

IN THE HIGH COURT OF FIJI

AT LABASA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 48 of 2018

STATE

V

ISOA BOSEYACO

Counsel : Ms. Amelia Vavadakua with Mr. Inia Rakaria for the State
Mr. Amrit Sen for the Accused

Dates of Trial : 30 September & 1-3 October 2019

Summing Up : 4 October 2019

SUMMING UP

Madam Assessors and Gentleman Assessor,

[1] It is now my duty to sum up the case to you. We have reached the final stage of the proceedings before us. The presentation of evidence is over and it is not possible to hear any more evidence. You should not speculate about evidence which has not been given and must decide the case on the evidence which you have seen and heard. The Counsel for the State and the Accused have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.

[2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.

- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.
- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the two charges against the accused. Upon your return to Court, when you are ready, each one of you will be required to state his or her individual opinion orally on the charges against the accused, which opinion will be recorded. Your opinions could preferably be a unanimous one, but could also be a divided one. You will not be asked for reasons for your opinions. I am not bound to conform to your opinions. However, in arriving at my judgement, I assure you, that I shall place much reliance upon your opinions.
- [7] I have already told you that you must reach your opinions on evidence, and only on evidence. I will tell you what evidence is and what is not.
- [8] In this case, the evidence is what the witnesses said from the witness box and the documents tendered as prosecution exhibits.
- [9] If you have heard, or read, or otherwise came to know anything about this case outside this Courtroom, you must exclude that information from your consideration. The reason for this exclusion is, what you have heard outside this Courtroom is not evidence. Have regard only to the testimony and the exhibits put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted

the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may sometimes find Court environment stressful and distracting.
- [14] In this case you would have observed that the three lay witnesses for the prosecution were 'very reluctant witnesses'. This may be due to the fact that the said witnesses are very well known to the accused. Witness Taniela Delai said in his evidence that he has forgiven the accused for what he did to him, since they know each other and were good family friends.
- [15] Be that as it may, the prosecution has decided to continue with this case against the accused. That is the prerogative of the State. We cannot interfere with that process. What is important for you to decide is as to whether the evidence given in Court by the said prosecution witnesses is truthful, credible and reliable, and what weight you will attach to the said evidence.
- [16] You may also have to consider the likelihood or probability of the witness's account. That is whether the evidence of a particular witness seems reliable when compared with other evidence you accept? Did the witness seem to have a good memory? You may also consider the ability, and the opportunity, the witness had to see, hear, or to know the things that the witness testified about. These are only examples. You may well think that other general considerations assist. It is, as I have said, up to you how you assess the evidence and what weight, if any, you give to a witness's testimony.
- [17] Madam and Gentleman Assessors, I must make it clear to you that I offer these matters to you not by way of direction in law but as things which in common sense

and with knowledge of the world you might like to consider in assessing whether the evidence given by the witnesses are truthful and reliable.

- [18] Having placed considerations that could be used in assessing credibility and reliability of the evidence given by witnesses before you, I must now explain to you, how to use that credible and reliable evidence. These are directions of the applicable law. You must follow these directions.
- [19] When you have decided the truthfulness and reliability of evidence, then you can use that credible and reliable evidence to determine the questions of facts, which you have to decide in order to reach your final conclusion, whether the accused is guilty or not of the charges. I have used the term "*question of fact*". A question of fact is generally understood as what actually had taken place among conflicting versions. It should be decided upon the primary facts or circumstances as revealed from evidence before you and of any legitimate inference which could be drawn from those given sets of circumstances. You as Assessors, in determining a question of fact, should utilise your commonsense and wide experience which you have acquired living in this society.
- [20] It is not necessary to decide every disputed issue of fact. It may not be possible to do so. There are often loose ends. Your task is to decide whether the prosecution has proved the elements of the offences charged.
- [21] In determining questions of fact, the evidence could be used in the following way. There are two concepts involved here. Firstly, the concept of primary facts and secondly the concept of inferences drawn from those primary facts. Let me further explain this to you. Some evidence may directly prove a thing. A person who saw, or heard, or did something, may have told you about that from the witness box. Those facts are called primary facts.
- [22] But in addition to facts directly proved by the evidence or primary facts, you may also draw inferences – that is, deductions or conclusions – from the set of primary facts which you find to be established by the evidence. If you are satisfied that a certain thing happened, it may be right to infer that something else also occurred. That will be the process of drawing an inference from facts. However, you may only draw reasonable inferences; and your inferences must be based on facts you find proved by evidence. There must be a logical and rational connection between the facts you find and your deductions or conclusions. You are not to indulge in intuition or in guessing.
- [23] In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this morning, you saw a particular person seated on the back bench. Now he is not there. You did not see him going out. The fact you saw him seated there when you came in and the fact that he is not there now are two primary facts. On these two primary facts, you can reasonably infer that he must have gone out although you have not seen that. I think with that example you

will understand the relationship between primary fact and the inferences that could be drawn from them.

- [24] Then we come to another important legal principle. You are now familiar with the phrase burden of proof. It simply means who must prove the case. That burden rests entirely on the prosecution to prove the guilt of the accused.
- [25] This is because the accused is presumed to be innocent. He may be convicted only if the prosecution establishes that he is guilty of the offences charged. It is not his task to prove his innocence.
- [26] I have said that it is the prosecution who must prove the allegations. Then what is the standard of proof or degree of proof, as expected by law?
- [27] For the prosecution to discharge its burden of proving the guilt of the accused, it is required to prove it beyond any reasonable doubt. This means that in order to convict the accused, you must be sure that the prosecution has satisfied beyond any reasonable doubt every element that goes to make up the offences charged. A reasonable doubt is not any doubt or a mere imaginary doubt but a doubt based on reason. The doubt must only be based on the evidence presented before this Court.
- [28] It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offences, in order to find the accused guilty. If you are left with a reasonable doubt about guilt, your duty is to find the accused not guilty. If you are not left with any such reasonable doubt, then your duty is to find the accused guilty.
- [29] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victims or anger or prejudice against the accused or anyone else. No such emotion should have any part to play in your decision. You must approach your duty dispassionately, deciding the facts upon the whole of the evidence. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [30] Let us now look at the charges contained in the Amended Information.
- [31] There are two charges preferred by the Director of Public Prosecutions (DPP), against the accused:

COUNT ONE

Statement of Offence (a)

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

Particulars of Offence (b)

ISOA BOSEYACO, on the 23rd day of June 2018, at Tarven Night Club, in Savusavu, in the Northern Division, with intent to do some grievous harm to **TANIELA DELAI**, unlawfully wounded the said **TANIELA DELAI**, with a knife.

COUNT TWO

Statement of Offence (a)

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

Particulars of Offence (b)

ISOA BOSEYACO, on the 23rd day of June 2018, at Tarven Night Club, in Savusavu, in the Northern Division, with intent to do some grievous harm to **SAVENACA RATUDUGUCA**, unlawfully wounded the said **SAVENACA RATUDUGUCA**, with a knife.

[32] Section 255 (a) of the Crimes Act No 44 of 2009 (“Crimes Act”) reads as follows:

A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

*(a) unlawfully wounds or does any grievous harm to any person by any means; or
(b)*

[Emphasis is mine].

[33] As you would observe, in this case the prosecution has charged that the accused intended to do some grievous harm to the two complainants; and with that intention unlawfully wounded the complainants with a knife.

[34] Therefore, in order for the prosecution to prove the first count of Act with Intent to Cause Grievous Harm, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 23 June 2018);
- (iii) At Tarven Night Club, in Savusavu, in the Northern Division;
- (iv) Unlawfully wounded Taniela Delai, with a knife;
- (v) With the intention to do some grievous harm to the said Taniela Delai.

[35] Similarly, in order for the prosecution to prove the second count of Act with Intent to Cause Grievous Harm, they must establish beyond any reasonable doubt that;

- (i) The accused;
- (ii) On the specified day (in this case the 23 June 2018);
- (iii) At Tarven Night Club, in Savusavu, in the Northern Division;
- (iv) Unlawfully wounded Savenaca Ratuduguca, with a knife;
- (v) With the intention to do some grievous harm to the said Savenaca Ratuduguca.

[36] Let me now elaborate on these elements together in respect of counts one and two.

[37] The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.

[38] The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.

[39] The fourth element is that the accused unlawfully wounded, Taniela Delai, with a knife (in respect of Count One), and Savenaca Ratuduguca, with a knife (in respect of Count Two). The word "unlawfully" simply means without lawful excuse or without just cause. The term "wound" has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the two complainants as defined herein.

[40] The fifth and final element the prosecution must prove is that the accused intended to cause grievous harm to Taniela Delai (in respect of Count One) and Savenaca Ratuduguca (in respect of Count Two). The law provides that a person is said to have intention with respect to conduct if he or she means to engage in that conduct. Therefore, to prove the fifth element, the prosecution should prove beyond reasonable doubt that the accused intended to cause grievous harm to the said Taniela Delai and Savenaca Ratuduguca, respectively.

[41] I must also direct you that it is not necessary for the prosecution to establish that grievous harm was in fact caused to either of the victims or that the injuries caused to them were actually grievous in nature. What the prosecution must prove is that the accused had the intention to do or cause some grievous harm to the victims.

[42] Grievous harm has been defined at Section 4(1) of the Crimes Act as follows:

"grievous harm" means any harm which—

(a) amounts to a maim or dangerous harm; or

(b) seriously or permanently injures health or which is likely so to injure health; or

(c) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.

- [43] The term "dangerous harm" has been defined to mean as "*harm endangering life*".
- [44] The term 'harm' has been defined to mean: "*any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).*"
- [45] If you are satisfied beyond any reasonable doubt that the accused, on 23 June 2018, unlawfully wounded Taniela Delai, with a knife, with the intention to cause grievous harm to the said Taniela Delai, then you must find him guilty of the first count of Act with Intent to Cause Grievous Harm.
- [46] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge.
- [47] If you are satisfied beyond any reasonable doubt that the accused, on 23 June 2018, unlawfully wounded Savenaca Ratuduguca, with a knife, with the intention to cause grievous harm to the said Savenaca Ratuduguca, then you must find him guilty of the second count of Act with Intent to Cause Grievous Harm.
- [48] If you find that the prosecution has failed to establish any of these elements in relation to the charge, then you must find the accused not guilty of the charge.
- [49] However, if you find that the prosecution has proved all elements of the offence beyond any reasonable doubt, except the final element, that the accused intended to cause grievous harm to the said Taniela Delai (in respect of Count One) and Savenaca Ratuduguca (in respect of Count Two); as an alternative, you are then allowed to look at the lesser offence of Assault Causing Actual Bodily Harm, in terms of Section 275 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the first and second counts.
- [50] In terms of Section 275 of the Crimes Act "A person commits a summary offence if he or she commits an assault occasioning actual bodily harm."
- [51] In order for the prosecution to prove the offence of Assault Causing Actual Bodily Harm, in respect of Count One, they must establish beyond any reasonable doubt that;
- (i) The accused;

- (ii) On the specified day (in this case the 23 June 2018);
 - (iii) At Tarven Night Club, in Savusavu, in the Northern Division;
 - (iv) Assaulted the complainant, Taniela Delai; and
 - (v) Thereby caused actual bodily harm to the said complainant, Taniela Delai.
- [52]** Similarly, in order for the prosecution to prove the offence of Assault Causing Actual Bodily Harm, in respect of Count Two, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified day (in this case the 23 June 2018);
 - (iii) At Tarven Night Club, in Savusavu, in the Northern Division;
 - (iv) Assaulted the complainant, Savenaca Ratuduguca; and
 - (v) Thereby caused actual bodily harm to the said complainant, Savenaca Ratuduguca.
- [53]** The first element is concerned with the identity of the person who committed the offence. The prosecution should prove beyond reasonable doubt that the accused and no one else committed the offence.
- [54]** The second element relates to the specific day on which the offence was committed. The third element relates to the place at which the offence was committed. The prosecution should prove these elements beyond any reasonable doubt.
- [55]** The fourth element relates to the actual assault. The prosecution should prove beyond any reasonable doubt that the accused assaulted Taniela Delai (in respect of Count One) and Savenaca Ratuduguca (in respect of Count Two).
- [56]** With regard to the final element, the prosecution should prove beyond any reasonable doubt that actual bodily harm was caused to Taniela Delai (in respect of Count One) and Savenaca Ratuduguca (in respect of Count Two), as a result of the assault.
- [57]** As I informed you a few moments ago, the term ‘harm’ has been defined at Section 4(1) of the Crimes Act to mean: *“any bodily hurt, disease or disorder (including harm to a person’s mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).”*
- [58]** However, I wish to emphasize that you need to go in this direction ONLY if you find that the prosecution has failed to establish the final element of the offence of Act with Intent to Cause Grievous Harm, namely that the accused intended to cause grievous harm to Taniela Delai (in respect of Count One) and Savenaca Ratuduguca (in respect

of Count Two), beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offences of Act with Intent to Cause Grievous Harm beyond reasonable doubt, then you must find the accused guilty as charged.

[59] In this case, in respect of Count Two, the accused takes up the position that he acted in self-defence. Section 42(1) of the Crimes Act sets out: *“A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self-defence.”*

[60] In terms of Section 42(2) of the Crimes Act:

“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*
- (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*
- (c) to protect property from unlawful appropriation, destruction, damage or interference; or*
- (d) to prevent criminal trespass to any land or premises; or*
- (e) to remove from any land or premises a person who is committing criminal trespass —*

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

[61] The witness Savenaca Ratuduguca testified as to how the injury was caused to him. He said: *“We were drinking. Chako came and took the beer bottle from us. I took a bottle hit him with it and it missed. That is the time he also stabbed me”*. The witness further explained that Chako had approached the table where he, his cousin brother Manasa and his neighbour Livai were at. The witness then explained: *“He came, he took a bottle, I saw him, then I took an empty bottle, I hit him with that bottle which missed him. That’s when he stabbed me”*.

[62] This is matter for you to decide based on all the facts and circumstances of the case. It is for you to decide whether the conduct of the accused, in the given circumstances was necessary and a reasonable response to the circumstances as perceived by him.

[63] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.

Case for the Prosecution

[64] The prosecution, in support of their case, called the two complainants, Taniela Delai and Savenaca Ratuduguca, witness Sairusi Ratusili, and two Medical Officers: Dr. Rayape Racaca and Dr. Maloni Bulanauca. The prosecution also tendered the following documents as prosecution exhibits:

Prosecution Exhibit **PE1** – The Medical Examination Report of Taniela Delai.

Prosecution Exhibit **PE2** – The Medical Examination Report of Savenaca Ratuduguca.

Prosecution Exhibit **PE3** – Further Medical Examination Report in respect of Taniela Delai.

[65] Evidence of Taniela Delai

- (i) *The witness testified that he is currently residing at Vuci Road in Nausori. He is currently unemployed.*
- (ii) *Last year he had been residing at Savusavu. He was employed as a DJ in a Night Club. He referred to the Night Club as White Stock Tarven.*
- (iii) *On 23 June 2018, between 7.00 and 8.00 p.m. he was opening the DJ room to set up the music for the night. The Night Club was just opened. He said: "First group was coming was three of them". He had set up the music and he was trying to come up. When he tried to come out he had met his friend Chako, the accused in the case. The witness said Isoa is his other name. However, he knows him as Chako. They are family friends.*
- (iv) *The witness said: "I walked out from my DJ room. Same time I opened my door to walk out and met him and he said to me in itaukei 'vacava' (to mean what happened or how is it)... I just thought that he wanted to just play with me and he punched my stomach. And I did not realise that it was a knife".*
- (v) *When asked as to how the accused had been holding the knife the witness said: "I didn't get a clear view of the knife. I just thought he punched me like that (and the witness demonstrated with his hand to show how the accused had punched him on his abdomen)".*
- (vi) *The witness said that he thought that the accused was throwing his hand at him in a joking manner. He used the itaukei term 'qitotaka' (to mean joking or for fun).*
- (vii) *When asked to explain again as to how the punch was thrown at him, the witness said: "When I opened my door, when I looked and step down – I opened the room and walked down the steps. I then met*

Chako. Then he uttered those words in itaukei 'hei vacava'" and the witness described what Chako did.

- (viii) When asked what the accused's tone was like when he said hei vacava, the witness testified: "Initially I thought that he was just playing. But when his hand landed I felt that my stomach was injured". The witness again demonstrated as to how Chako threw the punch at him. The witness demonstrated that he was on top of the steps and Chako was a little bit on the lower level.*
- (ix) The witness continued: "He came towards the left and then said hei vacava and punched me on the left side of my stomach".*
- (x) The witness testified that after he was stabbed he felt blood coming out (from his abdomen). He had pressed on that part and run to where the bar was located. Chako's wife had been there. She was working as bartender. He had told the wife that her husband had a knife with him and that he has caused an accident to him (the witness). When asked to explain what he meant by accident he said: "That he stabbed me".*
- (xi) Thereafter, the witness had gone and called out for his boss Tony and told him that he was wounded. That he was stabbed at the club just outside the DJ room. Tony had then taken the witness to the Savusavu Hospital, in the car belonging to the witness. Tony drove the vehicle.*
- (xii) When asked why he couldn't drive himself the witness said: "I was pressing on my stomach because there was a lot of blood coming out".*
- (xiii) The witness testified that he had been first treated at the Savusavu Hospital and the next morning he was transferred to the Labasa Hospital where surgery was performed on him.*
- (xiv) The witness identified Chako as the accused in the dock.*
- (xv) The witness said that after the incident Chako had come to his home seeking his apology and for reconciliation. He said he has forgiven the accused since they were known to each other and were good family friends.*
- (xvi) The witness was cross-examined by the Learned Counsel for the Defence.*
- (xvii) The witness confirmed that he has forgiven the accused and the reasons for doing so.*

(xviii) *The following questions were, inter-alia, put to the witness in cross-examination:*

Q: You agree with me that Chako did not have any reason to hurt you?

A: Yes.

Q: When he punched your stomach you agree that he had no intention to hurt you?

A: Yes.

Q: You agree with me that when he wanted to punch your stomach, he just wanted to joke with you?

A: Yes.

Q: You agree with me that you did not see any knife in Chako's hand that night?

A: I never saw a knife. I only felt it after a few seconds.

Q: So when he punched your stomach you did not feel any pain – but a few seconds later you felt some pain?

A: After his hand landed then I felt the pain inside.

Q: Instantaneously or a few seconds later?

A: Just as he withdrew his hand I felt pain and there was also blood.

Q: You agree with me that you did not see any object in his hand at the time he punched your stomach?

A: Yes. I did not see the knife. Because to see properly I need to use glasses.

Q: You agree with me it was dark inside the club?

A: It was not that dark. We can see faces.

Q: There were other people drinking beer in the club?

A: There were only three people. Him and another two.

Q: Those people were also close by?

A: They were drinking at the bar area and I was at the DJ site.

Q: *You agree with me when you went to the bar area you told his wife that an accident happened?*

A: *Yes. I did say that her husband caused an accident.*

Q: *You agree with me that whatever happened that night was an accident?*

A: *Yes.*

Q: *You agree with me that you don't know what caused you that injury?*

A: *Yes.*

Q: *When you say yes what do you mean?*

A: *I did not know how I got injured.*

Q: *You also agree with me that you don't know who caused you that injury?*

A: *I know who injured me.*

Q: *You agree that you were not sure as to who caused that injury?*

A: *I'm sure.*

Q: *But whatever happened that night was an accident?*

A: *It was an accident because there was nothing wrong between us that can cause the incident to happen.*

Q: *You agree with me that Chako is not a person who ever had an intention to hurt you?*

A: *Yes.*

(xix) *In re-examination the witness confirmed that it was Chako Isoa who caused the injury to him.*

[66] Evidence of Savenaca Ratuduguca

(i) *The witness testified that he is residing in Naqere in Savusavu. He is working as a baker in Naqere.*

(ii) *He testified to the incident which took place on 23 June 2018 around 8.00 in the evening. He said that he and two others went to the Tavern Night Club. They had gone into the Night Club just at the time it had*

opened. After going inside they had bought drinks. Then Chako had entered.

- (iii) *The witness testified: "We went to the bar to buy some more drinks. By the time we were standing in front of the bar with Chako... we were standing beside the table. He came with the knife. He wanted to stab me. I tapped his hand with my left hand. Then the knife struck my hip. (The witness showed the left side of his waist area to indicate the place he had been stabbed)".*
- (iv) *When asked as to what happened after he struck him with the knife, the witness said: "I thought that I had urinated because my pants got wet. I went to the washroom. Then I realised that I was wounded".*
- (v) *The witness was asked the following question: "You said he came with a knife. He wanted to stab you. Where was the knife pointing to before you tapped his hand?" The witness demonstrated by showing the left side of his lower abdomen. Then the witness had tapped Chako's hand. Then the knife had struck his hip.*
- (vi) *The witness said that thereafter he went to the security and informed him that he was injured. Then he was taken to the Savusavu Hospital by his boss, Toni. Taniela was also taken to hospital together with him.*
- (vii) *The witness said that at the hospital his injury had been treated. The doctor had stitched/put sutures and closed the wound.*
- (viii) *The following questions were, inter-alia, put to the witness in cross-examination:*

Q: *You were drinking there at the Tavern and you agree with me that you were also fairly drunk?*

A: *Yes.*

Q: *You would also agree with me that Chako was also drinking there?*

A: *Yes.*

Q: *Is it not true that when the drinking was going on an argument developed between your group and Chako?*

A: *Yes.*

Q: *And in the course of that argument either you or someone in your group picked up a beer bottle and tried to strike Chako?*

A: Yes.

Q: *And then Chako pulled out a knife with a black handle and a silver blade and not the knife shown to you?*

A: Yes.

Q: *The knife that he pulled was one with a black handle and a small silver blade?*

A: Yes.

Q: *And he only pulled out the knife when he was attacked with the bottle of beer?*

A: Yes.

Q: *You agree with me he was doing so to defend himself?*

A: Yes.

Q: *At that time both parties were drunk?*

A: Yes.

Q: *My instructions are that you do not know how you got hurt?*

A: Yes.

(ix) *In re-examination it was clarified from the witness as to how exactly the incident which caused injury to him happened. "We were drinking. Chako came and took the beer bottle from us. I took a bottle hit him with it and it missed. That is the time he also stabbed me".*

(x) *The witness further explained that Chako had approached the table where he, his cousin brother Manasa and his neighbour Livai were at. The witness then explained: "He came, he took a bottle, I saw him, then I took an empty bottle, I hit him with that bottle which missed him. That's when he stabbed me".*

(xi) *When asked to explain as to why he said in cross examination that he did not know how he got hurt, the witness replied "I did not expect to be injured on that day".*

[67] Evidence of Sairusi Ratusili

(i) *At the outset it must be stated that this witness was a very reluctant witness.*

- (ii) *The witness testified that on 23 June 2018, he was working as a Security Officer at the Tarven Night Club, in Savusavu. He was the Chief Security Officer. He had been seated at the gate. Taniela, who was working as a DJ in the Night Club had come and informed him that he had been injured. Thereafter, his boss had taken Taniela to the hospital.*
- (iii) *The witness said that he got to know later from another Security Officer as to how Taniela got injured.*
- (iv) *Thereafter, he had briefed the Security Officers and told them to go back into the Night Club and if they know as to who caused the injury to bring that person to him. Two Security Officers by the names Sio and Tumanoa had brought the accused Chako to him. He had then instructed them to search Chako.*
- (v) *The witness said: "I told them to search him. Then they gave me a knife". When asked as to where the knife was taken from, he answered: "The information is that they got it from Chako's pocket".*
- (vi) *The witness testified that as soon as he received the knife he had handed it over to Kelera, the wife of his boss.*
- (vii) *Sairusi said that the knife was black in colour and was short in length (he said it was a bit shorter than the pen that was shown to him). He couldn't remember as to the nature of the blade. However, the witness was unable to identify as to whether the knife that was in Court was in fact the knife that was taken from Chako's pocket that evening.*
- (viii) *The witness testified that apart from Taniela, Save was also injured at the Night Club that evening.*

[68] Evidence Dr. Rayape Racaca

- (i) *The witness testified that currently she is a Medical Officer at the Savusavu Hospital. Her specialty is general medicine. She has been serving as a Medical Officer at Savusavu Hospital for the past 2 years. Prior to that, she was based at the Labasa Hospital.*
- (ii) *She conducted a medical examination on Taniela Delai, on 23 June 2018, at 8.30 p.m. The examination was conducted at the Savusavu Hospital. The Medical Examination Report of Taniela was tendered to Court as Prosecution Exhibit **PE1**.*
- (iii) *The Doctor testified as to her specific medical findings (column D12) of the Medical Report. She has described that there was:*

- a) *An incision of approximately 1.0 cm x 0.5 cm, with a depth of 1.0 cm, on the left upper quadrant of the abdomen (the exact location of the injury is shown by reference to the images found in Appendix 1). There was no active bleeding. The injury had been sutured and pressure bandaged.*
 - b) *There were no other bruising noted.*
- (iv) *The Doctor said that the patient had been admitted overnight for observation. The next morning, he was still in pain and the bandage was soaked in blood. Hence further investigations were carried out by way of repeat scan and repeat blood test. The scan had shown internal bleeding within and the blood tests showed deterioration in the patient's condition. His haemoglobin level had gone down.*
 - (v) *Due to the above factors she had referred the patient for further treatment to the Labasa Hospital.*
 - (vi) *The Doctor had also conducted a medical examination on Savenaca Ratuduguca, on 23 June 2018, at 8.30 p.m. The examination was conducted at the Savusavu Hospital. The Medical Examination Report of Savenaca was tendered to Court as Prosecution Exhibit **PE2**.*
 - (vii) *The Doctor testified as to her specific medical findings (column D12) of the Medical Report. She has described that there was:*
 - a) *There was a sharp incision approximately 0.5 cm x 1.0 cm, with a depth of 0.5 cm on the left inguinal region or left lower quadrant (the exact location of the injury is shown by reference to the images found in Appendix 1). There was some bleeding. The injury had been sutured and pressure bandaged.*
 - b) *There were no other bruises or lacerations noted.*
 - (viii) *The Doctor testified that the said injury was close to the genital area or private part area - upper part of the private area.*

[69] Evidence Dr. Maloni Bulanauca

- (i) *He is a General Surgeon based at the Labasa Hospital. He has been serving at the Labasa Hospital for the past 7 years.*
- (ii) *He had conducted the surgery on Taniela Delai, at the Labasa Hospital, on 24 June 2018. He has submitted to Court a medical report dated 19 July 2018, which was tendered as Prosecution Exhibit **PE3**.*

- (iii) *As per the report, he testified that Taniela was an in-patient at the Labasa Hospital over the period 24 June 2018 to 2 July 2018, under the care of Surgical Service. Taniela had been referred from the Savusavu Hospital, on the 24 June 2018, with the history of being stabbed with a sharp object to his left upper abdomen. He was admitted at Savusavu Hospital for resuscitation and observation prior to being transferred to Labasa Hospital due to his condition deteriorating.*
- (iv) *The Doctor testified that on 24 June 2018, a surgery had been conducted, under general anaesthesia, on Taniela's abdomen. This was for the purpose of finding out the source of the internal bleeding inside his abdomen. During the surgery 1.5 litres of blood had been evacuated from his abdomen.*
- (v) *The stab incision was said to be of full thickness through the superior epigastric vessels. The Doctor testified that the stab went right through the full thickness of the skin or abdomen and into abdomen cavity. The superior epigastric vessels are along that way.*
- (vi) *The Doctor said that they needed to identify where the vessels were injured. The injured vessel was controlled by stitches and cauterisation. The skin was closed under local anaesthesia prior to the patient's discharge from hospital.*
- (vii) *The Doctor further testified that there was a small capsular tear to the spleen which was treated conservatively with direct pressure and surgical cover.*
- (viii) *The Doctor concluded that Taniela was in a critical state. He could have bled out and died if he was not attended to in an appropriate manner.*

[70] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence. You then heard me explain several options to the accused. I explained to him that he could address Court by himself or through his counsel. He could also give sworn evidence from the witness box and/or call witnesses on his behalf. He could even remain silent. He was given these options as those were his legal rights. He need not prove anything. The burden of proving his guilt rests entirely on the prosecution at all times.

[71] In this case, the accused opted to remain silent. I must emphasize that you must not draw any adverse inference against the accused due to Court calling for his defence or of his choice to remain silent.

Analysis

[72] The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the two complainants, Taniela Delai and Savenaca Ratuduguca,

witness Sairusi Ratusili, and two Medical Officers: Dr. Rayape Racaca and Dr. Maloni Bulanauca, to prove its case.

- [73]** The prosecution is relying on the evidence of two Medical Officers, Dr. Rayape Racaca and Dr. Maloni Bulanauca. This kind of evidence is given to help you with scientific matters by a witness who has expertise. As you may have heard, experts carry out examinations which are relevant to the issues you have to consider. They are permitted to interpret results of the examinations for our benefit, and to express opinions about them, because they are used to doing that within their particular field of expertise.
- [74]** You will need to evaluate expert evidence for its strengths and weaknesses, (if any) just as you would with the evidence of any other witness. Remember, that while experts deal with particular parts of the case, you receive all the evidence and it is on all the evidence that you must make your final decision.
- [75]** In this case, the defence was objecting to the three medical reports being admitted into evidence as neither of the reports were shown to Taniela Delai and Savenaca Ratuduguca, at the time they testified in Court, for them to identify and confirm whether in fact the reports pertained to the examinations conducted on them. The defence counsel was not denying that both victims were taken to hospital and examined nor was he objecting to the contents of the said reports. As such, Court was of the opinion that this was not an issue of admissibility but of weight. Therefore the prosecution was permitted to tender the medical reports as Prosecution Exhibits PE1, PE2 and PE3. Copies of the report have been given to you.
- [76]** It is for you as judges of fact to decide whether in fact these reports are the true medical reports of Taniela Delai (PE1 and PE3) and Savenaca Ratuduguca (PE2), who are the complainants in this case. In deciding same you will have to consider the testimony of Taniela and Savenaca given before this Court. They both testified that after the incident happened on 23 June 2018, they were taken to the Savusavu Hospital and were medically examined. They had signed the two medical reports PE1 and PE2. Taniela had been kept under observation overnight at the Savusavu Hospital and thereafter was transferred to the Labasa Hospital the next morning. He had been discharged from the Labasa Hospital on 2 July 2018.
- [77]** You will also have to consider the testimony of Dr. Rayape Racaca, who submitted that she had examined both Taniela and Savenaca, and who also, testified to the treatment afforded to them. Further, you will have to consider the evidence of Dr. Maloni Bulanauca, who testified to the surgery he performed on Taniela on 24 June 2018, and the subsequent treatment given to him.
- [78]** As I have informed you earlier, the burden of proving each ingredient of the two charges rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.

- [79] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [80] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the two complainants, Taniela Delai and Savenaca Ratuduguca, and other prosecution witnesses, is truthful and, in addition, reliable. If you find the prosecution evidence is not truthful and or unreliable, then you must find the accused not guilty of the charges, since the prosecution has failed to prove its case. If you find the evidence placed before you by the prosecution both truthful and reliable, then you must proceed to consider whether by that truthful and reliable evidence, the prosecution had proved the elements of the offences of Act with Intent to Cause Grievous Harm, beyond any reasonable doubt.
- [81] In respect of the first count, the Defence takes up the position that the injury was caused to Taniela by accident or by mistake. It is for you to decide based on the evidence given in Court by Taniela and other prosecution evidence, whether in fact the injury to Taniela was caused by accident or by mistake or was it caused intentionally by the accused.
- [82] If you believe the accused's version then he cannot be found guilty for the offence of Act with Intent to Cause Grievous Harm in respect of the first count, but may only be found guilty to the lesser charge of Assault Causing Actual Bodily Harm.
- [83] In respect of the second count, the Defence takes up self-defence. I have already explained to you as to how you should deal with this matter. If you believe that the accused acted in self-defence then he cannot be found guilty for Act With Intent To Cause Grievous Harm, or even for the lesser charge of Assault Causing Actual Bodily Harm.
- [84] I must also direct you with regard to the knife that was marked for identification as Prosecution Exhibit MFI 1. Although, the knife was so marked for identification the prosecution could not prove the chain of custody – as to how the knife was recovered by the police and produced in Court. Therefore, the said knife cannot be considered as a production item in this case. As such, I urge you to disregard the said knife as a production item in this case.
- [85] You must consider each count separately and you must not assume that because the accused is guilty of one count, that he must be guilty of the other count as well.
- [86] In summary and before I conclude my summing up let me repeat some important points in following form:
- i. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the two counts of Act with Intent to Cause Grievous Harm;*

- ii. *If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charges of Act with Intent to Cause Grievous Harm has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*
- iii. *As an alternative to the charge of Act with Intent to Cause Grievous Harm, you may consider whether the accused is guilty or not guilty of the lesser charge of Assault Causing Actual Bodily Harm.*
- iv. *You should also consider the position taken up by the defence with regard to count one (mistake or accident) and with regard to count two (self-defence).*

[87] Any re directions the parties may request?

[88] Madam Assessor and Gentlemen Assessors, this concludes my summing up of the law and evidence. Now you may retire and deliberate together and may form your individual opinions on the charge separately against the accused. When you have reached your individual opinions you will come back to Court, and you will be asked to state your opinions.

[89] Your possible opinions should be as follows:

Count One

Act With Intent To Cause Grievous Harm - Guilty or Not Guilty.

If not guilty,

In the alternative,

Assault Causing Actual Bodily Harm - Guilty or Not Guilty.

Count Two

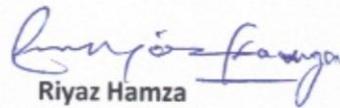
Act With Intent To Cause Grievous Harm - Guilty or Not Guilty.

If not guilty,

In the alternative,

Assault Causing Actual Bodily Harm - Guilty or Not Guilty.

[90] I thank you for your patient hearing.


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI



AT LABASA

Dated this 04th Day of October 2019

Solicitors for the State : Office of the Director of Public Prosecutions, Labasa
Solicitors for the Accused : Maqbool & Company, Labasa