

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case. No. HAC 72 of 2022**

**BETWEEN**

**THE STATE**

**A N D**

**OSEA QAMASIA**

**Counsel**

Mr. M. I. Rafiq for the State.

Ms. L. Volau and Mr. A. Waqavakatoga for the  
Accused.

**Dates of Hearing**

11, 12, and 13 October, 2023.

**Closing Submissions**

16 October, 2023

**Date of Judgment**

20 October, 2023

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**JUDGMENT – SPECIAL VERDICT**

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1. The Director of Public Prosecutions charged the accused by filing the following information:

***Statement of Offence***

**ACT WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary to section  
255 (a) of the Crimes Act 2009.

### ***Particulars of offence***

OSEA QAMASIA on the 15<sup>th</sup> day of February, 2022 at Sigatoka in the Western Division, with intent to cause grievous harm, unlawfully wounded one SILOVATE CAWAI with an axe.

2. In this trial, the prosecution called four witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of the offence as charged.

### **BURDEN OF PROOF AND STANDARD OF PROOF**

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.

### **ELEMENTS OF THE OFFENCE**

4. To prove the above count the prosecution must prove the following elements of the offence of act intended to cause grievous harm beyond reasonable doubt:
  - a) The accused;
  - b) with intent to do some grievous harm;
  - c) unlawfully does grievous harm to the complainant by any means.

5. In law 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.*

6. The term harm has also been defined as 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).
7. The first element of the offence of act intended to cause grievous harm is concerned with the identity of the person who allegedly committed the offence. This element is not in dispute.
8. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant. This element is in dispute.
9. The final element relates to the conduct of the accused that he did some grievous harm to the complainant by any means. This element is not in dispute.
10. Intention is not something that can be easily proved it is something that has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. This court will decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.

11. If this court is satisfied that the prosecution has proved all the above elements of the offence of act intended to cause grievous harm beyond reasonable doubt, then it must find the accused guilty of the offence of act intended to cause grievous harm. However, if there is a reasonable doubt with respect to any element of the offence of act intended to cause grievous harm then it must find the accused not guilty of this offence.

### **ADMITTED FACTS**

12. In this trial the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
13. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

### **PROSECUTION CASE**

14. The first witness Pauliasi Kunabuli the father of the accused informed the court that on 15<sup>th</sup> February, 2022 he was outside his main house doing some washing in the sink when he saw the accused go into the outside kitchen and take out an axe. The witness thought the accused was going to chop firewood, however, the accused went past the place where firewood was chopped, lifted the axe and went towards the main house where his daughter Silovate Cawai was. The accused had one of his legs inside the door of the house and the other on the doorway with the axe positioned backwards to strike. At this time Pauliasi heard a sound of agony.

15. Pauliasi called his other two sons who were in the other house not far away to come over. Pauliasi also went into the house and saw his daughter Silovate lying face up and bleeding from her head. The accused was in the house holding the axe walking to and fro. His son Sivaniolo Autiko also came into the house where the incident took place.
16. In cross examination, Pauliasi said that the accused had the habit of staying away from home whenever it pleased him and be back either the same day or the next day. On one occasion the witness had taken the accused to the Sigatoka Hospital after he noticed some behavioural changes in the accused. For instance the accused after rain would drink stagnant water from the puddle and he would not sleep the whole night. At times in the night the accused would be walking in the porch of the house.
17. From Sigatoka Hospital the accused was taken to the St. Giles Hospital for a check-up. Upon discharge the accused had gone to his grandparent's house in Rewa. After some time accused was brought home by his grandfather. The accused was given medication by the hospital but he was not taking the medication as required and before the incident.
18. The second witness Sivaniolo Autiko the younger brother of the accused told the court that on 15<sup>th</sup> February, 2022 he was in his room in the separate house when he heard his father calling his name saying someone has been struck inside the house. The witness went inside the house where he saw his sister Silovate lying on the floor unconscious shaking with saliva and vomit coming out of her mouth and Silovate's daughter was on her lap.
19. The witness took a towel and put it on Silovate's head since it was bleeding he then massaged her back by this time the accused was in the separate house packing his clothes. The witness saw the accused had the axe with him. The witness went to the accused and told him to put down the axe

- but he did not. The witness noticed that the accused was angry. Two boys from the neighbouring house came and the three of them confronted the accused. The accused ran out of the house with the axe in his hand, after chasing the accused the witness and his neighbours were able to catch the accused.
20. In cross examination, the witness stated that the accused had been taken to the St. Giles Hospital in 2019 and 2021. The witness said he noticed behavioural changes in the accused since he was sharing the separate house with the accused and he had noticed that the accused would not sleep at night, would be talking to himself, pretending that he is in a war and if it rained he will go outside the house and drink rain water.
  21. During the week before the incident the accused was restless he would go outside the house roam around come back then lie down but would not sleep. The accused was given his medications by the hospital but he never took any.
  22. Laisenia Rokotuwai the uncle and neighbour of the accused told the court that on 15<sup>th</sup> February, 2022 after his shower when he looked through his window he saw Silovate was vomiting and she was unconscious, he saw blood was coming out of Silovate's head. He made arrangements for Silovate to be rushed to the Sigatoka Hospital for medical attention.
  23. In cross examination the witness said he used to go to the house of the accused and he noticed the accused was acting weird at times. The accused had a strange attitude towards his father and sister Silovate, he did not want to eat or sleep, stayed up whole night and he will be rough with his family members.
  24. The final witness Dr. Sera Sadranu informed the court that she graduated with an MBBS degree in 2015 from the University of Fiji and this is her 7<sup>th</sup> year as a Medical Officer.

25. On 15<sup>th</sup> February, 2022 the witness had examined the complainant at the Sigatoka Hospital, the Fiji Police Medical Examination Form of Silovate Cawai was marked and tendered as prosecution exhibit no.1.
26. The specific medical findings of the witness were:
  - a). There was 5 cm in length and 2 cm deep laceration on the upper area at the back of the skull.
27. The witness explained the injury on the top portion of the patient's head was caused by trauma to the head. There was a possibility that the injury could have been caused by an axe.
28. According to the witness the injury was moderate which was quite serious which could have a permanent disfigurement. The patient was transferred to the Lautoka Hospital for specialist care.
29. This was the prosecution case.

### **DEFENCE CASE**

30. At the end of the prosecution case the accused was given his options. He chose to remain silent but he called one witness that is his right and no adverse inference will be drawn from the fact that the accused decided to remain silent. This court must consider the evidence of the defence witness and give such weight as is appropriate.
31. The defence witness Dr. Kiran Gaikwad informed the court that he graduated with MBBS degree from University of India. He has also done Post Graduate Diploma in Mental Health from the Fiji National University with International Diploma in Mental Health in Human Rights and Law from the Indian Law Society. Dr Gaikwad has 20 years' experience as a

medical professional. He is currently the Principal Medical Officer at the St. Giles Hospital.

32. The patient Mr Osea Qamasia was referred to the St Giles Hospital by court order dated 20<sup>th</sup> September, 2022. The witness identified the Psychiatric Evaluation Report dated 8<sup>th</sup> November, 2022 which was prepared by him. This report was marked and tendered as defence exhibit no. 1.
33. The accused is a patient of St Giles Hospital who was admitted twice in 2019 and twice in 2021. He has a personal history of substance induced psychosis and mental illness known as schizophrenia.
34. The witness further explained that schizophrenia is a chronic mental illness which affected a person's perceptual perception and attitude towards the world as a result such a person may imagine things or hear things which does not exist and sometimes such persons act on these hallucinations. The accused was diagnosed with substance psychosis and schizophrenia in 2021. According to the witness the accused had expressed no intention to quit marijuana. He smokes marijuana with the village boys.
35. The accused was given medicine which he did not take as directed and started smoking marijuana hence there was a relapse and at the time of the incident the patient was having psychosis.
36. In cross examination by state counsel the witness stated that it was highly likely the accused committed the act due to substance abuse and non-compliant to medications that is by not taking his medications and at the time of the incident the accused was acting under a hallucination due to substance abuse and schizophrenia.
37. This was the defence case.



## **DIRECTION ON EXPERT EVIDENCE**

38. This court has heard the evidence of Dr. Sadranu and Dr. Gaikwad who had been called as an expert on behalf of the prosecution and the defence. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the medical report of Silovate and the psychiatric evaluation report of the accused are before this court and what the doctors said in their evidence as a whole is to assist this court.
39. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the experts I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctors.
40. I have also kept in mind that this evidence of the doctors relate only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.

## **ANALYSIS**

41. The prosecution alleges that on 15<sup>th</sup> February, 2022 at around 9am the accused struck his younger sister Silovate Cawai on the head with an axe. As a result of the above Silovate became unconscious, saliva started coming out of her mouth and she was vomiting. Silovate's daughter was on her lap at the time of the assault.
42. As a result of the assault Silovate received a 5 cm in length and 2 cm deep laceration on the upper area of her skull that is the back top portion of the

- head. She was rushed to the Sigatoka Hospital and then transferred to the Lautoka Hospital for specialist care. The injury was moderate and serious with a possibility of a permanent disfigurement.
43. The prosecution submits that the accused had intended to cause grievous harm to his younger sister when he entered the house where Silovate was with her young daughter on her lap. The accused went to the outside kitchen took an axe and entered the house where Silovate was. There was no provocation by Silovate the accused struck the head of Silovate from behind with the axe he had with him.
  44. The doctor who had examined Silovate said that the injury was a serious and moderate one bearing in mind the serious nature of the injury the patient was transferred to the Lautoka Hospital for specialised treatment.
  45. On the other hand, the defence accepts that it was the accused who had struck Silovate Cawai with an axe on the day in question, however, he was not aware of what he was doing at the time since he was suffering from a mental illness namely substance induced psychosis and schizophrenia.
  46. As a result of this mental impairment the accused did not have the requisite mental element or *mens rea* to be legally responsible for his action. The accused was a patient of the St. Giles Hospital and at the time of the offending he was suffering from unspecified schizophrenia which affected his cognitive process to such an extent that he was incapable of knowing the nature and quality of his action at the time and/or was incapable of knowing that his action was wrong.

### **DETERMINATION**

47. I would like to remind myself that a person is presumed not to be suffering from a mental impairment. The presumption is only displaced if it is proved

on the balance of probabilities by the defence that the accused was suffering from a mental impairment at the time of allegation.

48. The accused is the elder brother of the victim and both were living in their father's house in the same compound. The accused has admitted the *actus reus* or the physical element of the offence of act intended to cause grievous harm. What is in dispute is the mental element?
49. The defence is arguing that the accused is not criminally responsible since he was suffering from a mental illness or impairment at the time of the allegation. The effect of this illness is that the accused did not know the nature and quality of his conduct and he did not know that his conduct was wrong.

## **LAW**

50. Section 28 of the Crimes Act states:

### *Mental impairment*

*28.-(1) A person is not criminally responsible for an offence if, at the time of carrying out the conduct constituting the offence, the person was suffering from a mental impairment that had the effect that-*

*(a) the person did not know the nature and quality of the conduct;*  
*or*

*(b) the person did not know that the conduct was wrong (that is, the person could not reason with moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong); or*

*(c) the person was unable to control the conduct.*

- (2) *The question whether the person was suffering from a mental impairment is one of fact.*
- (3) *A person is presumed not to have been suffering from such a mental impairment. The presumption is only displaced if it is proved on the balance of probabilities (by the prosecution or the defence) that the person was suffering from such a mental impairment.*
- (4) *The prosecution can only rely on this section if the court gives leave.*
- (5) *The court must return a special verdict that a person is not guilty of an offence because of mental impairment if and only if it is satisfied that the person is not criminally responsible for the offence only because of a mental impairment.*
- (6) *A person cannot rely on a mental impairment to deny voluntariness or the existence of a fault element but may rely on this section to deny criminal responsibility.*
- (7) *If the court is satisfied that a person carried out conduct as a result of a delusion caused by a mental impairment, the delusion cannot otherwise be relied on as a defence.*
- (8) *In this section-  
“mental impairment” includes senility, intellectual disability, mental illness, brain damage and severe personality disorder.*
- (9) *The reference in sub-section (8) to mental illness is a reference to an underlying pathological infirmity of the mind (whether of long or short duration and whether permanent or temporary), but does not include a condition that results from the reaction of a healthy mind to extraordinary external stimuli.*
- (10) *A condition that results from the reaction of a healthy mind to extraordinary external stimuli may be evidence of a mental illness if it involves some abnormality and is prone to recur.*

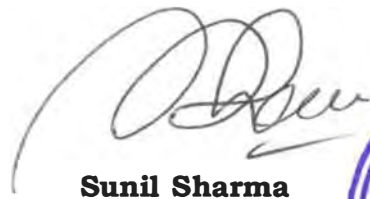
51. In reliance of the above the accused called Dr. Gaikwad. It is not in dispute that what the accused did was a result of a mental impairment and due to

- this illness of the mind he was not able to control his conduct and was incapable of knowing that his action was wrong.
52. When an accused person relies on the common law defence of insanity the evidential burden is on the accused on the balance of probabilities that it is more likely than not that on 15<sup>th</sup> February, 2022 the accused was suffering from a mental illness namely schizophrenia as a result of which he was not able to control his conduct when he struck the victim on her head with the axe.
53. There is no doubt that due to the act of the accused he had caused grievous harm to Silovate, however, it cannot be ignored that at the time of the alleged act the accused was suffering from a mental illness which renders the accused not criminally responsible for his action. I have no reason to disregard the opinion of Dr. Gaikwad, the accused has a history of mental illness known as schizophrenia. The psychiatrist gave a detailed account of the illness and how it had affected the accused at the material time.
54. After considering all the evidence adduced, this court is satisfied that the accused has established and discharged his burden of proof required of him in relation to the defence of mental impairment. This court is also satisfied that it was more likely than not that on 15<sup>th</sup> February, 2022 the accused was suffering from a chronic mental illness known as schizophrenia and as a result he was not able to control his conduct and was incapable of knowing that what he was doing was wrong when he struck Silovate on her head with the axe.

### **SPECIAL VERDICT**

55. For the above reasons, the accused is found not guilty by reason of mental impairment for one count of act intended to cause grievous harm as per section 28 of the Crimes Act 2009.

56. This is the judgment of the court. Counsel will be heard as to the appropriate orders that should be issued in accordance with the Mental Health Act.



**Sunil Sharma**  
**Judge**



**At Lautoka**

20 October, 2023

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**