

**IN THE HIGH COURT OF FIJI**

**AT LAUTOKA**

**CRIMINAL JURISDICTION**

**Criminal Case No.: HAC 179 of 2022**

**STATE**

**V**

**ABID HUSSEIN**

**Counsel** : Mr. J. Nasa for the State.  
: Ms. K. Kumar and Mr. R. Kishan for the Accused.

**Dates of Hearing** : 12, 13 March, 2025  
**Closing Speeches** : 18 March, 2025  
**Date of Judgment** : 18 March, 2025

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**JUDGMENT**

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1. The Director of Public Prosecutions charged the accused by filing the following information dated 24<sup>th</sup> January, 2023:

**COUNT ONE**

***Statement of Offence***

**ATTEMPTED MURDER:** contrary to section 44(1) and 237 of the Crimes Act 2009.

***Particulars of Offence***

ABID HUSSEIN on the 11<sup>th</sup> day of November, 2022 at Lautoka in the Western Division, attempted to murder one WAZID HUSSEIN.

**COUNT TWO**

***Statement of Offence***

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

***Particulars of Offence***

ABID HUSSEIN on the 11<sup>th</sup> day of November, 2022 at Lautoka in the Western Division, with intent to cause grievous harm, unlawfully wounded one NAZRA BEGUM aka NAZRA HASSAN with a cane knife.

**COUNT THREE**

***Statement of Offence***

CRIMINAL TRESPASS: contrary to section 387 (1) (c) of the Crimes Act 2009.

***Particulars of Offence***

ABID HUSSEIN on the 11<sup>th</sup> day of November, 2022 at Lautoka in the Western Division, unlawfully persisted in entering and remaining in the family house of one ASERI DALAWA, after being warned not to come thereon.

2. In this trial, the prosecution called five witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer 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 find the accused guilty for the offence of attempted murder the prosecution must prove the following elements beyond reasonable doubt:
  - a) The accused;
  - b) engaged in a conduct; and
  - c) the said conduct was an attempt to cause the death of the complainant Wazid Hussein; and
  - (d) the accused intended to cause the death of the complainant by his conduct.
5. In this case the prosecution is alleging that the accused intended to cause the death of the complainant Wazid Hussein by his conduct. The first element of the offence of attempted murder is concerned with the identity of the person who allegedly committed the offence of attempted murder.
6. The second element relates to the conduct of the accused. To engage in a conduct is to do an act which is the product of the will of the accused and it was not accidental. The prosecution has to prove

beyond reasonable doubt that the conduct of the accused was deliberate and not accidental.

7. For the accused to be guilty of attempted murder, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact.
8. The third element is that the said conduct of the accused was an attempt to cause the death of the complainant.
9. The final element is concerned with the state of mind of the accused that he intended to cause the death of the complainant. It is not possible to have direct evidence regarding an accused's state of mind since no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, one can construe the state of mind of the accused from the facts and circumstances proved.
10. In order for this court to conclude that the accused intended to cause the death of the complainant, this court should be satisfied that the accused intended to kill the complainant as a result of his conduct. In this regard, this court should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of the complainant.
11. In this trial, the accused has denied committing the offence of attempted murder. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to kill the complainant and with that intention he did something which was more than merely preparatory.

12. 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 cause 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.
13. The prosecution must also prove that with the intention to kill, the accused did something which was more than merely preparatory. Before this court can find the accused guilty of the offence of attempted murder it must be satisfied beyond reasonable doubt of two things: first that the accused intended to commit the offence of murder and second, that, with that intention, he did something which was more than merely preparatory for committing that offence.
14. In other words, did he actually intend to commit the offence of murder on the complainant, in which case he is guilty of attempting to commit murder, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
15. A person commits the offence of murder if:
  - (a) *the person engages in conduct; and*
  - (b) *the conduct causes the death of another person; and*
  - (c) *the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct."*
16. The prosecution says the accused intended to kill the complainant. The accused had struck the cane knife which he had just sharpened on the left side of Wazid's neck. The complainant was taken to the Lautoka

Hospital for treatment. If this court accepts the accused did this, then it is for this court to decide whether what he did went beyond merely preparatory.

17. If this court is satisfied that the prosecution has proved all the elements of the offence of attempted murder beyond reasonable doubt then this court must find the accused guilty as charged.
18. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempted murder.
19. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of attempted murder that is whether the accused had intended to kill the complainant then it should consider the offence of act intended to cause grievous harm.
20. To find the accused guilty of the offence of act intended to cause grievous harm the prosecution must prove the following elements beyond reasonable doubt:
  - a) The accused;
  - b) with intent to do some grievous harm;
  - c) unlawfully does grievous harm to the complainants Wazid Hussein and Nazra Begum by any means.
21. 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.*

22. 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).
23. 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.
24. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant.
25. The final element relates to the conduct of the accused that he did some grievous harm to the complainant by any means.
26. As I mentioned earlier intention of the accused is decided by considering what the accused did, this court should look at his actions before, at the time of, and after the act. Furthermore, unlawful means without lawful excuse and grievous harm means any dangerous harm to the body of another person.

27. 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.
28. To find the accused guilty for the offence of criminal trespass the prosecution must prove the following elements beyond reasonable doubt:
- a). The accused;
  - b). unlawfully persisted in entering and remaining;
  - c). in the family house of Aseri Dalawa;
  - d). after being warned not to come thereon.
29. If this court is satisfied that the prosecution has proved all the elements of the offence of criminal trespass beyond reasonable doubt then this court must find the accused guilty as charged.
30. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of criminal trespass. In this case, the accused is charged with three offences, I have borne in mind that the evidence in each count is to be considered separately from the other. It is not to be assumed that because the accused is guilty of one count that he must be guilty of the others as well. This also applies to the outcome of not guilty.



### **ADMITTED FACTS**

31. In this trial, the prosecution and the defence have agreed to certain facts titled as agreed facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
32. 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**

33. The complainant, Wazid Hussein, informed the court that the accused is his biological brother. They lived in the same house. On 11<sup>th</sup> November, 2022, in the morning, the complainant, along with his aunt, Nazra Begum, went to recharge his phone sim and buy some cream buns. At around 8 am, both returned home. The complainant's aunt went inside the house first, and then he followed.
34. In the porch of the house, the accused and another person, their neighbour, were sitting on the bench. The neighbour was drinking tea, and the accused was sharpening the cane knife since he had been cleaning the garden in the morning when the complainant had left home.
35. In the house, the complainant came to know that the accused had said something to their aunt. The complainant went and asked the accused if he had said anything. The accused denied saying anything, he said it was a lie. The accused asked the complainant to leave.

36. Since the accused had a knife in his hand, the complainant picked up a piece of iron rod from the corner of the porch. At this time, the complainant got angry, so he hit the iron rod on the railing. As he turned to go inside the house, the accused swung the knife, which landed on the left side of the complainant's neck. The complainant placed his hand on his neck to stop the bleeding. The aunt of the complainant was behind him. He saw his aunt's chopped hand, and she was shouting. As soon as the accused put the knife down, the complainant got hold of both the accused's arms. Their neighbour, who they call Master (a school teacher), came and got hold of the cane knife and threw it away.
37. After this, the complainant, with the help of Master, took his aunt to the Lautoka Hospital. The complainant further stated that it was only the accused who had a knife in the porch. The aunt was admitted to the hospital, whereas the complainant was sent home after a medical examination. According to the complainant his injury was not serious that is why he was sent home. The complainant pointed to the accused in court.
38. During cross examination, the complainant, agreed that he was living with the accused, accused's wife, and his aunt. Prior to 2022, the complainant had a good relationship with the accused. When he came home that morning, the accused did not say anything to him. Upon further questioning, the complainant stated that when he came out of the house and went to the accused, the accused was sitting. When the complainant questioned the accused, the accused stood up and told the complainant to leave. According to the complainant, the relationship between the accused and him was good even at this time. When the complainant picked up the iron rod the accused was standing.

39. The complainant agreed when he picked up the iron rod, the accused had not done anything to him apart from telling him to leave. When he was talking to the accused, and vice versa the tone was normal. When asked if everything was normal, then why he had hit the railing with the iron rod, the complainant said *"At that time, I was a little bit angry about what the accused had said to aunt, but not to me. I did not hear anything."* When the accused struck the complainant as he was turning to go into the house, the accused was beside the complainant.
40. The complainant told the court that he did not see the accused strike his aunt. The complainant agreed that when he came out of the house, he had said in Hindi *"let me see you hit me"*. However, the complainant denied that he had said to the accused to swing the knife. The complainant denied that he wanted to assault and/or scare the accused. The complainant explained that the only reason he had picked up the iron rod was to defend himself in case the accused struck him with the knife. The complainant agreed that the cut on his neck was a scratch and a blunt trauma.
41. The second witness, Vilive Cagivinaka, the immediate neighbour of the complainant and the accused, informed the court that on 11<sup>th</sup> November, 2022, in the morning when he was getting ready to go to work, when he heard a commotion and loud argument coming from the two brother's house.
42. The time would have been before 8 am. The witness came out of his house and tried to calm both brothers. The witness saw the accused swing the knife, which was in his hand, hitting the neck of the complainant, and at the same time, he swung the knife, hitting the lady's hand. The witness has known the two brothers for a long time.

43. Thereafter, the two brothers were struggling on the ground, and he managed to separate them. The witness was able to take the knife away from the hand of the accused. The witness saw that the lady's hand was completely chopped off. The witness grabbed the hand, put it in a container, and brought the lady and the complainant to Lautoka Hospital.
44. During cross examination, the witness stated that the commotion was loud, with shouting, anger, and words aggressively spoken. Upon further questioning, the witness stated that as he was calming the two brothers, it was the accused who suddenly swung the knife, and the complainant was struggling to take hold of the knife from the accused.
45. According to the witness, the accused had firstly swung the knife on his brother's neck and the second time at the lady's arm, who was trying to protect the complainant. The witness maintained that the first swing of the cane knife by the accused struck the brother, and the second swing struck the lady's hand. The witness could not recall if the complainant brother was holding an iron rod. At the time of the incident, apart from the two brothers and the lady there was no one in the porch.
46. The third witness, Aseri Dilawa, is a neighbour of the accused. On 11<sup>th</sup> November, 2022, the witness was at home with her 4 year old granddaughter preparing to go to town. In the morning, the witness had put out her beddings in the sun. Shortly after, she heard a dispute between the accused and his brother, so the witness went to bring her beddings inside the house and closed both the doors. The witness did this because she had seen the two brothers arguing and sensed that something would happen.

47. After some time, the witness heard someone cry. The witness opened the back door to ask another neighbour to call her daughter to come and drop her in town. At this time, the accused, with blood on his clothes, came and forced his way into the house. Upon seeing the accused the witness said, *"I don't want to be part of it."* The witness was scared, so she took her granddaughter out of the house and they were seated on the front porch. The accused was in the house for about 4 to 5 minutes and then left.
48. During cross examination, the witness could not recall if she had told the accused to go and wash himself in her bathroom.
49. The fourth witness, Dr. Monisha Sharma, informed the court that she graduated with an MBBS degree from the University of Fiji in 2016. In 2022, the witness was in the emergency department at the Lautoka Hospital. On 11<sup>th</sup> November, 2022, at around 9 am, the witness had examined a patient by the name of Nazra Begum. The Fiji Police Medical Examination Form of Nazra Begum was marked and tendered as prosecution exhibit no. 1.
50. According to the witness, the patient was brought to the hospital in a critical state, she was bleeding profusely. The specific medical findings of the witness were:
- a) Right hand amputated 1/3 below elbow;
  - b) Active bleeding noted;
  - c) Veins/tendons/bone were all exposed. The witness has indicated the injuries in appendix 1 as well.
51. In the professional opinion of the witness, the patient had suffered a traumatic amputation of her right hand due to physical assault with a knife.

52. The final witness Dr. Jona Nabaro informed the court that he graduated with an MBBS degree from the Fiji School of Medicine in 2008. He also has a post graduate Diploma in Emergency Medicine from Fiji National University in 2014.
53. In 2022, the witness was based at the Lautoka Hospital. On 11<sup>th</sup> November, 2022, he had examined Wazid Hussein. The specific medical findings were:
- a) Superficial laceration/scratch along the left side of the neck extending from below the left ear lobe to the back of the neck around 10 to 15 cm in length. There was no active bleeding noted;
  - b) Superficial abrasion noted on the interior chest around 2 to 3 cm in length. There was no active bleeding;
  - c) A small abrasion over the palmer aspect of the left thumb;
  - d) A small abrasion over the right knee.
54. The Fiji Police Medical Examination Form of Wazid Hussein dated 11<sup>th</sup> November, 2022, was marked and tendered as prosecution exhibit no. 2. The witness has indicated the injuries in appendix 1 as well.
55. During cross examination, the witness stated that the laceration/scratch seen on the neck of the patient was not as a result of a direct cut with the knife. There was a possibility that the patient would have defended. The laceration could have been possible due to struggle on the floor. The injuries seen on the patient were minor and superficial.

### **DIRECTION ON EXPERT EVIDENCE**

56. This court has heard the evidence of Dr. Sharma and Dr. Nabaro who were called as experts on behalf of the prosecution. 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 examination reports of Wazid Hussein and Nazra Begum are before this court and what the doctors said in their evidence as a whole is to assist this court.
57. 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.
58. 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.
59. This was the prosecution case.

### **DEFENCE CASE**

60. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be

subjected to cross examination. This court must also consider the evidence adduced by the defence and give such weight as is appropriate.

61. The accused informed the court that in the year 2022, he was living with his wife, his brother Wazid Hussein, and his aunt Nazra Begum. On 11<sup>th</sup> November, in the early morning, he went to cut grass. After a while, he came onto the porch of the house to sharpen the cane knife. The accused is also known as Bobby.
62. After sometime, one Shalen, who is the accused's neighbour, came and sat in the porch. Whilst Shalen was drinking tea, Wazid and aunt Nazra came and went into the house. The accused was sitting on the bench beside the sitting room door.
63. Shortly after, Wazid came onto the porch and said, "*What rubbish are you talking about?*" Before the accused could say anything, Wazid said "*I will come back.*" Wazid then went inside the house and came onto the porch with an iron rod.
64. Wazid started to threaten the accused by saying, "*We are the same children of our father and mother,*" and then in Hindi, "*chalau*" "*chalau*" meaning swing, swing. The accused stood up and was about one meter away from Wazid. According to the accused, Wazid was compelling him to strike Wazid. The accused responded, "*Are you mad? Go from here.*" At this time, Wazid hit the burglar bars with the iron rod. The accused got scared/confused and thought Wazid might hit him.
65. The accused had the cane knife in his hand, which he swung upwards to scare Wazid so that Wazid would leave. The accused also stated that the



knife was sharp. As the accused swung the knife, his aunt's hand came in the way of the knife and she got injured.

66. At this time, Wazid turned and the knife landed on Wazid's neck. When questioned why he had swung the knife upwards, the accused said it was not directed at anybody, but he had just swung it upwards thinking Wazid would leave. The accused further stated that it was Wazid who had brought the iron rod to threaten him when he was sitting quietly doing his work.
67. After the knife hit Wazid, Wazid threw the iron rod, and both were facing each other. At that moment, Master Vilive came into the compound and said, "*Bobby, no*". Wazid held both his hands, and both were pushing each other. Vilive threw the knife away and asked the accused to leave.
68. The accused went to Aseri's house. When he knocked, Aseri opened the door, and the accused went inside. Aseri told him to use her bathroom, but he did not go into the bathroom. The accused was only wearing trousers and no singlet, so he then went home, and put on a singlet and then went to the police station.
69. During cross examination, the accused said that his aunt Nazra had travelled from California to visit him and his brother, and their relationship at home was always good. The accused also agreed that he had a good relationship with Vilive. When it was put to the accused that Wazid was holding an iron rod and had hit the railing, the accused responded by saying, "*Not railing, he was coming. He wanted to strike me, but the thing went and hit the railing.*" Upon further questioning that Wazid had hit the railing with the iron rod, the accused disagreed and said that Wazid was threatening him.

70. When questioned that Wazid had not swung the iron rod at him, the accused said that Wazid had tried. Then he swung the knife, first on the iron rod. When asked if he had told this to his lawyer, he said he did not. He was telling all this in court since it was convenient for him to tell the court. When it was put to the accused that swinging the knife which landed on Wazid's neck was not necessary, the accused responded that the only reason he did what he did was to scare Wazid and if he would not have done it Wazid would have hit him.
71. When it was suggested to the accused that there was no need for him to defend himself, the accused said Wazid had gone into the house and brought the iron rod and was going to hit him. The accused said he was sitting down and did not say anything.
72. The accused maintained that he had not used the knife separately on Wazid and his aunt. He said, "*I swung the knife once and it went and hit the aunt's hand, and the same went and hit my brother's neck.*" The accused denied committing the offences alleged.
73. In re-examination, the accused stated it was necessary to swing the knife at Wazid because he thought if he swung the knife then Wazid would leave and he did not think anything would happen. The accused did not intend to cause harm to Wazid and aunt Nazra.
74. This was the defence case.

## **ANALYSIS**

75. The prosecution states that the complainant Wazid Hussein and the accused Abid Hussein are biological brothers and they were living under the same roof. On 11<sup>th</sup> November, 2022 the aunt of both brothers Nazra Begum who had come from California was also staying with them.
76. On the same day in the morning, the accused was cutting grass in the garden when Wazid and Nazra went to the shop. When they returned the accused was sitting in the porch sharpening his cane knife. Nazra and Wazid went into the house.
77. Shortly after, Wazid came out of the house and questioned the accused about what he had said to their aunt. The accused denied saying anything and he said it was a lie. There was a heated exchange of words between the two. Since the accused had a knife in his hand Wazid picked up an iron rod which was in the porch. As the argument progressed Wazid got angry and he hit the railing with the iron rod.
78. At this time, the accused stood up with the cane knife in his hand. The prosecution alleges that as Wazid turned to go into the house, the accused struck him on the neck with the knife, resulting in a cut that began to bleed. Unbeknown to Wazid, Nazra had come behind him and was trying to protect him when the accused struck Nazra's right arm below the elbow, severing it.
79. Vilive the neighbour of the accused saw what the accused had done. He came separated the two brothers who were struggling with each other on

the floor, threw away the cane knife, picked up the fallen arm of Nazra put it in a container and transported Wazid and Nazra to the Lautoka Hospital.

80. Nazra was in a critical state and bleeding profusely that immediate attention had to be given by the doctor. Nazra was hospitalized. Wazid was also seen by a doctor and sent home due to superficial injuries he had suffered.
81. The prosecution submitted that in respect of Wazid's injury the accused had intended to kill Wazid that is the reason why the accused had swung the cane knife on the neck of Wazid. What the accused did was more than mere preparatory in that he had stood up and with cane knife in hand struck the neck of Wazid.
82. In respect of Nazra, the prosecution submitted that the accused had intended to cause grievous harm when he struck Nazra's arm with such a force that the entire arm below the elbow was completely severed exposing her veins/tendons and bone.
83. The prosecution further submitted that the medical reports of Wazid and Nazra are self-explanatory and indicate serious harm. The knifing incident was not only narrated by Wazid, but was also seen by an independent witness, Vilive, who was first at the scene to offer his assistance to Wazid and Nazra.
84. In respect of the allegation of criminal trespass, the prosecution submitted that Aseri had made it clear that she did not want to be involved when she saw the accused. The accused forcefully entered her house and stayed there for about 4 to 5 minutes. Aseri was so concerned by this behaviour that she left the house and sat on the porch.

85. Finally, the prosecution submitted that the accused knew what he was doing at the time and he did so, knowing the consequences would be serious. Wazid had the iron rod with him but had not used it against the accused at any time. Wazid had not even threatened the accused. The accused, in a haste struck Wazid and at the same time struck unarmed Nazra, who had come to protect Wazid.
86. On the other hand, the defence says the allegations did not make sense as the accused, Wazid and Nazra had a good relationship as members of a family. They were living under one roof without any problems. There was a lot of love and affection between the three, with no animosity. Therefore, it is beyond common sense to think that the accused would ever want to harm Wazid and Nazra. The defence argues that the allegations are unfounded and baseless.
87. The accused did not do anything to Wazid and Nazra as narrated and alleged. What Wazid and Vilive said in court was not possible and/or probable and therefore they should not be believed. There was no altercation by the accused.
88. In respect of Wazid, the defence is also asking this court to consider the fact that Wazid brought the iron rod from the house after confronting the accused. The accused had been sitting quietly and doing his work. It was Wazid who attempted to strike the accused with the iron rod, but it hit the railing. Wazid admitted that he was angry, and there is no doubt that it was his aggression that escalated the situation, the accused got scared and was bound to protect himself.
89. There was no intention by the accused to kill Wazid, which is reflected by the superficial injuries in the medical report. The accused denied saying

anything to his aunt, which was an acceptable response. It was Wazid who was behaving in an erratic manner. The tense situation, created by Wazid, was happening fast had an effect on the accused, who thought Wazid would attack him with the iron rod. The accused swung the knife upwards to scare Wazid, hoping that Wazid would leave and not attack the accused.

90. From nowhere, Nazra's hand came on the way, and the knife struck her hand. As a result, the direction of the knife changed, and it struck Wazid's neck. Had the accused intended to kill Wazid, the injuries would have been life threatening. The injuries sustained show that there was no intention by the accused to cause any harm.
91. In respect of Nazra, the defence submitted that the circumstances at the time were so tense and confusing that the accused had no idea that Nazra was present. He had only moved his knife upwards. The accused did not have any intention whatsoever to harm Nazra.
92. In respect of the allegation of criminal trespass, the defence submitted that the accused had known Aseri from a long time. When the accused went to Aseri's house, it was Aseri who, upon seeing blood on the accused, told him to go and clean himself in her bathroom. However, the accused did not do so but remained at the door and then he left for his house.

### **DETERMINATION**

93. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the

version of the defence still the prosecution must prove this case beyond reasonable doubt.

94. In this case, there are two different versions, one given by the prosecution and the other by the defence. This court must consider all the evidence adduced to decide whether the prosecution has proven beyond reasonable doubt that the accused committed the offences alleged. It is not for this court to decide who is acceptable between the complainants and the accused.
95. This court has kept in mind the following factors when determining the credibility and reliability of a witness such as promptness/spontaneity, probability/improbability, consistency/inconsistency, contradictions/omissions, interestedness/disinterestedness/bias, the demeanour and deportment in court [and the evidence of corroboration where it is relevant] see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016, *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022)).
96. Brennan J in *Liberato and Others v The Queen* ((1985) [1985] HCA 66; 159 CLR 507 at 515 has discussed the appropriate approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J held that:

*“When a case turns on a conflict between the evidence of a prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question; who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question ( which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the prosecution has proved beyond reasonable doubt the issue which it bears*

*the onus of proving. The jury must be told that; even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification.”*

97. This court has also taken into account the observations made by the Court of Appeal in *Rokocika v The State* [2023] FJCA 251; AU0040.2019 (29 November 2023) regarding what the accused told the court. At paragraph 45 the Court of appeal had stated as follows:

*The Liberato direction covers three points on the spectrum of belief regarding what the accused has said — positive belief (first aspect), positive disbelief (third aspect), and neither actual belief nor rejection of the accused’s account (second aspect): Park v R [2023] NSWCCA 71 at [102]–[103].*

98. I have also kept in mind the observations made by Prematilaka RJA sitting as a single judge of the Court of Appeal in *Josaia Naikalivou vs. The State*, AAU 017 of 2022 (26<sup>th</sup> March, 2024) at paragraph 9 as follows:

*In Murray v The Queen (2002) 211 CLR 193 at 213 [57] Gummow and Hayne JJ, in the High Court of Australia made it clear that it is never appropriate for a trial judge to frame the issue for the jury’s determination as involving a choice between conflicting prosecution and defence evidence:*



*in a criminal trial the issue is always whether the prosecution has proved the elements of the offence beyond reasonable doubt. In R v Li (2003) 140 A Criminal R at 288 at 301 it was again held that the issue can never be which of the cases is correct or who of the complainant and the accused is telling the truth. This seems to be what exactly the trial judge had done in the judgment.*

99. There is no dispute that the accused is the younger biological brother of Wazid, and Nazra is the maternal aunt of the accused and Wazid. There is also no dispute that all three were living under one roof, and they shared a good relationship.

**LESSER OFFENCE**

100. In respect of count one, attempted murder, I have also directed my mind to the lesser offence of act intended to cause grievous harm. The law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of attempted murder, it must then consider the lesser offence of act intended to cause grievous harm.
101. I do not accept that the accused intended to kill Wazid. Had this been the case, Wazid would have received life-threatening injuries to his neck. The medical report of Wazid and the evidence of Dr. Nabaro support the contention that minimal force was used and there was no direct contact of the knife with Wazid's neck. I have once again carefully examined the evidence in totality, and I am satisfied that the evidence adduced does not satisfy the offence of attempted murder. However, this court is satisfied

that the evidence satisfies all the elements of the offence of act intended to cause grievous harm.

### **SELF DEFENCE**

102. The accused relied on self defence. This is provided for in section 42 of the Crimes Act:

*(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.*

*(2) A person carries out conduct in self defence if and only if he or she believes the conduct is necessary:*

*(a) to defend himself or herself or another person; or*

*...*

*and the conduct is a reasonable response in the circumstances as he or she perceives them.*

103. It is not for the accused to establish that he was acting under self defence. This court must consider the matter of self defence in light of the situation that the accused honestly believed he was facing. This court must first ask whether the accused honestly believed that it was necessary to use force to defend himself, and secondly, whether the type and amount of force used by the accused was reasonable. Obviously, a person who is under attack (or threatened attack) may react on the spur of the moment, and cannot be expected to work out exactly how much force is necessary to defend himself.

104. On the other hand, if the accused uses excessive force or force that is out of all proportion to the anticipated attack against him, or uses more force than is necessary to defend himself, the force used would not be reasonable. Therefore, this court must take into account both the nature of the attack (or threatened attack) and what the accused did as a result.
105. The accused, during cross examination informed the court that he was threatened by the complainant, Wazid, who had tried to hit him with an iron rod, but missed and struck the railing instead. As a result, the accused reacted by swinging his knife upwards.
106. Self defence, if validly established, is a complete defence to the charge of act intended to cause grievous harm. Therefore, if this court finds that the accused was acting in self defence, then this court should find him not guilty of the offence of act intended to cause grievous harm. Since the prosecution must prove the guilt of the accused it is the responsibility of the prosecution to prove that the accused was not acting in self defence.
107. If this court is sure that the force the accused used was unreasonable then the accused could not have been acting in self defence, but if this court is satisfied that the force used by the accused was or may have been reasonable then this court must find the accused not guilty.
108. The prosecution asserts that Wazid did not threaten the accused and Nazra never did anything to the accused. The eye witness, Vilive, supported the evidence of Wazid, stating that he saw the accused suddenly swing the knife and strike firstly Wazid, and secondly Nazra. Furthermore, the prosecution states that the two doctors testified about the injuries sustained by Wazid and Nazra.

109. The prosecution submitted that the force used by the accused was disproportionate and unreasonable, therefore, self defence does not arise in the circumstances of the case.
110. Upon considering the evidence adduced, this court is satisfied beyond reasonable doubt that the accused was not acting in self defence. Wazid and Nazra had not threatened or done anything to the accused that would have prompted such a reaction. In any event, the force used by the accused was unnecessary, disproportionate and unreasonable since no imminent danger existed.
111. The defence also stated that the accused did not intend to cause grievous harm to Wazid and Nazra. I once again direct my mind to the definition of "intention" mentioned in paragraph 12 of this judgment. I am unable to accept that the accused did not intend to cause grievous harm to Wazid and Nazra. The manner and circumstances in which the accused swung the cane knife demonstrated that he intended to cause grievous harm to Wazid and Nazra. The fact that Wazid received superficial injuries is not a relevant consideration.
112. After carefully considering the evidence adduced by the prosecution and the defence, I believe the evidence of the complainant, Wazid Hussein, and the other prosecution witnesses as truthful and reliable they gave a comprehensive account of what the accused had done that morning. They were also able to withstand cross examination and were not discredited with regard to the main version of their evidence.
113. Wazid Hussein was able to recall and relate what happened that day. I accept that Wazid did not threaten and/or retaliate against the accused

with the iron rod at any point in time. This witness was not discredited in cross examination.

114. Vilive, the eye witness, was able to coherently recall and relate what he had seen that morning, and I have no doubt in my mind that he told the truth in court. This witness was able to withstand cross examination and was not discredited. Vilive gave an account of what he had seen, and he had also carried out his civic duty in transporting Wazid and Nazra to the hospital in a timely manner. Furthermore, both doctors narrated the extent of the injuries suffered by Wazid and Nazra, and their opinions are reliable and credible.
115. The defence did not suggest any motivation by Wazid to falsely implicate the accused. In any event, the relationship between Wazid and the accused was good even on the day of the allegations.
116. Moreover, the absence of Nazra Begum does not affect the prosecution case. The evidence of Wazid, Vilive, and, to an extent the accused, as well as the medical report of Nazra, clearly corroborate what had happened to Nazra. I reject the evidence of the accused that he had not seen Nazra in the porch as unbelievable.
117. I also accept the evidence of Aseri Dilawa that the accused had forcefully entered her house and stayed there for about 4 to 5 minutes. Although Aseri did not say that she had told the accused to go away, her act of leaving the house and going onto the porch clearly suggests that she did not want the accused to remain in her house. Upon seeing the accused, she told him that she did not want to be involved, which was a clear indication that he must leave.

118. On the other hand, the accused did not tell the truth. He gave a version of events that is not probable and believable. The accused also did not tell the truth when he said that Wazid had threatened and attempted to strike him with the iron rod which hit the railing.
119. It was also noted that the accused was not forthcoming in his evidence. He primarily attempted to divert attention by talking about unrelated issues and repeating himself. During cross examination, the accused was evasive and failed to answer the questions asked. He gave answers that were confusing and convoluted. When in a tight corner the accused avoided answering and spoke about irrelevant matters.
120. As the evidence of the accused progressed, it became obvious that the accused had made up his mind not to tell the truth about what had actually happened. I do not give any weight to the evidence of the accused.
121. Finally, on a holistic review of the evidence before this court, the prosecution has disproved beyond reasonable doubt self defence and lack of intention raised by the accused. I also reject the defence assertion that Aseri Dilawa had allowed the accused into her house as implausible.
122. The defence has not succeeded in raising a reasonable doubt in the prosecution case in respect of all the counts as charged.

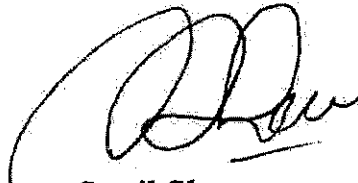
### **CONCLUSION**

123. This court is not satisfied beyond reasonable doubt that the accused on 11<sup>th</sup> November, 2022 had attempted to murder Wazid Hussein. The accused is acquitted of the charge of attempted murder. However, this

court satisfied beyond reasonable doubt that the accused on 11<sup>th</sup> November, 2022 with intent to cause grievous harm to Wazid Hussein and Nazra Begum unlawfully wounded them with a cane knife. Furthermore, this court is satisfied beyond reasonable doubt that the accused on 11<sup>th</sup> November, 2022 unlawfully persisted in entering and remaining in the family house of Aseri Dilawa after being warned not to come thereon.

124. In view of the above, I find the accused guilty of the lesser offence of act with intent to cause grievous harm in count one, act with intent to cause grievous harm in count two and criminal trespass in count three and he is convicted accordingly.

125. This is the judgment of the court. \*

  
**Sunil Sharma**  
**Judge**



*\*It is noted that the surname of Aseri Dilawa has been incorrectly typed in the information. This omission did not cause any prejudice to the defence.*

**At Lautoka**

18 March, 2025

**Solicitors**

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

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

