

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

Judgment : 25 January 2021

JUDGMENT

- [1] According to the Information filed by the Director of Public Prosecutions (DPP), the accused, Timoci Kurukuvui, is charged with the following offence:

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-l-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.

- [2] The accused pleaded not guilty to the charge and the ensuing trial was held over 4 days.

[3] At the conclusion of the evidence and after the directions given in the summing up, by a majority decision, the Assessors found the accused not guilty of the charge. However, by their majority decision the same two Assessors found the accused guilty of the alternative charge of Assault Causing Actual Bodily Harm.

[4] I have carefully examined the evidence presented during the course of the trial. I direct myself in accordance with the law and the evidence which I discussed in my summing up to the Assessors and also the opinions of the Assessors.

[5] During my summing up I explained to the Assessors the salient provisions of Section 255 (a) of the Crimes Act No. 44 of 2009 (Crimes Act).

[6] In terms of Section 255 (a) of the Crimes Act "*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].

[7] 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 with a broken beer bottle.

[8] Accordingly, I directed the Assessors that in order for the prosecution to prove the charge of Act with Intent to Cause Grievous 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) Intended to do some grievous harm to Sotia Sereki; and

(v) Unlawfully wounded the said Sotia Sereki (with a broken beer bottle).

[9] The above individual elements were further elaborated upon in my summing up in respect of the said charge.

[10] 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.

[11] Grievous harm has been defined in the same subsection 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.*

[12] The term 'harm' has been defined in the same subsection 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)."* Whereas, "dangerous harm" has been defined to mean as *"harm endangering life"*.

[13] However, the Assessors were further directed that if they 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, they were 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.

[14] 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."

[15] Therefore, the Assessors were further directed that 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.

[16] The above individual elements were further elaborated upon in my summing.

[17] 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.

[18] I directed the Assessors that since the prosecution and the defence have consented to treat the above facts as “Admitted Facts” without placing necessary evidence to prove them they must, therefore, treat the above facts as proved beyond reasonable doubt.

[19] 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**.

[20] The accused testified on his own behalf.

[21] I have summarized the evidence of all the witnesses in my summing up.

[22] The complainant clearly testified as to the incident which took place in the afternoon of 12 August 2019, at his mother’s home in Wairua, Tamavua-I-Wai, Suva, after he had asked the accused to return his mother’s phone back to him since he had to go and meet his wife. During the incident injuries were caused to him on the right side of his chest.

[23] The complainant testified that when he had asked for the phone back, 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.”

[24] The relevant portion of the complainant’s evidence relating to the incident is as follows:

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- 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?*

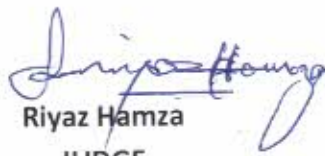
A. *Then I noticed I got injured. And I pushed him and start running down to the road to search for help.*

[25] 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.

[26] 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.

- [27] However, I am of the opinion, considering all the evidence in this case, that the prosecution has failed to establish beyond reasonable doubt that the accused had the intention to cause grievous harm to Sotia Sereki, at the time he caused the injuries to the complainant.
- [28] It is clear from the evidence that the injury to the complainant had been caused during the course of an argument between the complainant and the accused, his younger brother. In fact, even in the Admitted Facts it has been agreed by the parties that the complainant and the accused had an argument with each other about a mobile phone and that during the said argument a physical confrontation had occurred between the two of them. It is during the said physical confrontation that injuries had been caused to the complainant.
- [29] Therefore, in my view, the majority opinion of the Assessors in finding the accused not guilty of the charge of Act with Intent to Cause Grievous Harm was justified. It was open for them to reach such a conclusion on the available evidence. I concur with the unanimous opinion of the Assessors in respect of the said charge.
- [30] In the circumstances, I find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm.
- [31] However, considering the nature of all the evidence before this Court, it is my considered opinion that the prosecution has proved beyond reasonable doubt the alternate count of Assault Causing Actual Bodily Harm by adducing truthful and reliable evidence satisfying all elements of the said offence. Therefore, in my view, the majority opinion of the Assessors in finding the accused guilty of the lesser charge was justified.
- [32] In the circumstances, I find the accused guilty of the alternate count of Assault Causing Actual Bodily Harm.
- [33] Accordingly, I convict the accused of Assault Causing Actual Bodily Harm.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 25th 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.