of his duty as a police officer.
29. Section 277 does not specify a fault element for the above physical elements. Intention is the fault element for the first physical element as stated above.
30. In relation to the second physical element which consists of circumstances, recklessness is the fault element which can be satisfied by proving intention, knowledge or recklessness. This is pursuant to sections 21(4) and 23(2) of the Crimes Act.

### ***Discussion***

31. There were marked inconsistencies between the evidence of PW1, PW2 and PW3 in relation to their accounts as to what took place at the police post on the morning of 09/11/19.
32. It was noted that PW1 was not forthright when it came to answering certain questions. Her answer that she cannot recall when it was suggested to her about the accused being assaulted by PW2 (before the accused got hold of the knife) draws suspicion as to whether those answers were true because the incident in question had taken place just little more than a year ago, in November 2019. There was no justification for PW1 to forget whether the accused was so assaulted or not. This answer given by PW1 suggests the possibility of the accused being assaulted by PW2 on 09/11/19 prior to the scuffle involving the kitchen knife as claimed by the accused.

33. The suspicion on this possible assault by PW2 is compounded given the inconsistencies in the accounts given by the first three witnesses.
34. According to PW1, the accused got angry and ran to the kitchen when she said that she cannot repay him the money and she did not mention in her evidence in chief about a long conversation she had with the accused prior to this moment as stated by PW2. According to PW2, there was a conversation between PW1 and the accused where he had to tell the accused to calm down and the accused told him (PW2) that *"you bunch of police officers, you always take the women's side"*, just before the accused ran into the kitchen. This evidence of PW2 raises the question as to the actual reason the accused got angry and made him run to the kitchen. Was he angry at PW1's conduct or PW2's conduct? Moreover, I do not find in the evidence adduced answers to questions such as; why did the accused run into the kitchen?, was he familiar with that police post for him to know that it was a kitchen and that he would find a knife there?
35. According to PW1, the accused was just asking for the money when he came running after her to the office. She did not hear the accused saying 'I will kill you'. But according to PW2, the accused ran after PW1 saying *"I will kill you"*. PW3 said that the accused told PW1 *"come, I will kill you"* and according to his evidence this was said while the accused was stabbing PW1 being held by PW2.

*First count*

36. With regard to the accused stabbing PW1 on her head, PW1 was clear in her evidence that the accused stood in front of her and stabbed her on top of her head while she was standing. However, according to PW2, she was 'crouching' when the accused stabbed her. Moreover, PW2 who approached the accused first, had seen the accused stabbing PW1 at the back near her neck and he does not mention about PW1 being stabbed on the head. According to PW3, PW2 was holding the accused when he saw the knife struck PW1's head. If this was the case, then it is possible for PW3 not to see the accused stabbing PW1 on the head. Then, the

evidence of PW2 and PW3 cuts across the evidence of PW1 with regard to the manner she was stabbed on the head and how she sustained the injury on the head.

37. What is significant next in relation to the injury on PW1's head was the medical evidence. According to PW4, the doctor who examined PW1 on the same day, 09/11/19, the injury PW1 had on her head was a cut injury 1mm in depth and 1.5mm to 2mm in length. These dimensions were not recorded in the medical report PE6. The doctor recalled from her memory saying that she had recorded this in the relevant register maintained at the hospital. Therefore this evidence pertaining to the dimensions of the relevant injury was unreliable and unsatisfactory. However, irrespective of the actual dimensions of the injury noted on PW1's head, PW4 made it clear that the said injury was not a very deep injury and that it was not consistent with an injury that would be inflicted when someone stab the head of another with force, without any resistance. From the evidence of the doctor it was obvious that if the accused stabbed PW1 on the head in the manner described by PW1, she (PW3) would expect an injury that is deeper than what was observed on PW1's head by her. Conversely, medical evidence is consistent with PW3's evidence that PW2 was holding the accused when he saw the accused stab PW1, as it would be rational to expect such restraint also to lower the impact of the strike.
38. I am also mindful of PW1's admission during cross examination that she told PW2 and PW3 to stop assaulting the accused. This evidence is not consistent with the evidence of PW2 and PW3 that they were restraining the accused to prevent the accused from stabbing PW1.
39. In view of all the evidence and especially the medical evidence, I find that the injury sustained by PW1 on her head is consistent with an injury that could be sustained during an incident in line with the version of the accused and not the version of PW1. I have a strong doubt on whether the conduct of causing the

injury on PW1's head by the accused was a voluntary conduct or not. Especially given PW1's admission during cross-examination that the accused realized that she was injured only after the incident, I am not satisfied beyond reasonable doubt that the said conduct of the accused was a product of the will of the accused.

40. With regard to the injury on the neck, firstly, PW1 clearly said that she sustained that injury by accident and she did not even see who was holding the knife when it struck her neck. Secondly, when she gave evidence she said that she sustained the injury on the right side of her neck whereas the medical evidence revealed that the relevant second injury was noted on the left side of her neck. Thus she was not sure of the exact circumstances under which this second injury was sustained. According to PW4, this injury was a superficial laceration which was 3mm in length. These circumstances again suggested that it was more probable for PW1 to have received this second injury in line with the accused's version.
41. Accordingly, I am not satisfied beyond reasonable doubt that the conduct of the accused that led to PW1's neck being injured was a product of the will of the accused.
42. In the circumstances I find that the prosecution has failed to prove the first count beyond reasonable doubt.

*Second count*

43. PW3 initially explained in detail how the accused managed to stab him on his right shoulder. But after he realized upon perusing the medical report (PE5) that the injury had in fact been inflicted on the left shoulder and not the right, he owed an explanation as to why he initially said that he was stabbed on the right shoulder and also about his description of the manner he said he sustain that

injury on the right shoulder. His previous description as to how he sustained the injury on his right shoulder does not apply to the injury on the left shoulder.

44. Given the above fact and the previous discussion on the evidence, I am not satisfied beyond reasonable doubt that the conduct of the accused that caused the injury on PW1's left shoulder was a product of the will of the accused. In the circumstances I find that the prosecution has failed to prove the second count beyond reasonable doubt.

*Third count*

45. According to the medical report of PW2, only a superficial abrasion of 0.5mm was noted close to the left armpit of PW2. Moreover, the cut in the uniform is noted on the left sleeve and on the face of it, does not correspond to the injury noted on the body near the armpit. On the other hand, given the length of the cut that is noted on the said sleeve, in my assessment, the knife should have penetrated to a considerable extent and a more serious injury should have been caused.
46. Given the above observation and the previous discussion on the evidence, I find PW2's version to be unreliable. Moreover, on the strength of the evidence I am not satisfied beyond reasonable doubt that PW2 was in due execution of his duty, when he was injured as a result of the accused's conduct. In the circumstances I find that the prosecution has failed to prove the third count as charged beyond reasonable doubt.
47. However, even if the accused was assaulted by PW2, getting hold of a knife inside a police post to defend him against PW2 who was a police officer, cannot be regarded as a reasonable response on the part of the accused in relation to the threat he ought to have perceived given the circumstances of this case. I am


unable to accept the accused's claim that he was not conscious of the fact that he was holding a knife at the material time.

48. Therefore, even though I have found that the prosecution has failed to establish the offence of serious assault as charged on the third count, I find that the accused had caused actual bodily harm to PW2 and that he was reckless in causing that actual bodily harm to PW2. Accordingly the lesser offence of assault causing actual bodily harm contrary to section 275 of the Crimes Act has been established beyond reasonable doubt based on the evidence presented in this case. Self-induced intoxication is not relevant in relation to this offence.

### *Conclusion*

49. In view of the foregoing, I find the accused not guilty of the first and second counts.
50. I find the accused not guilty of the third count as charged, but I find him guilty of the offence of assault causing actual bodily harm contrary to section 275 of the Crimes Act.
51. Thus, the accused is hereby acquitted of the first, second and the third counts as charged. The accused is hereby convicted of the offence of assault causing actual bodily harm contrary to section 275 of the Crimes Act.



  
Vinsent S. Perera  
JUDGE

### **Solicitors;**

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