

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 296 of 2019

STATE

V

TIMOCI KURUKUVUI

Counsel : Ms. Bhavna Kantharia for the State
Ms. Lavinia David for the Accused

Dates of Trial : 18-21 January 2021

Summing Up : 22 January 2021

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

[2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. 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 assure you, that 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] In this case, the evidence is what the witnesses said from the witness box, the document tendered as a prosecution exhibit and any admissions made by the parties by way of admitted facts.
- [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 Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-

examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel 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, a matter which will be of primary 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 sometimes find Court environment stressful and distracting.
- [14] You may also have to consider the likelihood or probability of the witness's account. That is 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 perceive (or 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.
- [15] In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [16] A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which

would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.

- [17] This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission 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 or fragile 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 or omission, you may conclude that the underlying reliability of the account is unaffected.
- [18] However, if there is no acceptable explanation for the inconsistency or omission 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 and omissions 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 or omission 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 or omission and consider him or her to be reliable as a witness.
- [19] Madam Assessors and Gentleman Assessor, 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.
- [20] 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.
- [21] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charge. 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.

- [22] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offence charged.
- [23] 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.
- [24] 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. This is also referred to as circumstantial 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.
- [25] 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.
- [26] I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [27] 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.
- [28] 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. It is not his task to prove his innocence.
- [29] 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?

- [30] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond a reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond a reasonable doubt every element that goes to make up the offence charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [31] It is for you to decide whether you are satisfied beyond a reasonable doubt that the prosecution has proved the elements of the offence, 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.
- [32] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [33] Let us now look at the charge contained in the Information.
- [34] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

Statement of Offence

ACTS INTENDED TO CAUSE GRIEVOUS HARM: Contrary to Section 255 (a) of the Crimes Act 2009.

Particulars of Offence

TIMOCI KURUKUVUI, on 12th August 2019, at Wairua, Tamavua-I-Wai, Suva, in the Central Division, with intent to do some grievous harm to **SOTIA SEREKI**, unlawfully wounded **SOTIA SEREKI** with a broken beer bottle.

- [35] Section 255 (a) of the Crimes Act No 44 of 2009 (“Crimes Act”) reads as follows:

*A person commits an indictable offence 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; or
 (b)

[Emphasis is mine].

- [36] As you would observe, in this case the prosecution has charged that the accused intended to do some grievous harm to the complainant; and with that intention unlawfully wounded the complainant.
- [37] Therefore, in order for the prosecution to prove the charge of Act with Intent to Cause Grievous Harm, they must establish beyond a reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 12 August 2019);
 - (iii) At Wairua, Tamavua-I-Wai, Suva, in the Central Division;
 - (iv) Intended to do some grievous harm to Sotia Sereki; and
 - (v) Unlawfully wounded the said Sotia Sereki (with a broken beer bottle).
- [38] Let me now elaborate on these elements in respect of the charge.
- [39] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [40] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [41] The fourth element is that the accused intended to cause grievous harm to Sotia Sereki. The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove the fourth element, the prosecution should prove beyond reasonable doubt that the accused intended to cause grievous harm to the said Sotia Sereki.
- [42] The fifth and final element the prosecution must prove is that the accused unlawfully wounded, Sotia Sereki (in this instance with a broken beer bottle). The word “unlawfully” simply means without lawful excuse or without just cause. The term “wound” has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the complainant as defined herein.
- [43] I must also direct you that it is not necessary for the prosecution to establish that grievous harm was in fact caused to the complainant or that the injuries caused to him

were actually grievous in nature. What the prosecution must prove is that the accused had the intention to do or cause some grievous harm to the complainant.

[44] 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.

[45] The term "dangerous harm" has been defined to mean as *"harm endangering life"*.

[46] The term 'harm' has been defined to mean: *"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)."*

[47] If you are satisfied beyond any reasonable doubt that the accused, on 12 August 2019, at Wairua, Tamavua-I-Wai, Suva, intended to cause grievous harm to Sotia Sereki, and thereby unlawfully wounded the said Sotia Sereki, then you must find him guilty of the charge of Act with Intent to Cause Grievous Harm.

[48] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge.

[49] However, if you find that the prosecution has proved all elements of the offence beyond any reasonable doubt, except the fourth element, that the accused intended to cause grievous harm to the said Sotia Sereki; as an alternative, you are then allowed to look at the lesser offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act, though the accused is not formally charged in the Information for that offence.

[50] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an assault occasioning actual bodily harm."

[51] In order for the prosecution to prove the offence of Assault Causing Actual Bodily Harm, they must establish beyond any reasonable doubt that;

(i) The accused;

(ii) On the specified day (in this case the 12 August 2019);

(iii) At Wairua, Tamavua-I-Wai, Suva, in the Central Division;

(iv) Assaulted the complainant, Sotia Sereki; and

(v) Thereby caused actual bodily harm to the said complainant, Sotia Sereki.

[52] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[53] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[54] The fourth element relates to the actual assault. The prosecution should prove beyond a reasonable doubt that the accused assaulted Sotia Sereki.

[55] With regard to the final element, the prosecution should prove beyond a reasonable doubt that actual bodily harm was caused to Sotia Sereki, as a result of the assault.

[56] As I informed you a few moments ago, the term 'harm' has been defined at Section 4(1) of the Crimes Act to mean: *"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)."*

[57] However, I wish to emphasize that you need to go in this direction ONLY if you find that the prosecution has failed to establish the fourth element of the offence of Act with Intent to Cause Grievous Harm, namely that the accused intended to cause grievous harm to Sotia Sereki beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Act with Intent to Cause Grievous Harm beyond reasonable doubt, then you must find the accused guilty as charged.

[58] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

[59] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as *"Admitted Facts"* without placing necessary evidence to prove them:

1. Sotia Sereki is an older brother of Timoci Kurukuvui.

2. At about 1.00 p.m. on 12 August 2019, at their home in Wairua, Tamavua-I-Wai, Suva, Timoci Kurukuvui and Sotia Sereki had an argument with each other about a mobile phone.
3. During their said argument at their home on 12 August 2019, a physical confrontation had occurred between Timoci Kurukuvui and Sotia Sereki.
4. During the said physical confrontation on 12 August 2019, Sotia Sereki was wounded on his chest where his wounds were caused by a broken beer bottle.

[60] Since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[61] The prosecution, in support of their case, called the complainant, Sotia Sereki, Detective Constable 5359 Viliame and Dr. Isaac Vijend Singh. The Medical Examination Report of Sotia Sereki was tendered to Court as Prosecution Exhibit PE1.

[62] Evidence of Sotia Sereki

- (i) *The witness testified that he is 30 years of age. He is currently residing at Makoi (at the back of Shop and Save). He is married with two daughters. He is a seafarer by occupation. However, at present he is staying at home. He said “Currently I just started a market....selling vegetables.”*
- (ii) *The witness testified that in 2019 he was staying with his mother, helping out in the running of her market at Super Fresh, in Tamavua. At the time his mother, his step dad, his wife, his daughter and his older brother (Tikiko Korocawiri) were staying in the house along with him. The exact location of the house was at Tamavua-I-Wai.*
- (iii) *The complainant testified to the incidents which took place on the 11 August 2019 and 12 August 2019. He said that on 11 August 2019 (which was a Sunday), he was drinking along with the accused Timoci, his older brother (Tikiko) and his step brother. They were drinking at home from around 9.00 o’clock in the morning throughout the afternoon and until night that day.*
- (iv) *Later that night the four of them went to the Union Night Club at Kimberly Street in Suva. He had remained at the Night Club until 3.00 in the morning on 12 August 2019.*

- (v) *The witness testified that he had left the Night Club at around 3.00 in the morning. He had gone to meet his wife who was in the Suva Market. She had come to buy stocks to sell at the Super Fresh. He had met his wife at around 4.00 in the morning. Thereafter, he had brought his wife to Super Fresh and gone home to sleep. He said when he reached home it would have been around 5.00 to 6.00 in the morning. It was still dark when he reached home. He had then gone off to sleep.*
- (vi) *Around 2.00 in the afternoon Timoci had woken him up and asked for the phone – it was his mother’s phone. He had given the phone to Timoci and asked him to use it fast as he had to go to the market to meet his wife.*
- (vii) *Thereafter, the witness had gone to have a shower. After his shower he had asked Timoci for the phone. He had told Timoci that he was in a hurry because he had to go to the market so that his wife could be released and go home.*
- (viii) *The complainant testified that the accused had told him to wait and started swearing at him. The accused had used the swear word, magaitinamu (your mother’s vagina), magaitamamu (your father’s vagina) and caititamamu (fuck your father). The complainant said: “I didn’t do anything because I know he was still drunk and hasn’t slept at that time. I look at his eyes and he hadn’t slept at that time.”*
- (ix) *The complainant was then asked the following questions and he answered as follows:*
- Q. *What happened then?*
A. *Then he told me he won’t give the phone.*
- Q. *What did you do?*
A. *I tried to take the phone from his hand.*
- Q. *Were you able to take the phone off his hand?*
A. *No.*
- Q. *Then what happened?*
A. *I tried to take the phone. He started pushing me and holding me on the neck.*
- Q. *Then what happened?*
A. *From there we start having action against each other.*

- Q. *What do you mean by this?*
A. *We start having a fight.*
- Q. *Can you tell us who started the fight?*
A. *He was holding my shirt like this (near my neck) and started punching my chin. (The witness demonstrated how this took place).*
- Q. *What did you do?*
A. *I punched him back, right back at him.*
- Q. *You said you punched him back – what happened then?*
A. *He fell down and there were bottles piled at the bottom of the house. He picked one bottle and tried to hit me with the bottle.*
- Q. *Prior to you punching him, where were you standing?*
A. *We were standing outside the house.*
- Q. *Where exactly did he fall down?*
A. *He fell down where exactly the bottles were piled. By the time we were fighting, we were outside the house.*
- Q. *Where were the bottles piled?*
A. *Outside the house – at the bottom of the house.*
- Q. *What bottles are you referring to?*
A. *Beer bottles.*
- Q. *You said he picked one bottle and tried to hit you with the bottle – Can you tell us was this in the same pile of beer bottles?*
A. *Yes.*
- Q. *Can you explain?*
A. *He picked one bottle of beer and tried to hit me with it.*
- Q. *Did he hit you?*
A. *The first hit he missed. There was a grill at the side of the porch. The bottle hit the grill and it broke...then when I saw the bottle was broken I was feeling afraid. And I tried to hold him. And at that moment his hand was swinging. At the time I came and hold him the broken beer bottle was still in his*

hand. At the time I went to hold him that is the time the broken beer bottle hit my chest. (The witness demonstrated how this took place).

Q. How did the beer bottle hit you?

A. At the time I went to hold him his hand was swinging like this (witness demonstrates). When I tried to hold him the broken beer bottle hit my chest.

Q. What happened then?

A. I started to see blood coming out from me.

Q. Then what happened?

A. Then I noticed I got injured. And I pushed him and start running down to the road to search for help.

Q. Prior to you running to the road – when you were hit on the chest was this the only injury you sustained?

A. Only my chest.

Q. Which side of your chest were you hit?

A. My right side.

(x) The complainant then explained that the neighbours called the police and called for a cab/taxi to take him to hospital. He was directly taken to the Samabula Hospital. His elder brother Tikiko had accompanied him to hospital.

(xi) After reaching the Samabula Hospital they had given him an injection, cleaned his wounds and transferred him to the CWM Hospital as they had said the injury was serious. He had two wounds – one small scratch at the bottom of his neck and a deep cut on the right side of his chest.

(xii) He had been admitted at the CWM Hospital for 4 to 5 days. They had cleaned the deep cut wound and put stitches on it. The complainant testified that permanent marks (scarring) had been caused by the injury on his chest. The witness showed in Court the permanent scars that he had sustained on his chest.

(xiii) When questioned by Court the witness confirmed that the beer bottles that were piled at the bottom of the house were all empty bottles. He also confirmed that at the time he sustained the injury he was wearing a t-shirt.

- (xiv) *The complainant was cross-examined at length by the defence. The defence also put several suggestions to the complainant – suggestions as to the defence version of the events.*
- (xv) *The complainant agreed that the incident (wherein he was injured) all happened very fast or spontaneously.*
- (xvi) *When asked whether he agrees that it was just by accident that the accused had stabbed him, the complainant said yes.*
- (xvii) *When asked whether he agrees that if he hadn't got hold of the accused, he would not have been injured by the bottle, the witness said: "Yes I think so."*
- (xviii) *The complainant denied that he was intoxicated at the time of the incident. He said: "When I woke up I was sober." The complainant also denied that he had sworn at the accused when asking the accused to return the phone to him. He also denied that he had started punching Timoci when Timoci had sworn at him. The complainant also denied that when he was punching Timoci that he had then pushed him off the porch and he had fallen down. The complainant also denied that after Timoci had fallen and was trying to get up that he had come for Timoci again and continued punching Timoci.*
- (xix) *It was put to the complainant that Timoci did not mean to strike or injure him with the bottle. The witness answered thus: "I don't know at that moment. Because we were in the fight. I don't know what he is thinking of."*
- (xx) *In re-examination the complainant was asked to clarify whether at the time Timoci had stabbed him was it intentional or was it accidental. The complainant answered as follows: "At that moment I was trying to hold him and take away the broken bottle. That's the time the broken bottle hit my chest."*
- (xxi) *In re-examination the complainant was also asked to clarify the position he had taken in cross-examination ("Yes I think so") when asked if he hadn't got hold of the accused, that he would not have been injured by the bottle. The complainant answered as follows: "Because at that moment Timoci was holding the broken bottle and I was trying to take the bottle from his hand. At that moment I didn't know what Timoci was thinking of. We were both on heat – and I was afraid when I saw the broken bottle in his hand."*

[63] Evidence of Detective Constable 5359 Viliame

- (i) He is currently serving at the Samabula Police Station CID Branch. He has been in the Fiji Police Force since 2016.*
- (ii) The witness recalled the incidents which took place on 12 August 2019. He had been on operational duties assisting the front desk personnel. While on duty a report had been received at the Police Station of an incident of stabbing from Tamavua-I-Wai Settlement. This was around 13.30 hours.*
- (iii) Upon receiving the report he had left the Station immediately with two other colleagues (WDC Mafi and Corporal Manasa). When they had approached the roundabout at Wairua Road there was a large crowd gathered and they were all pointing at the house that was close to the roundabout – as the place where the incident happened.*
- (iv) The witness had got off the vehicle and went in the direction of the house. Before reaching the house – a few meters from the house – he had seen an iTaukei man sitting close to the house and he was crying. The man had been on the track that goes to the house. He was sitting on the ground. The witness had also seen dried blood stains on both of his palms.*
- (v) The witness had approached the man and showed him his ID card – since at the time he was in civilian clothing – and explained to him who he was. Then he had asked the man for his name. The man had said his name was Timoci “He also said at the time that he had struck his brother with a beer bottle and injured him and that’s how he got the blood on his hands.”*
- (vi) The witness said that the said person was smelling of liquor at the time.*
- (vii) The witness had cautioned the man in the iTaukei Language and informed him that he was going to arrest him. The accused had been arrested and had been granted his constitutional rights. The accused had then been brought to the Samabula Police Station and handed over to the personnel at the front desk.*
- (viii) The witness said that he had not made a note or documented anywhere the words uttered by the accused. He had only made a statement in this regard.*
- (ix) The witness identified the accused in the dock as the person he arrested on 12 August 2019.*

- (x) *The witness was cross-examined by the defence. The defence put several suggestions to the witness – suggestions as to the defence version of the events.*
- (xi) *In cross-examination the witness agreed that the admission made by the accused was a verbal admission. He also agreed that any such verbal admission should be noted down, usually in the police notebook.*
- (xii) *However, the officer denied that the police notebook has not been produced in Court because he is making up a story that the accused had confessed to him. The witness also agreed that the caution should be given to a suspect before he makes an admission or a statement.*
- (xiii) *The witness said that although the accused was smelling of liquor, he was not sure as to how drunk the accused was so as to actually say if the accused was aware or not of what was happening.*
- (xiv) *The defence highlighted the following omission in the testimony given in Court by the witness vis a vis her statement made to the Police:*
- Although in his evidence the witness said that he had cautioned the accused in the iTaukei Language and testified to the exact cautionary words used by him; in his statement to the Police he has not mentioned any of these matters.*
- (xv) *It was suggested to the witness that this fact was not documented because in fact he did not caution the accused at all. The witness denied this suggestion.*
- (xvi) *It was also suggested to the witness that at no time did he approach the accused and show him his ID card and explained who he was. The witness denied this suggestion.*
- (xvii) *It was further suggested to the witness that the accused never admitted to him that he had struck his brother with a beer bottle and injured him. The witness denied this suggestion and said that those were the words uttered to him by the accused before he was arrested. It was one of the reasons for the accused's arrest.*

[64] Evidence of Dr. Isaac Vijend Singh

- (i) The doctor testified that he is currently serving as a Medical Officer at the Emergency Department at the CWM Hospital dealing with trauma cases, which includes assaults, falls and motor vehicle accidents.*
- (ii) He has been practising as a Medical Officer since 2015, after having graduated from the Fiji School of Medicine, with a MBBS Degree.*
- (iii) The doctor said that the complainant, Sotia Sereki, had been medically examined by him, on 12 August 2019, at 16.30 hours at the Emergency Department of the CWM Hospital (Fast Track Room 1). Pursuant to the examination he had prepared the Medical Examination Report, which is tendered to Court as Prosecution Exhibit PE1.*
- (iv) As per the initial impression of the person examined, as found in Column D11 of the Medical Report, it is stated that the patient was intoxicated. However, the doctor testified that he did not test the patient for his blood alcohol level.*
- (v) Doctor Singh explained in detail as to the specific medical findings as found in column D12 of Prosecution Exhibit PE1.*
 - (a) There was a superficial laceration on the base of the neck measuring approximately 3 cm.*
 - (b) There was a jagged wound on the anterior right chest wall measuring approximately 2 to 3 cm. By jagged the doctor said that the wound would not be on a straight line. There would be a break in the continuity of the skin.*

The doctor also referred to Appendix 1 of the Medical Report where the exact location of the above two injuries are indicated in a body diagram.
- (vi) The doctor explained his professional opinion as found in column D14 of the Medical Report. It states acute (recent) penetrating injury (which had occurred at approximately 1.00 pm). The doctor explained that a penetrating injury would be an injury which had gone through the layer of the skin.*
- (vii) The witness admitted that such an injury could be caused by a broken bottle.*

(viii) *The doctor testified that after his examination the patient had been admitted to hospital and transferred to the new surgical ward. He had been so transferred due to the nature of the wound. The wound needed to be cleaned and closed in a sterile setting being the operating theatre.*

[65] 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 address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[66] In this case, the accused opted to offer evidence under oath.

[67] **Evidence of the Accused – Timoci Kurukuvui**

- (i) *The accused testified that he is currently residing at Tamavua-I-Wai Settlement. Even at the time of the alleged incident the witness had been staying at the same residence.*
- (ii) *He is a market vendor by occupation. He said he is helping his parents in running a market.*
- (iii) *The accused said that he has three brothers. He is the youngest in the family. He's eldest brother is Tikiko Korocawiri. The second brother is Avenai Ratusaqasaqa. And his third brother is Sotia Sereki.*
- (iii) *The witness testified to the events that took place on 11 and 12 August 2019. He said on the previous Thursday he had come back from Levuka. Upon arrival he had gone straight to hospital to stay with his mother who was sick.*
- (iv) *On 11 August 2019, when he came home around 10.00 in the morning his two brothers, Tikiko and Sotia, were drinking beer with his step brother Eneriko. He had returned home from hospital after looking after his mother. His brother Tikiko had asked him to join them. He had done so. They were celebrating their step brother's arrival back home from a fishing vessel.*
- (v) *They had been drinking until 9.00 in the night. Thereafter, they had gone to the Union Night Club around 10.00 pm. They continued drinking at the Night Club.*

- (vi) *Around 3.00 in the morning he had realised that his brothers were missing. He went searching for them but they could not be located.*
- (vii) *He had then met some of his colleagues and they had left the Union Night Club and gone to the Ocean View, which is like a Motel. He had continued drinking with his friends until 9.30 in the morning. Thereafter, he said he had a nap.*
- (viii) *He testified that he had left the Ocean View Motel around 12.00 noon and had gone straight home. He had reached home around 1.00 in the afternoon.*
- (ix) *Upon reaching home he was walking up the stairs and had seen his brother Sotia who had just finished having his bath. He had asked his brother nicely for his mother's phone so as to call his wife who was in Levuka. Sotia had given him the phone and told him to use it quickly because he wants to go to his wife. The witness had asked Sotia to wait a little bit. "Then he started to tell me to use it quickly because he had to go."*
- (x) *The witness said that while he was talking on the phone with his wife, Sotia tried to grab the phone away from him. So the witness had pushed Sotia and told him that he is still speaking to his wife. He said: "I pushed him to wait because he was getting aggressive to me. When I pushed him he started throwing punches at me. And I fell from the porch down to the ground."*
- (xi) *The witness showed the distance from the top of the porch to the ground where he had fallen.*
- (xii) *The witness was then asked the following questions and he answered as follows:*
- Q. *What did Sotia do after you had fallen from the porch?*
A. *He was still coming at me, while I was struggling to stand.*
- Q. *What do you mean?*
A. *He kept on throwing punches at me.*
- Q. *Then what happened?*
A. *While this was happening my brother Tikiko was sleeping in the sitting room. And he started hearing noises and he wake up and by the time he came outside he yelled at us to stop fighting.*

- Q. *What did you do?*
- A. *Sotia was still throwing punches at me and I fell to the ground. At that time I was trying (struggling) to stand up. I didn't know/notice that I was holding on to a beer bottle. Then he pushed me and I didn't notice the beer bottle hit the grill and he was running at me trying to hold me and I did not intend to hurt my brother Sotia because it happened so fast.*
- Q. *Would you recall how did the beer bottle hit the grill?*
- A. *The beer bottle hit the grill at the time he pushed me.*
- Q. *What happened after the time the beer bottle had hit the grill? What did you do when the beer bottle had hit the grill?*
- A. *At that time I didn't notice that I was holding on to a broken beer bottle – and Sotia came and want to hold me. It happened so fast. I did not intend to hurt him.*
- Q. *Did Sotia hold you?*
- A. *He was trying to hold me with his two hands. (The witness demonstrated how this happened).*
- Q. *Then?*
- A. *At the time he was holding me I did not know that he got injured.*
- Q. *When did you come to know that he was injured?*
- A. *When I see blood coming from his chest.*
- Q. *Were you drunk at the time?*
- A. *Yes.*
- Q. *How was Sotia at that time?*
- A. *The only thing I know is he made his way down to the main road. Tikiko was going with him to go and look for a taxi.*
- Q. *Were you aware of what you were doing at that time – at the time you were fighting with your brother?*
- A. *Yes.*
- Q. *What did you do at this time?*
- A. *I was at home.*
- Q. *Where at home?*

A. *A few meters away (30 meters) from home and thinking about my brother Sotia.*

Q. *What happened when the Police Officer had arrived?*

A. *When they arrived I was sitting under the coconut tree. PC Viliame approached me and I didn't know that he came from Samabula Police Station. Because he never showed me any ID of his. And when I looked there was another officer, Officer Manasa. Then I did know that they came from Samabula because Officer Manasa is my uncle.*

Q. *When PC Viliame approached you did he say anything to you?*

A. *He did ask me what happened. And I told him that there was an argument between me and my brother Sotia.*

Q. *Did you tell him anything else?*

A. *No.*

Q. *What happened after you told them that there was an argument between you and Sotia?*

A. *And he did tell me for me to go with them to where the argument took place.*

(xiii) The witness was cross-examined at length by the State Counsel. The prosecution also put several suggestions to the witness – suggestions as to the prosecution version of the events.

Analysis

[68] The above is a summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Sotia Sereki, Detective Constable 5359 Viliame and Dr. Isaac Vijend Singh, in support of their case. The Medical Examination Report of Sotia Sereki was tendered to Court as Prosecution Exhibit **PE1**. The defence relied on the evidence of the accused himself.

[69] In this case, the complainant had been medically examined by Dr. Isaac Vijend Singh. He is the Medical Officer who had examined and prepared the Medical Examination Report of Sotia Sereki, which is tendered to Court as Prosecution Exhibit PE1.

[70] This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the

examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.

- [71] You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [72] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond a reasonable doubt.
- [73] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [74] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond a reasonable doubt. Based on the said agreed facts the identity of the accused, the date of incident and the place of incident are not in dispute. However, the prosecution must establish beyond a reasonable doubt that the accused intended to cause grievous harm to Sotia Sereki and with that intention unlawfully wounded Sotia Sereki, by striking him on his chest with a broken beer bottle.
- [75] I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [76] However, if there is no acceptable explanation given by the witness for the inconsistency or omission 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 and omission 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 or omission 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 or omission and consider him or her to be reliable as a witness.
- [77] In this case the prosecution is relying on the verbal admission made by the accused to DC Viliame. DC Viliame said that the statement was made spontaneously by the

accused. The accused denies that he made any such verbal admission to DC Viliame. You have heard the evidence of both DC Viliame and the accused. It is for you to decide which version to believe. If you believe the prosecution version that the accused did in fact make the verbal admission you may consider that the admission was made voluntarily. However, it is for you decide as to the truthfulness of the said statement and as to what weight you should attach to the said admission.

[78] In any event, you must bear in mind that the statement made by the accused only relates to the physical act and not to the mental element of the offence.

[79] In this case, the accused takes up the position that that he had no intention to harm the complainant and that the broken beer bottle struck the complainant by accident.

[80] If you believe the accused's version that the broken beer bottle struck the complainant by accident, then obviously it means that there was no intention on the part of the accused to attack the complainant. Therefore, he cannot be found guilty for Act with Intent to Cause Grievous Harm, but only for the lesser charge of Assault Causing Actual Bodily Harm. This is a matter for you to decide based on all the facts and circumstances of the case.

[81] The prosecution denies that that the injury to the complainant was caused by accident. The prosecution version is that the accused intended to cause grievous harm to Sotia Sereki and thereby unlawfully wounded him by striking him on his chest with the broken beer bottle. The State's position is that even after the beer bottle struck the grill and broke, that the accused continued to hold on to the broken bottle and was swinging the said bottle until it struck the complainant and caused injury to him.

[82] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, Sotia Sereki, and other prosecution witnesses are truthful and in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offence of Act with Intent to Cause Grievous Harm, beyond reasonable doubt.

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

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

[85] However, I must caution you that even if you reject the evidence of the defence 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 defence and that too on the evidence they presented before you.

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

- i. If you believe the evidence of the accused, then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- ii. If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- iii. If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- v. If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charge of Act with Intent to Cause Grievous Harm has been established beyond a reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- vi. As an alternative to the charge of Act with Intent to Cause Grievous Harm, you may consider whether the accused is guilty or not guilty of the lesser charge of Assault Causing Actual Bodily Harm.*

[87] Any re directions the parties may request?

[88] Madam Assessors and Gentleman Assessor, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge 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.

[89] Your possible opinions should be as follows:

Act With Intent To Cause Grievous Harm - Guilty or Not Guilty.

If not guilty,

In the alternative,

Assault Causing Actual Bodily Harm - Guilty or Not Guilty.

[90] I thank you for your patient hearing.

Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 22nd Day of January 2021

Solicitors for the State : Office of the Director of Public Prosecutions, Suva
Solicitors for the Accused : Office of the Legal Aid Commission, Suva.