

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 68 of 2021

STATE

vs.

- 1. JOELI NUENUE**
- 2. EPINERI QALIBAU**

Counsel: Ms. B. Kanthari for the State
Ms. L. David for 1st Accused
Mr. E. Sau for 2nd Accused

Date of Hearing: 08th November – 10th November 2022

Date of Closing Submission: 11th November 2022

Date of Judgment: 14th November 2022

JUDGMENT

Introduction

1. The Director of Public Prosecutions has charged the accused for the following offences as per the Information dated 05th June, 2020:

COUNT ONE

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS HARM: Contrary to Section 255

(a) of the Crimes Act, 2009.

Particulars of Offence

JOELI NUENUE and EPINERI QALIBAU in the company of each other on the 18th day of February 2021, at Raiwaqa in the Central Division, with the intent to cause grievous harm to **MERESEINI BULARAWA**, unlawfully wounded the said **MERESEINI BULARAWA** with a piece of cement block.

2. Upon entering pleas of not guilty by both the Accused persons, the matter proceeded to trial and the Prosecution led in evidence 9 witnesses. Upon the close of the prosecution the defence was called for and both the Accused gave evidence on their behalf and closed their cases. Both parties made oral submissions and the defence also tendered written submissions. Thus I will now proceed to consider the evidence and pronounce the judgment.
3. In the charge is based on joint enterprise and the two Accused persons are alleged to have committed this offence in the company and together with each other. Where two or more persons commit a criminal offence, whatever the participation of each person may be if they are acting together as part of a joint plan or agreement to commit the offence, each one of them will be guilty. However no formal plan and agreement is not required as an agreement to commit an offence may arise on the spur of the moment. The essence of joint responsibility for a criminal offence is that each accused shared a common intention to commit the offence and played his part in it, of any degree to achieve that aim.
4. Charge is based on Section 255 (a) of the Crimes Act No 44 of 2009 (“Crimes Act”) which 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 added).

5. In this case the prosecution has charged that the accused persons intended to do some grievous harm to the complainant; and with that intention unlawfully wounded the complainant.
6. Thus the main elements of the offence of “Acts Intended to Cause Grievous Harm” are that;
 - i. The accused persons;
 - ii. with intent to do some grievous harm;
 - iii. unlawfully wounded the complainant by any means.
7. The first element of the offence of Acts Intended to Cause Grievous Harm is concerned with the identity of the accused persons. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant, whilst the final element relates to the conduct of the accused that he did some grievous harm to the complainant by any means. In law grievous harm means any harm which—
 - i. amounts to a maim or dangerous harm; or
 - ii. seriously or permanently injures health or which is likely so to injure health; or
 - iii. extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.
8. Unlawful means without lawful excuse and grievous harm mean any dangerous harm to the body of another person. 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.
9. To prove this charge 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. However the prosecution is required to prove that the accused had the intention to do or cause some grievous harm to the complainant.

10. However, if the prosecution fails to prove, that the accused intended to cause grievous harm to the victim then as an alternative this court may consider at the lesser offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act. 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 and place
 - (iii) Assaulted the complainant, the victim; and
 - (iv) Thereby caused actual bodily harm to the said complainant, victim.

Presumption of innocence

11. Each accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the accused. There is no obligation or burden on the accused to prove his innocence. The prosecution must prove the accused's guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the accused's guilt, or if there be any hesitation in my mind on any of the ingredient or on the of evidence or led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted.

Prosecution case

12. This is a case where the complainant was hit by a stone whilst travelling in a bus and sustained injuries. The two Accused persons were apprehended immediately after the incident by passengers travelling in the bus of which the prosecution evidence is as follows.

Prosecution Evidence

13. The injured victim **PW1 Mereseini Bularawa** in her evidence narrated as follows. On the 18th of February 2021 around 12.30 she had been travelling in a bus towards Suva. Whilst it was slowing down she had seen two boys on the left side of the road. Just as then she had seen one of the boys throwing a stone towards her. However, though she wanted to dodge it was too late and the said stone had alighted on the left side of her face. She had sustained injuries to her lips and her jaw was fractured, front left teeth had broken off and caused bleeding. Due to the impact of the blow she had momentarily lost consciousness or was concussed. However, she had regained her senses when she found two other girls in the bus helping her and then she had been put in to a vehicle proceeded to the Samabula Police then to the CWM Hospital.
14. She had seen two young I-Taukei boys and has seen what they were wearing. One of them was in a black vest or t-shirt and a $\frac{3}{4}$ and the other was in a round neck t-shirt with a flowery design. He was also in a colourful $\frac{3}{4}$ trouser. Though she had observed that one of them throwing a stone she is unable to recall which one it was.
15. She does say that she was hospitalized for 2 weeks. She had been a professional rugby player but due to this incident she had not been able to pursue with her career. She is now wearing dentures and continues to suffer as she is unable to eat hard food and I observed a visible deformity on the left side of her face.
16. In cross-examination it was elicited that she had not said that she saw the stone been thrown. She admitted that it may not have been aimed at her. Her position is that she saw the stone coming from the boys, and that there was no one else other than the two of them and one of them threw the stone. She identified the exhibits namely the black vest PE1, flowery t-shirt PE2, the $\frac{3}{4}$ pants PE3 and the colourful $\frac{3}{4}$ trouser PE4.
17. **PW2 Peggy Kennedy** was a passenger in this bus and according to her the bus was somewhat empty with only a few passengers scattered throughout the bus. She had been on the left side of the bus on the 5th raw from the rear. As the bus approached Jittu Settlement along Ratu Mara Road passing the Raiwaqa Road she had seen two boys standing on the

left side of the road. She identifies one of them to have been dressed in a black vest and a ¾ and the other round collar flowery t-shirt and the colourful ¾. They have been about 5 meters away from the bus. As the bus slowed down and approached she had seen the boy in the black vest and the ¾ throwing something at the bus. The stone which was thrown had hit something in the bus and the girl in the seat immediately ahead of her was struck and injured. There had been a loud noise when the stone stuck. That girl was bleeding from her mouth and this witness had gone to help her. At this moment some passengers have jumped out and pursued the boys and the two boys whom she saw dressed in the clothes described have been brought to the bus. She along with another lady have taken the injured in a taxi to the Samabula Police Station and to the Hospital.

18. Apart from describing the clothes worn by the two boys she has observed that they were both I-Taukei boys between 18 and 25 and of medium height. She says that this was a sunny day and around mid-day. She would not identify their faces but said both Accused in court are of similar height of the boys she saw. In cross-examination it was suggested that she had only a fleeting glance and she identified them later on when they were seen at the police station, she denied the same. She identified the stone PE5.
19. Witness **PW3 Vakaloloma Anisa Sereima Luveni** is also a witness who happened to be in the bus at the time of the incident. She had been on the right of the bus. When she suddenly heard a lady shouting then seen a lady seated on the left side was bleeding from her mouth. The victim's jaw had dropped and some teeth had broken and fallen off. The witness had used her scarf and wrapped her to stop the bleeding and to hold the jaw. She had also seen some passengers jumped out of the bus and run.
20. She had also seen a stone beside her in the bus which she had picked up and put it into her bag. She along with another lady had taken the victim in a taxi to the Samabula Police Station. She had handed over the stone and immediately proceeded to the hospital with the injured person and another lady.
21. She says that she was listening to music and was not observing the surroundings. It was only upon the hearing of a lady shout that she had been alerted.

22. **Mr. Waisake Kaivei** who was an off duty policeman who happens to be travelling in the same bus with his family. Around 12.50 mid-day as the bus was travelling along Ratu Mara Road pass the Raiwasa junction he was seated on the left side then suddenly a stone had struck a woman passenger seated on the left side about 3 rows ahead of him. He had not known who threw the stone but when he rushed to help her he had seen two persons running away. He along with some other passengers had jumped out of the window and given chase. The boys had run along the feeder road into the settlement. As they went in they had seen the two youths standing at the ground. When asked they have denied, however the witness along with others had apprehended and brought these two boys back to the bus. He identifies the boys in open court has been the two Accused. He also recognizes the clothes PE1 to PE4 as been the clothes worn by them at that time. He says that the 2nd Accused Epineri was in the black vest and Joeli the 1st Accused was in round neck Nike T-Shirt. He clearly states that apart from these two Accused there was no one else in the vicinity.
23. In cross-examination he admitted that he did not know where the stone was thrown from and by the time he got off the bus he did not see the boys there. However, when he went about 10 meters along the feeder road these two Accused were there.

Police Evidence

24. PW8 PC 7212 Mr. Sharma and PW 9 PC 4156 Leone Masitabua have recorded the caution interviews of Joeli and Epineri respectively. According to the caution interview Joeli had admitted being in round neck floral t-shirt and the colourful ¾. Epineri being in black vest and camouflage ¾.
25. PW7 PC 1804 Tevita Kuruvakadua was attached to Samabula Police while he was there and injured lady has come with another and she was bleeding. The lady has handed over a stone PE5 to him. Two suspects also had been brought and later on this witness had handed them over with a stone to the Raiwaqa Police as the incident had taken place within the Raiwaqa Police area. This witness identified both the Accused.

26. PW6 PC 4993 Shamal he was attached to the Raiwaqa Police and on 18/2/2021 two Accused were brought to Raiwaqa Police Station and he had uplifted the stone and the clothes worn by the Accused and also spray can. He had handed them over to the Crime Writer.

Medical Evidence

27. PW 8 Doctor Sailasa; Sailasa's evidence was led via Skype with consent and agreement of the defence. He is a senior dental officer at the CWM with 19 years of service. He had obtained his degree in 2002 and post graduate diploma in 2015. During his career he had examined about 100 cases of assault of this nature. Considering his qualifications and experience I am satisfied that he can be considered an expert witness.
28. He had treated the victim Mereseini and has observed a large midline left lip laceration on both lower and upper lips. There were missing teeth; the upper and lower left region and some teeth were embedded on the lower region. He had also observed an alveolar bone fracture. The victim has been treated and corrective measures have been taken. He clearly stated that this was due to blunt trauma. The witness also stated that these type of injuries may be caused a stone striking her face. He confirm that the teeth could not be replaced unless she underwent another surgery. He also mentioned that the healing process may be from one month to six months and that her ability to speak, drink, and eat solid food may be affected and that as she was young and single she had been traumatized. He specifically mentioned that if there was no immediate attention she would have fainted and been in a pool of blood, and due to her luck she was taken to hospital immediately by the two passengers. However, despite treatment her appearance may not be normal.
29. The doctor was not cross examined and the medical report was tendered as exhibit PE7 along with extracts of medical folder.

Defence Case

30. The **1st Accused Joeli Nuenue** gave evidence and said that on 18/02/21 around 11.30 he left home which was in the settlement and saw Epineri marking a volleyball court with a spray can. He had walked there and has called Epineri to join him to smoke a cigar. When

they were smoking a cigar some people had come and made allegations and then had started punching and pulled them and taken them to the bus. Thereafter both of them were taken to the Samabula Police. He had been questioned and told to go home and find the person but he had refused and said that he will stay at the police station.

31. The 1st Accused admits that he was wearing the Nike round neck and a colourful ¾. He denies being by the side of the road at any time and also denies throwing a stone.
32. In cross-examination he denied all the suggestions of the Prosecution. He says that it was about 20 meters from the bus stop to the place where he was apprehended. On this day he admitted leaving home at 11.30am after his sister came from the kindergarten. He admitted that there was no one else other than both of them.
33. **2nd Accused Epineri Qalibau** gave evidence on behalf and according to him on 18/2/21 around 11.30am he had left his house and he had come to volleyball court to do the markings of the court. This 2nd Accused also lives in this settlement. When he was there his friend the 1st Accused has told him to take a rest and have a cigar. As it was very hot they have been having a cigar just as then some people had come there alleging that they have done something. One, he says was a police officer. Those who came had asked if they saw anyone else and then had taken them forcibly to the bus nearby and then to the Samabula police station.
34. At the police station he claims to have seen the injured lady and two other ladies. He admits wearing the black vest PE1 and the dark ¾ PE4 that day. The 2nd Accused says that he did not leave the volleyball court that day and did not come to the road.
35. In cross examination the prosecution had suggested their position and the Accused had denied that. It was suggested that there was no other in the vicinity and it was the Accused and his friend the 1st Accused who threw the stone which he denied. The Accused says that this was a week day as he saw children returning from school he denies the allegations.

Evaluation of the Defence Evidence

36. Both the accused take up the simple defence that they were never at the road and that is a total denial. Their position is that they were just taken away from the volleyball court on mere suspicion. The 2nd Accused had come to the volleyball court around 11.30 to make the markings. The 2nd Accused had left his house shortly after 11.30 and their common position is that they were having a cigar when they were arrested. Both the accused do not say if the marking was completed or if it was in progress but both say that they were having a cigar when they were taken away. The fact that they were having a cigar is an important aspect of the defence that is the reason why they were just standing there when the crowd arrived. However, it was not suggested to any of the prosecution witnesses that they were smoking a cigar. Neither did the police in or any other find or see any cigar in their possession. In the normal course of events one would necessarily expect the defence to suggest to the prosecution witness the fact that the accused were having a smoke; it was not done so. Therefore, the failure to suggest an important aspect of the defence leads to the inference that the cigar story is an afterthought to justify and explain why they were just standing at that time.
37. The 2nd Accused admits that the marking of the court would take not more than ½ an hour. He had come there at 11.30. When the crowd arrived and apprehended them it was well past 12.30 and it was 12.50.
38. The 2nd Accused Epineri when asked about the time he arrived he has responded as follows Question, “what time did you come to the Volleyball Court?” Answer “Around 11 o’clock, My Lord. 11 or 10.45”. Therefore, Epineri has arrived at the volleyball court by 11am. He admits that his friend Joeli arrived at the volleyball court around 11.30 or 12. Similarly, he admits that the marking of the volleyball court would take 30 minutes. The when he was asked if the marking was complete when Joeli arrived he says that he was about to finish the marking. Therefore, if Epineri has commenced the marking around 11am, by 11.30 he would have almost completed the marking. Between 11.30 and 12 he says that the 1st

Accused arrived therefore latest by 12 they should have finished smoking their cigars as claimed. According to the prosecution evidence the incident takes place between 12.30 and 12.50. The defence did not challenge this evidence if that be so the accused cannot be smoking the cigar at 12.30. Therefore, the 1st Accused clearly has given highly improbable evidence if he came there by 11 he certainly should have completed the marking latest by 12 mid-day.

39. No doubt the 1st Accused had a spray can in his hand but there was no suggestion nor direct evidence from the Accused that the marking was in progress. This clearly leads to the inference that the marking of the volleyball court was not in progress as claimed by the Accused persons. Further, as admitted by the 2nd Accused the marking could be completed within ½ an hour. If so the marking should have finished well before 12.30 or 12.50. In these circumstances position taken up by the Accused and the explanation given for being there is improbable and in all probabilities not true. This is further buttressed by the failure to suggest the smoking of the cigar to the prosecution witnesses.
40. To this extent the main position taken up by both the Accused is false and not truthful. The 2nd Accused Epineri said that whilst in the police he was told to go home and look for the person who threw the stone. He claims to have refused to leave the police and wanted to remain in the police station. In the first instance it is not normal and is extremely unlikely that the police officer at the Samabula Police Station would let go a suspect who had been brought by another and handed over to him. Secondly, if the 2nd Accused was told that he was free to go and look for the actual perpetrator it is extremely improbable for him to forcibly opt and decide to remain in the police station. Thus, 2nd Accused evidence in this respect is improbable. He is attempting by this to impress this court that in fact that they were apprehended due to a mistake and that the police too was aware of that fact. This was not suggested to the witness either.
41. In view of above analysis I am of the view that the defence evidence that they were merely standing near the volleyball court sharing a cigar is so improbable on their own evidence

that it is false in all probabilities. Accordingly, I reject the evidence of both the Accused as it is false, in all probabilities.

42. I do not believe Accused persons' evidence, but this by itself will not lead to a finding of guilt, because to do so would be to forget who has to prove the case. Falsity of the defence will not prove the prosecution case. It is the Prosecution who is required to prove the guilt. I must assess all the evidence that I accept as reliable and consider if the evidence satisfy me of the Accused persons' guilt beyond reasonable doubt. As stated at the outset the starting point is the presumption of innocence. I must treat the Accused as innocent until the State has proved their guilt. The presumption of innocence means that the Accused persons do not have to establish their innocence. The State must prove that Accused are guilty beyond reasonable doubt. Proof beyond reasonable doubt is a very high standard of proof. It is not enough for the prosecution to persuade this court that the Accused are probably guilty or even that they are very likely guilty. It is certainly not an absolute certainty. What then is reasonable doubt? A reasonable doubt is an honest and reasonable uncertainty left in my mind about the guilt of the Accused after I have given careful and impartial consideration to all of the evidence. In summary, if, after careful and impartial consideration of the evidence, I am sure that the Accused are guilty is when I can find them guilty. On the other hand, if I am not sure that they are guilty, I cannot find them guilty. Now let's evaluate the prosecution evidence.

Evaluation of the prosecution evidence

43. I will evaluate and consider the prosecution evidence. There are 4 prosecution witnesses who were passengers in the bus. The complainant and the two ladies who were in the bus namely Peggy and Luveni, in their evidence they do not identify the Accused by their facial features. All three of them have identified only the clothes worn by the two boys seen by them. If they were so minded and was uttering untruth one would expect them to have identified the Accused. The two Accused were apprehended and brought to the bus and these witnesses did have the opportunity to see them and identify them. However, they have not done so. This clearly indicates that these three witnesses have truthfully stated

exactly what they saw and remember. The clothes worn by two Accused have been described by them, the first Accused was in a bright blue and red Nike t-shirt with a floral design and his ¾ shorts also was a similar colour and this is clearly eye-catching and noticeable. Similarly, the 2nd Accused was in a black vest and dark ¾ when these two are placed next to each the contrast clearly enables any average person to clearly see and remember these clothes. It was mid-day and a sunny day. According to Mereseini and Peggy the two persons have been on the left side about 5 meters away from the bus. These two witnesses were also seated on the left side when the bus approaches at a slow speed it is certainly possible to see and observe the two figures standing in these circumstances.

44. As for the evidence of Mereseini there was one omission that was raised. In her evidence she did say that she saw one of them throw something towards the bus. According to the statement she had seen two boys standing by the road and has stated that one big stone hit her from the side, the boys were standing. In her evidence she does not say which one threw the stone. She merely said that she saw one of them throwing something. When you consider a statement she had seen two boys and they were the only persons around there. The stone had emanated from that direction. In these circumstances in the course of her evidence she stated that one of them threw the stone is not a fabrication but a narration of what she saw and may be the only necessary inference being put into words. Therefore, I am of the view that this is not an omission to that extend and in any event it is certainly not an utterance of a falsehood in evidence. Therefore it does not affect the credibility of the complainant.
45. Witness number 2 Peggy had clearly identified that the presence of the two boys and described and identified the clothing worn by them. She had clearly testified the boy in the black vest swing his hand and throw something. There is no contradiction or omission in this regard or in any other way. Considering the distance, light and the speed of the bus it is extremely possible that Peggy had the opportunity and the occasion to observe the two boys and their clothing as narrated in her evidence.

46. As regards witness Luveni she had been seated at the right side of the bus. She does not claim to have seen the boys standing on the left side. She very clearly said that she was concentrating on the music she was listening to music at that time and she was in her world of her own. She has seen the two boys when they were apprehended and brought by others. He evidence clearly shows that she had very truthfully narrated exactly what she saw that day and no more.
47. All these three witnesses have made statements to the police and Peggy along with Luveni have made their statement on the same day and the complainant subsequently as she was hospitalized on that day. Apart from the omission that was considered above there were no contradictions and omissions that was raised during their cross examination. Considering their evidence together I did not observe any inter se contradictions of any significant nature except the place of incident which I will consider now.
48. The complainant does says that around 12.30 the incident took place somewhere around Grantham Road. However, she says that she didn't know the name of the road. However, all other witnesses do say that it was along Ratu Mara.it was led in evidence that there is a link to Grantham Road somewhere in the vicinity. Be that as it may the defence admit that the bus was stopped at Ratu Mara Road on that day. It is common ground that the incident had taken place down Ratu Mara Road. Hence this apparent contradiction has arisen due to the mere ignorance of the name of the road. Therefore, I would not consider this as a vital contradiction.
49. Witness number 4 Waisake does say that he boarded the bus around 12 o'clock at Davuilevu and the incident took place around 12.50pm at Ratu Mara Road. To that extend there is a contradiction between the complainant's and Peggy's evidence *vis-à-vis* the evidence of Waisake. Out of the three witnesses Waisake was an off duty policeman and he was very specific as to the time he boarded the bus and also the time he reached the place of incident at Ratu Mara Road. However, the evidence of other two witnesses as regards the time appears to be a rough estimation as both of them were involved in rushing the victim to the hospital and they had made their statement at a later point of time. This

difference of 20 minutes is not due to an utterance of any deliberate untruth but due to the narration of the time as it appeared to them. Therefore, this contradiction does not affect the credibility of these prosecution witnesses. Witness Waisake had made a prompt statement and given evidence in this court. There were not contradictions or omissions raised during his cross examination.

50. As to the demeanor of these four witnesses I clearly observed that they did not in any way try to exaggerate or embellish their evidence. All of them basically narrated what they saw and what they remember. The complainant appears to have been concussed momentarily but had been conscious thereafter. When she was giving evidence I observed that she was re-living her experience and recalling and narrating what she remember. As far as other three witnesses also I observed the same nature and demeanor when they gave evidence too. Witnesses Peggy, Luveni and Waisake are to a great extent are disinterested and independent witnesses. They have no special affinity or connection to the victim nor any reason to give evidence against the Accused. Both parties were unknown to them prior to this incident.
51. In the aforesaid circumstances I am satisfied that these four witnesses are credible and truthful witnesses.

Credibility and Reliability

52. Merely by deciding that the evidence of a witness is credible will not be sufficient to determine the testimonial trustworthiness of a witness. In considering the testimonial trustworthiness of a witness there are two aspects that a court is required to consider. One is the *credibility* or veracity and the other is the *reliability* or accuracy. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns and relates to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned

with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, an honest witness, may, however, still be unreliable. [vide; R. v. Morrissey (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. (at p. 526): 2014 MBCA 74 (CanLII) and R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288 R. v. H.C., 2009 ONCA 56, 244 O.A.C. 288]

53. I have considered reliability of these witnesses to some extent in the above analysis. However, I would consider it in relation to all the four witnesses once again. The complainant and Peggy have seen the two persons standing by the side of the road. Witnesses Luveni and Waisake were on the right side of the bus and they have not seen the two persons standing on the side of the road at the time of the incident. However Waisake had immediately after the bus was stopped and had run towards the feeder road with two others and apprehended the two Accused. As for the complainant and Peggy, they had the opportunity and the occasion to clearly observe the two persons 5 meters away from the slow moving bus. As stated above the complainant and Peggy have not clearly observe the facial features of the two persons but both of them have clearly observed the clothing these two persons were dressed in. One person was in a colourful floral round neck with the distinctive mark Nike in front (PE2). His $\frac{3}{4}$ shorts was also of a similar blue (PE3). Whereas the other person was in black vest (PE1) and a dark camouflage $\frac{3}{4}$ (pants) (PE4). These items of clothing were tendered as exhibits. It is probable that one may not observe the facial features at such a moment and in these circumstances. However, it is extremely probable and possible for the witnesses to see and observe the clothes worn by such persons.
54. As for Waisake he identifies the two Accused in court not on the basis of seeing them at the time of the incident but as he subsequently apprehended them and brought them to Samabula Police Station. This witness being a police office and having had the opportunity to be with the two Accused persons for a considerable length of time is no doubt able to identify him in court. Further, Waisake does not claim to have seen the Accused in the act of throwing the stone or seen them standing by the side of the road immediately after the

incident. It appears that with the stopping of the bus and commotion the two persons on the side of the road had moved into the feeder road. Witness Waisake appears to have either observed this movement or being informed of it has jumped out of the window and proceeded in that direction and then seen the two Accused persons. In the aforesaid circumstances these witnesses evidence is highly reliable.

Evaluation of the Police Evidence

55. PW5 Sharma, PW6 Leone, PW7 Tevita and PW8 Shamal were the police witnesses whose evidence were led during this trial. PW5 Sharma and PW6 Leone have recorded the caution interviews of the two Accused persons and the Accused Joeli had admitted wearing the flowery round neck and bamuda shorts and Epineri has admitted wearing the black vest and ¾ camouflage pants and a grey cap. Witness Tevita was at the Samabula Police Station and has taken charge and uplifted a stone (PE5) handed by a lady. He has also taken charge of the two suspects and then handed them over to the Raiwaqa Police for investigations. He also does say that the boys handed over their clothes and everything in their possession to him which he handed over to the Raiwaqa Police.
56. PC Shamal had received the suspects and the exhibits from the Samabula Police and has visited the hospital and the suspects upon the interview has taken over the clothes, a spray can and the cement block which he identified in court.
57. In cross examination the defence did challenge that the proper custody of the exhibits had not been established as the crime writer was not a witness. Further that the investigation was faulty for not dusting the cement block (the stone) for fingerprints. However, the defence has admitted the fact that the Accused were wearing these clothes when they were apprehended that day and that they making the caution statements. Further there is no allegation of any unfairness or ill-treatment by the police. The police officers clearly had given evidence of the investigations and their duty performed by each of them. Therefore, the evidence of the police officers is credible and reliable.

58. Considering the above evaluation this court is satisfied that the prosecution evidence is credible and reliable. Accordingly, I now consider if the prosecution has been able to prove the necessary ingredients of the offence. On the evidence of the complainant and Peggy two persons standing on the left side of the road has pelted or thrown a projectile at the bus which was moving at a slow speed approaching the bus stand. The victim Mereseini had seen something thrown towards her from the direction where the two persons were standing. It had directly alighted on her face and Peggy has clearly seen that it was thrown by the person in the black vest. Luveni had collected the stone which was quite a large part of the cement block which could be held in the hand and as observed by the court it was quite heavy and lethal if thrown with reasonable force and velocity. Both these witnesses have clearly identified the clothing of the two persons and apart from these two there had been no other persons in the vicinity.
59. Immediately with the stone striking the face of the victim the bus had stopped and as at then it appears that the two persons have quickly moved into the feeder road. They appear to have so moved away before any one started to pursue them but because the bus stopped. This is not an instance of hot pursuit where the two perpetrators take to their heels upon seeing the passengers coming for them. It is a situation in which the Perpetrators tactically moving away from the crime scene and remaining there believing that they are safe. Then witness Waisake and two others having immediately jumped out of the window of the bus and gone in that direction. As Waisake proceeded less than 10 meters he had seen the two Accused. The two Accused were taken off guard and then were apprehended and brought them to the bus. By which time the victim, Peggy and Luveni had stopped a taxi and were about to proceed to the Samabula police station.
60. According to Waisake apart from the two Accused whom he identified positively in open court he had not seen any other in or around of the vicinity of the volleyball court where the Accused were. The Accused themselves admit that they were there and were so apprehended. They admit being dressed in the clothes as described by the witnesses.

Considering the totality of the prosecution evidence the two persons seen by the side of the road and throwing a projectile were the two who were apprehended by Waisake, out of whom the first Accused was in the Nike floral round neck and Epineri in a black vest. Peggy clearly had seen the person in a black vest throwing something at the bus. Thus it is established circumstantially it is the 2nd Accused Epineri who threw the stone PE5 towards the bus. Similarly it is so proved that it is the 1st Accused Joeli who was standing with Epineri. The fact that there was no other persons other than these two Accused present in the vicinity considered together with Peggy's positive identification proves beyond reasonable doubt that it was the 2nd Accused Epineri who threw the stone at the moving bus towards the window where victim was seated.

61. As the offence of intent to cause a grievous harm has a specific intent the prosecution is required to prove beyond reasonable doubt that the 2nd Accused Epineri did act with the intent to cause grievous harm to the victim.

62. In **R v. Belfon** [1976]3AllER 46 [English Court of Criminal Appeal] dealing with the specific intent requirements under similar statute, held that:

"it was necessary to prove that the accused had done the acts in question with intent to cause grievous bodily harm; the fact that the accused had foreseen that such harm was likely to result from his acts, or that he had been reckless whether such harm would result; did not constitute the necessary intent"

63. In **Naosara v State** [2007] FJHC 71; HAA047J.07S (2 November 2007) the Appellant was charged with, Act with Intent to Cause Grievous Bodily Harm. It was alleged in the charge, that on the 3rd of June 2006 at Nasinu, the accused, with intent to do grievous harm to complainant, unlawfully wounded him with a kitchen knife. During an operation the Appellant fled from a house and struck a Corporal with a kitchen knife causing him injuries. He swore at the Corporal and threatened to kill him. A tendered medical report showed that he had a 1-2cm cut on his chin and abrasions on the neck and jaw. Justice Shameem stated:

“Although greater analysis was called for after the review of the evidence, the issue was essentially a simple one. Did the Appellant strike at Cpl. Matou with a knife causing an injury and did he intend serious harm? Anyone who uses a knife on another in an aggressive way must be assumed to intend serious harm. That is the consequence of using potentially lethal weapons.”

64. According to the evidence this was a white bus with open windows and at that time there were only around 8 to 15 passengers in the bus. They were scattered in the bus. The victim appears to be seated somewhere around 5th or the 6th row from the rear end on the left hand side window seat. The seat in front as well as behind her was occupied. Thus, the 2nd Accused standing approximately 5 meters away has directed the stone towards the area where passengers were seated.
65. When a person throws a stone or a cement block similar to that of PE5 in the normal course of events it will certainly cause grievous bodily harm or serious harm if alighted on the facial area. This is the necessary and natural consequence of such an act. A person is presumed to intend the natural and probable or consequences of his acts. The 2nd Accused has clearly directed a heavy cement block (PE5) towards the area of this white bus where the passengers were seated. It was an open bus and necessarily when such a projectile is so thrown it is undoubtedly intended to strike the facial area of such a passenger. In these circumstances the only irresistible inference is that 2nd Accused Epineri had intended to cause grievous bodily harm to the passenger who was there namely Mereseini and there is no other reasonable hypothesis that arises therefrom.
66. The central issue of a charge of an act with intend to cause grievous injuries is the intention and not the result. In the present case the accused throwing a cement block/stone with a great velocity by itself will prove that he intended to cause grievous harm. That should be the intention to cause grievous harm to the victim. This ingredient is proved as aforesaid. In addition to this ingredient the particulars specify that Mereseini was unlawfully wounded with a piece of cement block, which the prosecution is required to prove. Unlawfully means without lawful excuse or without just cause. The term “wound” is defined in 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. According to the victim's evidence as well as the medical evidence the victim has sustained extensive external injuries to her lip, the lower jaw and also to her mouth including the loss of several teeth. These injuries are of a grievous nature and certainly amounts to wound as defined above. These injuries have been caused by the act of 2nd Accused which was certainly committed without any lawful excuse or just cause.

67. The evidence clearly have proved that it has taken place within the Raiwaqa Police area at Ratu Mara Road on the 18th February 2021. Accordingly, the prosecution evidence has proved that the 2nd Accused had committed the offence as charged. The evidence of the defence or their suggestions have not created any doubt on the prosecution case. As such I am satisfied that the prosecution has proved the charge against the 2nd Accused beyond reasonable doubt and it is proved that he is the principal offender.

Culpability of the 1st Accused

68. According to the prosecution witnesses the 2nd Accused is proved to be the principal offender. He has thrown the cement block at the victim. As for this 1st Accused it is admitted and proved he was wearing the colourful *Nike* round neck of blue and red. He was seen standing alongside the 2nd Accused Epineri. They left the scene very likely together. Both of them were apprehended also together a short distance away. This evidence on the face of it leads to the inference that the 1st Accused Joeli was with the 2nd Accused and they were operating and moving together. Apart from this evidence there is nothing more that indicates or could be inferred to show some form of active participation or the sharing of the common intention to cause grievous harm to the complainant.
69. Joint Enterprise entails criminal liability when an offence is committed jointly by two or more persons as described in Section 46 of the Crimes Act. Joint enterprise" is "when two or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed, of such

a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence”

70. The 2nd Accused is the principal offender so to speak who had committed the act of throwing the cement stone. In considering the 1st Accused’s liability and culpability prosecution should prove that the 1st Accused Joeli with the 2nd Accused formed a common intention with each other, to act with intent to cause grievous harm to the complainant (PW1)
71. The circumstances and they moving together no doubt leads to the inference that the two may have been acting together. However, it does not conclusively and necessarily lead to the inference that the 1st Accused Joeli was sharing the necessary specific intention. They are friends. Thus along with inference that the 1st Accused Joeli may have acted in concert with Epineri to commit this criminal act there is also the possibility that he happened to be with his friend at the wrong time. When a person happens to be with another who may have acted unilaterally and caused some injury or criminal act then such person fleas the innocent person also will necessarily be inclined to go along and get away from scene of incident. In these circumstances the principles of criminal liability require the Accused be given the benefit of the possible inference which may be in his favour. Accordingly, I am of the view that there is a reasonable doubt as to whether the 1st Accused was sharing a common intention to cause grievous harm to the victim. Accordingly I hold that the prosecution have not been able to prove the charge against the 1st Accused beyond reasonable doubt.

Conclusion

72. In the aforesaid circumstances and for the reason stated above I hold that the charge of Act with Intent to Cause Grievous Harm against the 2nd Accused Epineri Qalibau is proved beyond reasonable doubt. As such I find the 2nd Accused guilty of the offence as charged and convict the 2nd Accused for this said charge.

73. However, I hold that the prosecution has failed to prove the charge against the 1st Accused Joeli Nuenue beyond reasonable doubt and accordingly the 1st Accused is hereby acquitted.



At Suva

14th November 2022

Solicitors

Office of the Director of Public Prosecutions for the State.

Legal Aid Commission for both the Accused