

**IN THE MAGISTRATES' COURT OF FIJI  
AT TAVUA  
CRIMINAL JURISDICTION**

Criminal Case No: 226 – 2012 & Criminal Case No: 237 – 2012

Both cases above are consolidated under CF 226 - 2012

**STATE**

-v-

**AMIT VIKASH - 1<sup>st</sup> Defendant**

**SHARMILA SHANKAR - 2<sup>nd</sup> Defendant**

**TARA MATI - 3<sup>rd</sup> Defendant**

Before : RM Fotofili L.

For the Prosecution : Inspector Lenaitasi S. [ Police Prosecution ]

For the 1<sup>st</sup> and 3<sup>rd</sup> Defendant : Mr. Samuel K Ram and Mr Patel D. [ Samuel K Ram ]

For the 2<sup>nd</sup> Defendant : Mr Datt A. [ Messrs Dayal Lawyers ]

Trial : 24<sup>th</sup> June 2019 and 10<sup>th</sup> February 2020

No Case To Answer Ruling : 19<sup>th</sup> November 2019

Judgment : 31<sup>st</sup> March 2020

**JUDGMENT**

**BACKGROUND**

1. When providing the No Case To Answer Ruling in this matter on the 19<sup>th</sup> of November 2019, I summarised the background of the case, the evidence adduced by prosecution and some applicable law.
2. I will reproduce some of these in this judgment.
3. The 1<sup>st</sup> defendant was initially charged separately and which is the subject of Tavua CF 226 – 2012 while the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were jointly charged in another case and which is the subject of Tavua CF 237 – 2012.

4. The prosecution [ without objection from the defence ], were granted leave on the 28<sup>th</sup> of January 2019 to file a consolidated charge.
5. The cases are now consolidated under Tavua CF 226 – 12 with all the 3 defendants charged in the same file.
6. The 3 defendants pleaded not guilty to the amended or consolidated charge which reflects the following:

#### **COUNT ONE**

##### *Statement of Offence*

**SERIOUS ASSAULT**: Contrary to Section 277 ( b ) of the Crimes Act of 2009.

##### *Particulars of Offence*

**AMIT VIKASH** on the 17<sup>th</sup> day of August, 2012 at Dakavono in the Western Division resisted the arrest of **Police Constable Number 4704 VONIANI NAMUA** in the due execution of his duties.

#### **COUNT TWO**

##### *Statement of Offence*

**SERIOUS ASSAULT**: Contrary to Section 277 ( b ) of the Crimes Act of 2009.

##### *Particulars of Offence*

**SHARMILA SHANKAR and TARA MATI** on the 17<sup>th</sup> day of August, 2012 at Dakavono in the Western Division wilfully obstructed **Police Constable Number 4704 VONIANI NAMUA** in the due execution of his duties.

7. The parties were served a copy of the court record for Tavua CF 225 – 12 [ a related file ] and the parties have advised the court that they did not have any issue with what is contained in that court record.
8. I have taken judicial notice of the records in that file.
9. In the case of Tavua CF 225 – 12, the 1<sup>st</sup> defendant Mr Amit Vikash was also the defendant. In that file, the 1<sup>st</sup> defendant was charged with assaulting and causing injuries to his wife Ms Sharmila Shankar who is currently the 2<sup>nd</sup> defendant. The allegation in CF 225 – 12 is alleged to have happened on the 14<sup>th</sup> of August 2012. The

1<sup>st</sup> defendant Mr Amit Vikash was acquitted at no case to answer after the 2<sup>nd</sup> defendant or his wife gave evidence during the trial testifying under oath that she was not assaulted or pushed or that her husband ' never did anything ' to her. She also denied that she gave a police statement to police which reflects that her husband had assaulted her. She claimed that police had fabricated her police statement.

10. As for this case before us for which all the 3 defendants are charged, the prosecution only called 1 witness and the defence had a shirt marked for identification [ **MFI Defence 1** ] through that 1 prosecution witness.
11. After the prosecution closed their case, I found that there was a case to answer.
12. Options were then provided to the defence and in response, the defence elected to call the 2<sup>nd</sup> defendant Ms Sharmila Shankar and the 3<sup>rd</sup> defendant Tara Mati as witnesses.
13. The defence declined and did not tender or exhibit the shirt or **MFI Defence 1**.
14. I summarise the oral evidence for the prosecution and defence below.

**PW1**

15. Prosecution witness 1 [ PW1 ] is Police Constable 4704 Voniani Namua.
16. He is based at the Tavua Police Station.
17. He has been serving as a police officer for 11 years.
18. In 2012 he was based at the Vatukoula Police Station, in their community policing unit.
19. On the 17<sup>th</sup> of August 2012 he was on duty during the 'dayshift' and was driving a Nissan Navara police vehicle.
20. PW1 was requested by a police officer Gyan to be dropped off home. Gyan stayed at Toko, Tavua.
21. PW1 drove the vehicle with Gyan and another officer Loame accompanying them.
22. PW1 drove past the 1<sup>st</sup> defendant or Amit's residence on his way to drop off Gyan.

23. On PW1's return, PW1 said that he was surprised to see the 1<sup>st</sup> defendant walking towards the vehicle.
24. The 1<sup>st</sup> defendant was wearing trousers with a shirt.
25. PW1 stopped the vehicle as the 1<sup>st</sup> defendant is a good friend of his.
26. The 1<sup>st</sup> defendant then shouted at PW1. PW1 was confused.
27. The 1<sup>st</sup> defendant was holding onto the side of the vehicle door. The door was closed.
28. The 1<sup>st</sup> defendant shouted saying 'what did you do?', 'why did you take my wife from Vatukoula to Nadi?'.
29. PW1 responded saying for the 1<sup>st</sup> defendant to speak with another lady police officer WPC Makelesi who is handling the case regarding the wife.
30. PW1 was aware at the time that there was a case regarding the 1<sup>st</sup> defendant and his wife.
31. PW1 explained that he was requested by WPC Makelesi to drop the 1<sup>st</sup> defendant's wife at Tavua Police Station and that was before PW1 met the 1<sup>st</sup> defendant that day.
32. PW1 described that the 1<sup>st</sup> defendant was "really angry he was shouting he swore said 'Fuck all police officers" '.
33. PW1 was annoyed and concerned that some neighbours would have heard it.
34. PW1 requested the 1<sup>st</sup> defendant to calm down.
35. PW1 told PC Loame for them to arrest the 1<sup>st</sup> defendant.
36. PW1 was in civilian clothing or was not in police uniform at the time.
37. When PW1 opened the vehicle door, the 1<sup>st</sup> defendant wanted to run away so PW1 grabbed the 1<sup>st</sup> defendant's trousers around the waist area.
38. PC Loame got out of the vehicle and was assisting PW1 put the 1<sup>st</sup> defendant in the vehicle.
39. PW1 said that he was surprised when he was hit by a Sasa broom.

40. PW1 looked back and saw '2 Indian ladies'.
41. PW1 identified the 3<sup>rd</sup> defendant as the lady holding the Sasa broom.
42. PW1 cannot remember how many times he was hit with a Sasa broom as he was concentrating on something else.
43. One of the lady was pulling the 1<sup>st</sup> defendant and the other lady was pulling PW1.
44. PW1 identified the 2<sup>nd</sup> defendant as the lady pulling him.
45. PW1 told the ladies to stop.
46. The ordeal went on for more than 5 minutes.
47. PW1 then told PC Loame to leave the 1<sup>st</sup> defendant or otherwise the 2 ladies will get injured.
48. PW1 then drove back to Vatukoula Police Station.
49. When cross examined by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant, PW1 repeated that he was annoyed.
50. PW1 told PC Loame to arrest the 1<sup>st</sup> defendant.
51. It was part of their duty to drop PC Gyan home on that day.
52. PW1 is not aware that there was a complaint against PC Gyan by the 1<sup>st</sup> defendant.
53. When returning to Vatukoula Police Station, PW1 reported the matter to the station orderly.
54. PW1 does not know whether an investigation was carried out in relation to this report and cannot recall whether any witness or the 1<sup>st</sup> and 3<sup>rd</sup> defendant was interviewed.
55. PW1 described that his duty on that day was to drive. When the 1<sup>st</sup> defendant said Fuck all police officers, this annoyed PW1. The 1<sup>st</sup> defendant ran. PW1 grabbed the 1<sup>st</sup> defendant but the defendant still ran.
56. PW1 described that it was a 'marked' police vehicle they were using on that day.
57. PW1 struggled with the 1<sup>st</sup> defendant when the latter was trying to get away.

58. The ladies told PW1 to stop.
59. PW1 did not see who hit him with a Sasa broom but when he turned, he saw the 3<sup>rd</sup> defendant.
60. PW1 accepted that he gave a police statement about the incident later the same day or 1 hour 40 minutes after the incident.
61. PW1 accepts that in his police statement, he did not mention that there was a Sasa broom.
62. PW1 recalls that the 1<sup>st</sup> defendant was wearing a shirt on the day in question but PW1 cannot recall whether the shirt shown to him in court is the same shirt worn by the defendant on the day.
63. A shirt with 3 buttons missing from the front and with a tear to the back was marked for identification [ MFI ] by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant and listed as **MFI Defence 1**.
64. When cross examined by counsel for the 2<sup>nd</sup> defendant, PW1 said that when he realised that women were involved, PW1 left.
65. PW1 added that the Sasa broom brushed his back.
66. The 2<sup>nd</sup> defendant was not holding the Sasa broom.
67. PW1 said that he only said 'Stop' after feeling the Sasa broom on his back.
68. PW1 did not say anything else.
69. PW1 accepts that there was no clear direction to 'them' that he was affecting an arrest.
70. PW1 denies that the 1<sup>st</sup> defendant was pinned to a fence during the struggle.
71. PW1 accepts that when he said that the 2<sup>nd</sup> defendant was holding him, he meant that the 2<sup>nd</sup> defendant was holding her husband the 1<sup>st</sup> defendant.

#### DW1

72. Defence witness 1 [ DW1 ] is the 2<sup>nd</sup> defendant Ms. Sharmila Shankar, 38 years old, domestic duties.

73. In 2012 she resided at Toko Tavua with her husband who is the 1<sup>st</sup> defendant together with her father and mother [ the 3<sup>rd</sup> defendant ].
74. On the 17<sup>th</sup> of August 2012 at 9 am, DW1 was at home with her son together with the 1<sup>st</sup> and 3<sup>rd</sup> defendant.
75. DW1 went to hang the clothes outside the house and saw that that 2 males were 'forcing' her husband on the barb wire fence.
76. This happened outside the gate and DW1 was about 15 meters away.
77. DW1 also heard a loud voice but she could not make out where it came from.
78. Both DW1 and the 3<sup>rd</sup> defendant went to where they thought the voice was coming from.
79. The 3<sup>rd</sup> defendant was about 3 meters in front of DW1 when they approached.
80. The 3<sup>rd</sup> defendant reached first.
81. DW1 saw that her husband's shirt was torn and buttons were missing.
82. DW1 explained that one of the male was forcing her husband on the barb wire fence and the other male 'was just standing there'.
83. DW1 cannot remember what clothes the 2 males were wearing.
84. The male who was forcing her husband, DW1 has seen before as that male took her to the police station earlier and DW1 knows that he is a police officer.
85. DW1 was frightened that her husband will get hurt since he was pinned against the fence.
86. DW1 tried pulling her husband away from the wire.
87. There was no communication between DW1 and the 2 males even when they were standing around.
88. DW1 said that they came back home and the 2 males went away in a police van. Her husband then went to town in a taxi.
89. DW1 saw the police van when she went back.
90. Her husband had scratches on the back of his shoulders because of the barb wire.

91. DW1 says that she did not have the intention to obstruct police. She was saving her husband.
92. When cross examined, DW1 says that she cannot recall whether there was a sasa broom in her mother in law or the 3<sup>rd</sup> defendant's hand.
93. DW1 did not know whether the police officer was arresting her husband.

## **DW2**

94. DW2 is Ms Tara Mati, 64 years, domestic duties.
95. DW2 recounts that she heard a sound or noise and went outside. It sounded like someone was fighting.
96. She saw her son the 1<sup>st</sup> defendant was about 20 meters from her.
97. DW2 described that a police officer 'hang him at the wire'.
98. The other police officer was standing there.
99. DW2 saw a police van and that is how she knew they were police.
100. The police were not in uniform.
101. DW2 reached the place before her daughter in law.
102. DW2 said that she saved her son from getting hurt. His shirt was pinned and she freed him.
103. The police did not say anything to DW2 and similarly, DW2 did not say anything to the police.
104. The police then left in their van and her son changed his shirt and left to town.
105. When cross examined, DW2 said that she and her daughter in law went to the place 'all of a sudden'.
106. DW2 accepts that she was tidying the house but was not using a broom.



### **SUBMISSION BY COUNSELS**

107. Written submissions from counsels have been provided prior to my giving the no case to answer ruling. I have reconsidered those too in this judgment.
108. Counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant submit that the standard of proof has not been reached.
109. That circumstantial evidence may not be sufficient in this case. PW1 did not give evidence that he had reasonable suspicion to arrest the 1<sup>st</sup> defendant.
110. The 1<sup>st</sup> defendant is not facing any indecently insulting or annoying charge.
111. There is no intention by the 3<sup>rd</sup> defendant to obstruct the arrest. She was there to save the 1<sup>st</sup> defendant.
112. The police officer standing by could have notified the defendants.
113. Counsel for the 2<sup>nd</sup> defendant submit that the events happened quickly.
114. The family members were acting to aid the 1<sup>st</sup> defendant.
115. The 2<sup>nd</sup> defendant was mistaken about whether an arrest was being attempted.
116. I have considered the submissions by counsel.

### **BURDEN and STANDARD OF PROOF**

117. I remind myself that the defendants are presumed innocent until proven guilty.
118. The prosecution carries the burden of proving their guilt.
119. I remind myself that I must be convinced beyond a reasonable doubt or I must be sure that the defendants committed the offence before I can find any or all of them guilty.
120. The 1<sup>st</sup> defendant has elected to remain silent. That is his right and I draw no negative inference regarding his exercise of that right.
121. The 2<sup>nd</sup> and 3<sup>rd</sup> defendants have elected to give evidence. Their evidence will be assessed in the same way as I would with the prosecution's evidence but being

mindful that the burden is on the prosecution. Even if I don't accept the evidence or any part of the defence evidence, that does not necessarily mean that a defendant or the defendants are guilty.

122. There are 3 defendants in this case and I remind myself to assess the case against each of them carefully.

### **ELEMENTS**

123. The elements for count one - serious assault contrary to section 277 ( b ) of the **Crimes Act 2009** are:

- i. **The 1<sup>st</sup> defendant Amit Vikash :**
- ii. **Resists;**
- iii. **Any police officer namely Constable 4704 Voniani Namua;**
- iv. **In the due execution of the officer's duty.**

124. I have accepted the definition of 'resisting' outlined in the no case to answer submission filed by counsel for the 1<sup>st</sup> and 3<sup>rd</sup> defendant at page 10 paragraph 30 and 31, in that resistance implies some physical action.
125. It must also be remembered that section 15 ( 1 ) ( a ) ( b ) and ( c ) and section 16 of the **Crimes Act 2009** stipulates that a physical element of an offence maybe conduct or a result of a conduct or a circumstance in which conduct, or a result of conduct, occurs. The conduct must also be voluntary.
126. The **Concise Oxford English Dictionary** ( 12<sup>th</sup> edition ), 2011, at page 1224 amongst other things, defines resistance to mean an action of resisting or the impeding effect exerted by one material thing on another.
127. We must also apply common sense when determining the circumstance of each case and whether the conduct amounts to resistance.
128. The Fiji Police Force continues its existence under the **2013 Constitution** [ see section 129 ].
129. The primary legislation is the **Police Act 1965**.

130. Section 5 of the Act stipulates that 'The Force shall be employed in and throughout Fiji for the maintenance of law and order, the preservation of the peace, the protection of life and property, the prevention and detection of crime and the enforcement of all laws and regulations with which it is directly charged; and shall be entitled for the performance of any such duties to carry arms.'
131. An officer can be appointed or enlisted pursuant to Part 3 of the Act.
132. Further on, section 17 ( 1 ) ( 2 ) and ( 3 ) of the Act prescribes the general powers and duties of police officers.
133. For instance, every police officer is deemed to be on duty at all times, to collect and communicate intelligence affecting the public peace, to prevent the commission of offences and public nuisances, to detect and bring offenders to justice, and to apprehend all persons whom he or she is legally authorised to apprehend and for whose apprehension sufficient ground exists.
134. It may be worthwhile considering that section 31 ( a ) and ( b ) of the **Criminal Procedure Act 2009** prescribes that every police officer may take action necessary for the purpose of preventing the commission of any offence and shall prevent the commission of any offence to the best of their ability.
135. The above provision or duty is aimed at prevention or 'pre offence'. It could even be applicable if the offence is a continuing one.
136. Generally, every person has the right to freedom of speech, expression, thought, opinion and publication [ section 17 ( 1 ) of the **2013 Constitution** ].
137. In a case of indecently insulting or annoying any person contrary to section 213 ( 1 ) ( a ) of the **Crimes Act 2009** by uttering any word for example with the intention to insult the modesty of another, is one example where the right to express oneself maybe limited.
138. It is an offence to use obscene language in public and this is contrary to section 7 ( 1 ) of the **Minor Offences Act 1971**.
139. There are many other examples where the right to free expression or speech can be curtailed.
140. Generally, every person has the right to be at liberty. A person can be deprived of his or her liberty if for example they are reasonably suspected of committing an offence [ section 9 ( 1 ) ( e ) of the **2013 Constitution** ].

141. There is a balance that needs to be made when enforcing these rights.
142. Section 10 ( 1 ) and ( 3 ) and section 13 of the **Criminal Procedure Act 2009** authorises the touching or confinement of the person to be arrested unless the person submits to custody either by word or action. Reasonable force is justified and is the standard to be applied if for instance there is forcible resistance or an attempt to evade arrest. A person arrested need not be subjected to more restraint than what is necessary to prevent escape.
143. There are certain situations in which a police officer may arrest a person without a warrant or an order from a Magistrate. The situations listed below are selected intentionally from the list prescribed in section 18 of the **Criminal Procedure Act 2009** as they may be applicable in this case against the 3 defendants:
- a. whom the officer suspects on reasonable grounds of having committed an indictable offence (whether or not the offence is triable summarily);
  - b. who commits any offence in the presence of the officer;
  - c. who obstructs a police officer while in the execution of his or her duty, or who has escaped or attempts to escape from lawful custody;
144. Section 13 of the **2013 Constitution** outlines some of the rights of arrested and detained persons. I do not propose to repeat all of them but I highlight the right to be informed promptly for the reason of their arrest or detention and the nature of any charge that may be brought against them, the right to remain silent and the consequences of not remaining silent.
145. An ordinary reading of section 13 suggests that these rights apply 'post arrest or detention'.
146. In some cases, it is the practice of police to advise the person before arrest or when placing them under arrest of these rights.
147. The elements for the second count - serious assault contrary to section 277 ( b ) of the **Crimes Act 2009** are:
- i. **The 2<sup>nd</sup> Defendant Sharmila Shankar and 3<sup>rd</sup> Defendant Tara Mati;**
  - ii. **Wilfully obstructed;**

iii. **Any police officer namely Constable 4704 Voniani Namua;**

iv. **In the due execution of the officer's duty.**

148. The case for the prosecution is that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant acted jointly or in concert. This can be gleaned from the way the charge is drafted.
149. I remind myself that I must still assess the evidence against each of the defendants carefully.
150. Offenders can act in support of each other and the intention to commit an offence jointly can be spontaneous, even planned.
151. Section 45 ( 1 ) of the **Crimes Act 2009** stipulates that a person is deemed to have committed the offence if that person aided, abetted counselled or procured the commission of the offence.
152. Shouting encouragements, providing visible physical backup, giving advice, taking steps to facilitate the commission of the offence are some of the several ways where defendants can assist each other.
153. There is another way in which defendants can be linked to an offence.
154. Section 46 of the **Crimes Act 2009** prescribes that if 2 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.
155. Wilfully is not defined in the **Crimes Act 2009**.
156. However, wilfully can mean either being intentional or being reckless or just not caring about the consequence **Lagi v The State** [2004] FJHC 69; HAA0004J.2004S ( 12 March 2004 ) .
157. The **Concise Oxford English Dictionary** ( 12<sup>th</sup> edition ), 2011, at page 1651 defines wilful to mean intentional, deliberate, stubborn and determined.
158. I also accept the definition outlined in **Lagi**.
159. If intention was the only fault element that the legislators intended, then they would have inserted that easily in section 277 ( b ) of the **Crimes Act 2009** or the offending

provision. They have not. Recklessness is by no means an easy fault element to prove as well. If one were to go down the range of difficulty, it could be argued that the fault element of recklessness would be below the fault element of intention but higher than the fault element of negligence or knowledge.

160. Section 19 ( 1 ) ( 2 ) and ( 3 ) of the **Crimes Act 2009** defines that intention in relation to a conduct, arises when a person means to engage in that conduct. If it is a circumstance, the person believes it exists or will exist. If it is about a result, the person means to bring it about or is aware that it will occur in the ordinary course of events.
161. A person can be reckless as to a circumstance or result [ section 21 ( 1 ) and ( 2 ) of the Crimes Act 2009 ]. The defendant(s) should be aware of a substantial risk [ subjective test ] that the circumstance exists or will exist or that the result will occur and having regard to the circumstance known to him or her [ again a subjective test ], unjustifiably took the risk [ objective test ].
162. The **Oxford: Dictionary of Law** ( 9<sup>th</sup> edition ), 2018, at page 468 and relying on the UK **Police Act 1996** at section 89, states that obstruction includes any intentional interference, e.g. by physical force, threats, telling lies or giving misleading information, refusing to cooperate in removing an obstruction, or warning a person who has committed a crime so that he can escape detection, even warning speeding drivers of a speed trap ahead. It is not an offence merely not to answer any question or to advise someone not to answer any question.
163. It is inevitable in every case that there is some circumstantial evidence.
164. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care. It is evidence from which a reasonable inference can be drawn linking the defendant(s) to the offence and must negate any other reasonable conclusion that may exonerate the defendant(s). Drawing a reasonable inference should not be confused with conjecture or guessing. Timing, motive, opportunity amongst other factors assist in determining whether there is sufficient circumstantial evidence. At the end of the day, the court must be convinced beyond a reasonable doubt [ **Varasiko Tuwai v. The State** Criminal Appeal Number CAV 13 of 2015 ( 26<sup>th</sup> August 2016 ) at paragraph 51 to 53 ].

## FINDINGS

165. There are certain facts which I have found, which is applicable to both the counts.
166. I find and accept that the defendants are related. The 1<sup>st</sup> defendant Mr. Vikash and the 2<sup>nd</sup> defendant Ms. Shankar are married. The 3<sup>rd</sup> defendant Ms. Mati is mother of the 1<sup>st</sup> defendant or the mother in law of the 2<sup>nd</sup> defendant.
167. That all the defendants were present at the material time.
168. These facts are established from the evidence of all the witnesses who gave evidence.
169. Further to that and as I have explained in the background of this judgment, I have taken judicial notice of the court record in Tavua CF 225 – 12 which also establishes the relationship between the defendants, particularly the relationship of the 1<sup>st</sup> and 2<sup>nd</sup> defendant.
170. The allegation of assault in that case is alleged to have happened on the 14<sup>th</sup> of August 2012 which is 3 days prior to this case.
171. Although none of the witnesses related this directly in their evidence, there is circumstantial evidence and I am satisfied beyond a reasonable doubt that that case of assault is an underlying factor in the lead up to what allegedly transpired on the 17<sup>th</sup> of August 2012.
172. For instance, PW1 in his evidence related what that the defendant had approached him and asked why PW1 had taken his wife earlier. The 2<sup>nd</sup> defendant Ms Shankar in her evidence recounts that she was taken to the police station earlier by PW1 and that is how she knows that PW1 is a police officer and together with the records in Tavua CF 225 – 12.
173. I am satisfied beyond a reasonable doubt too that PW1 was a police officer at the material time. This evidence comes from PW1 himself which I accept. Together with the evidence of the 2<sup>nd</sup> defendant Ms Shankar and the 3<sup>rd</sup> defendant Ms Mati who in her evidence gives circumstantial evidence saying that PW1 left in a police vehicle and that a police vehicle was present when the incident happened.
174. Hereafter, I will deal with each count respectively.

**First Count – 1<sup>st</sup> Defendant Amit Vikash**

**175.** For convenience, I repeat the elements needed to be proven beyond a reasonable doubt:

- i. The 1<sup>st</sup> defendant Amit Vikash :**
- ii. Resists;**
- iii. Any police officer namely Constable 4704 Voniani Namua;**
- iv. In the due execution of the officer's duty.**

**176.** As I have stated earlier, I find and accept that PW1 Voniani Namua was a police officer at the material time.

**177.** I find and accept that the 1<sup>st</sup> defendant Amit Vikash was present and has been sufficiently identified by PW1.

**178.** I adopt and apply what I have outlined in paragraphs 124 to 127 of this judgment when assessing whether there was resistance by the 1<sup>st</sup> defendant.

**179.** I found PW1 to be a credible witness. He appeared to me to be forthright and natural in his evidence. His answers during cross examination were compelling and reinforced his credibility. For instance PW1 conceded that he did not explain to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that he was affecting an arrest on the 1<sup>st</sup> defendant and conceding that for example he did not mention that there was a sasa broom in his police statement. PW1 appeared to me to be physically able to overpower the 1<sup>st</sup> defendant with the help of another officer but PW1 chose not to. I believe him that he left as he was concerned that the ladies or the 2<sup>nd</sup> and 3<sup>rd</sup> defendant may get injured. The impression of his evidence on me leaves me with the sense that police leaving was a difficult decision but it appeared that PW1 had the safety of the parties in mind and another reason why I found PW1 a compelling witness. I also find PW1 reliable and nothing suggested to me that he is mistaken when relaying his evidence.

**180.** I accept and find based on PW1's evidence that the 1<sup>st</sup> defendant Mr Vikash approached the police vehicle. Although PW1's opinion that the 1<sup>st</sup> defendant was angry is not binding on me, I accept PW1's observation. The 1<sup>st</sup> defendant was shouting. I accept and find that the 1<sup>st</sup> defendant said to PW1 'what did you do?', 'why did you take my wife from Vatukoula to Nadi?'. The 1<sup>st</sup> defendant also said 'Fuck all police officers'.



181. I am satisfied that the 1<sup>st</sup> defendant was referring to a complaint made earlier that he had allegedly assaulted his wife and which is the subject of the other case Tavua CF 225 – 12.
182. This was sufficient motive and explains why the 1<sup>st</sup> defendant was in a lewd mood on that day.
183. I accept that both PW1 and the 1<sup>st</sup> defendant Mr Vikash were acquainted with each other prior to the day the 1<sup>st</sup> defendant approached PW1 saying those things.
184. PW1 is duty bound for example, to prevent the commission of offences and public nuisances and to apprehend a person for which sufficient ground exists see the Police Act 1965 at section 17 ( 1 ) ( 2 ) and ( 3 ).
185. Section 9 of the Constitution prescribes that liberty can be curtailed if a person is reasonably suspected of committing an offence.
186. Section 18 ( b ) of the Criminal Procedure Act 2009 allows the arrest of a person without a warrant if the person commits an offence in the presence of the officer.
187. As PW1 explained, the 1<sup>st</sup> Defendant was shouting and swearing in public. PW1 was annoyed and concerned about the neighbours. He told the 1<sup>st</sup> defendant to calm down.
188. It is an offence to use obscene language in public and this is contrary to section 7 ( 1 ) of the Minor Offences Act 1971 or to indecently insult or annoy any person which is contrary to section 213 ( 1 ) ( a ) of the Crimes Act 2009.
189. The test for whether there should be an arrest is not the same as whether there is sufficient evidence and it is in the public interest to charge someone. The test for arrest is whether sufficient ground exists and if liberty is to be limited, if there is a reasonable suspicion that the person has committed an offence. No charge(s) can still arise even if there was a lawful arrest or detention.
190. Additionally, it was not necessary that PW1 know or mention the specific provision of the law that was allegedly being breached.
191. There were sufficient grounds for PW1 to make an arrest and he was entitled to arrest the 1<sup>st</sup> defendant. PW1 was therefore acting in the due execution of his duty.

192. It is given that PW1 could have explained the reason why the 1<sup>st</sup> defendant Mr. Vikash was going to be arrested before PW1 went on to affect the arrest. In some instances this may be the most practical thing to do. In some cases it would not.
193. Whichever situation arises, I do not find that it is a requirement under section 13 of the **Constitution** that an explanation is to be made for the reason for arrest, prior to the arrest.
194. The provision requires 'prompt' explanation for the reason of arrest or detention and the nature of any charge that may be brought, the right to remain silent and the consequences of not remaining silent.
195. I accept PW1's evidence that when he tried to arrest the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant tried to run.
196. PW1 had to grab the 1<sup>st</sup> defendant by his trousers. PW1 called for assistance. I am sure that in the struggle, the 1<sup>st</sup> defendant's shirt got torn [ although it was not exhibited ].
197. The force used on the 1<sup>st</sup> defendant was reasonable and was not excessive.
198. I do not find the claim or evidence from the defence believable that the 1<sup>st</sup> defendant was pinned against barbed wire. I found PW1 credible as a witness and he denied that that was the case.
199. Even if the barb wire evidence or claim by the defence that the 1<sup>st</sup> defendant was pinned on the barb wire fence, surely, it was the 1<sup>st</sup> defendant who created the situation when he provided sufficient grounds for PW1 to arrest him by shouting and saying profanity in public and then trying to run away when PW1 tried to arrest him.
200. I find all the elements of count one of serious assault against the 1<sup>st</sup> defendant Mr. Amit Vikash proven beyond a reasonable doubt.

**Second Count – 2<sup>nd</sup> defendant Sharmila Shankar and the 3<sup>rd</sup> defendant Tara Mati**

201. For convenience, I repeat the elements needed to be proven beyond a reasonable doubt:
- i. **The 2<sup>nd</sup> Defendant Sharmila Shankar and 3<sup>rd</sup> Defendant Tara Mati;**
  - ii. **Wilfully obstructed;**

**iii. Any police officer namely Constable 4704 Voniani Namua;**

**iv. In the due execution of the officer's duty.**

- 202.** Although the 2<sup>nd</sup> and 3<sup>rd</sup> defendants arrived at the scene around the same time, I do not find sufficient evidence to convince me that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant were acting in aid of or acting jointly or there was no 'meeting of the minds'.
- 203.** The 2<sup>nd</sup> and the 3<sup>rd</sup> defendants were acting independently of each other.
- 204.** I am still obliged to consider whether each of them committed the offence.
- 205.** Elements **i.**, **iii.** and **iv.** are established through PW1's evidence and the 2<sup>nd</sup> and 3<sup>rd</sup> defendants own evidence.
- 206.** I have found and accepted PW1 to be a credible and reliable witness.
- 207.** I find that the 3<sup>rd</sup> defendant Ms Mati was holding a sasa broom at the time and she 'brushed' the back of PW1 with it while PW1 was trying to arrest the 1<sup>st</sup> defendant.
- 208.** This means that I reject the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's evidence on this point and I reject their denial that the 3<sup>rd</sup> defendant did not have a broom with her at the material time.
- 209.** I have also rejected the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's evidence that the 1<sup>st</sup> defendant was pinned to a barb wire fence. I did not find the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's evidence credible on this point. I find their evidence exaggerated.
- 210.** I accept their evidence that there was a fence, but not that it had barbed wire.
- 211.** The defendants are related and it is not necessarily the case that those related will give biased evidence. However in this case, I find that to be the case for both the 2<sup>nd</sup> and the 3<sup>rd</sup> defendant.
- 212.** I did not find the 2<sup>nd</sup> and 3<sup>rd</sup> defendants convincing witnesses. Their evidence to me appeared unnatural and calculated.
- 213.** I accept though that the 2<sup>nd</sup> defendant Ms. Shankar came and held the 1<sup>st</sup> defendant or her husband. I am sure that the 2<sup>nd</sup> defendant was there to help her husband.
- 214.** This evidence comes from PW1 too who accepted so when cross examined.
- 215.** As I have explained in count one, PW1 was acting in the due execution of his duty.

- 216.** The element of concern is whether the 2<sup>nd</sup> or 3<sup>rd</sup> defendant wilfully obstructed PW1 in due the execution of that duty.
- 217.** I adopt and apply paragraphs 155 to 162 of this judgment in relation to the fault element.
- 218.** I am satisfied that both the 2<sup>nd</sup> and 3<sup>rd</sup> defendants knew that PW1 was a police officer. This comes from their own evidence. It was immaterial therefore whether PW1 was in uniform or not.
- 219.** Civilians too can affect a private arrest.
- 220.** When a civilian is holding the 1<sup>st</sup> defendant or if they are struggling, is it reasonable to conclude that the civilian is trying to arrest the 1<sup>st</sup> defendant or that the civilian was acting in the due execution of his or her duty? A logical answer is, it depends.
- 221.** However, I do not find that it is reasonable to assume whether it be a civilian or a police officer ( whether uniformed or not ) that just because they are struggling with the 1<sup>st</sup> defendant, that an arrest is being attempted on the 1<sup>st</sup> defendant or the person was acting in due execution of a duty. Even if an arrest was being attempted, whether it was a lawful one.
- 222.** Wilfully is either intentional or being reckless.
- 223.** I am not convinced beyond a reasonable doubt that both the 2<sup>nd</sup> and 3<sup>rd</sup> defendant intended to wilfully obstruct PW1. There is circumstantial evidence suggesting this, for example, they knew that PW1 was a police officer and that he was struggling with first defendant outside the house. However, this is not enough to establish intention to obstruct.
- 224.** If intention is not proven but were the 2<sup>nd</sup> and 3<sup>rd</sup> defendants still reckless as to obstruction?
- 225.** Recklessness requires the court to assess the situation from the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's perspective. The defendant(s) should be aware of a substantial risk [ subjective test ] that the circumstance exists or will exist or that the result will occur and having regard to the circumstance known to him or her [ again a subjective test], unjustifiably took the risk [ objective test ].
- 226.** There is insufficient evidence before me to establish that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant heard the 1<sup>st</sup> defendant saying profanity at PW1 and shouting. The defendants heard a sound and they went towards it. When they approached, they saw the 1<sup>st</sup>

defendant struggling with PW1. I do not accept though that the 1<sup>st</sup> defendant was pinned to a barb wire fence during the struggle.

227. I am satisfied with the part of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants evidence that they went to help the 1<sup>st</sup> defendant.
228. I am not satisfied though that the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendant were aware that there was a substantial risk that there was an attempt being made to arrest the 1<sup>st</sup> defendant.
229. It would have made a big difference if PW1 or the other police officer who was present at the scene told the 2<sup>nd</sup> and 3<sup>rd</sup> defendant not to approach as the 1<sup>st</sup> defendant is being arrested and is resisting or something to that effect.
230. As PW1 acknowledged in his own evidence, he did not do that.
231. I find that the ii. element of wilfully obstructing has not been proven beyond a reasonable doubt against either the 2<sup>nd</sup> or 3<sup>rd</sup> defendant.

### CONCLUSION

232. For the reasons explained above:
233. I find the 1<sup>st</sup> defendant Amit Vikash guilty and I convict him of count one – **Serious Assault** contrary to section 277 ( b ) of the **Crimes Act 2009**.
234. I do not find the 2<sup>nd</sup> defendant Sharmila Shankar and 3<sup>rd</sup> defendant Tara Mati guilty of count two – serious assault contrary to section 277 ( b ) of the **Crimes Act 2009** and I acquit both of them of this count.
235. I will hereafter take mitigation and other information relevant to sentence before pronouncing sentence on the 1<sup>st</sup> defendant Mr. Amit Vikash.
236. 28 days to appeal regarding the acquittal of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.



LISIATE T.V FOTOFILI  
**Resident Magistrate**

At Tavua this 31<sup>st</sup> day of March, 2020.