

**IN THE HIGH COURT OF FIJI**

**AT LABASA**

**[CRIMINAL JURISDICTION]**

**CRIMINAL CASE NO: HAC 79 of 2018**

**STATE**

**V**

**JESE MATEAVULA TOMA**

**Counsel** : Ms. Amelia Vavadakua for the State  
Ms. Karen Boseiwaqa for the Accused

**Dates of Trial** : 24-26 June 2019

**Summing Up** : 27 June 2019

### **SUMMING UP**

Madam Assessor and Gentlemen Assessors,

- [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 has 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 opinion. You must take all evidence into consideration, before you proceed to form your opinion. 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 charge 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 charge 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, the documents tendered as prosecution exhibits and any admissions made by the parties by way of agreed facts.
- [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 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]** 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.
- [15]** In assessing the credibility of a particular witness, it may be relevant to consider whether there are inconsistencies in his or her evidence. This includes omissions as well. That is, whether the witness has not maintained the same position and has given different versions with regard to the same issue. This could be in relation to the testimony of the witness given in Court or in comparison to any previous statement made by that witness.
- [16]** This is how you should deal with inconsistencies. You should first decide whether that inconsistency is significant. That is, whether that inconsistency is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation for it. You may perhaps think it obvious that the passage of time will affect the accuracy of memory. Memory is fallible and you might not expect every detail to be the same from one account to the next. If there is an acceptable

explanation for the inconsistency, you may conclude that the underlying reliability of the account is unaffected.

- [17] However, if there is no acceptable explanation for the inconsistency which you consider significant, it may lead you to question the reliability of the evidence given by the witness in question. To what extent such inconsistencies in the evidence given by a witness influence your judgment on the reliability of the account given by that witness is for you to decide. Therefore, if there is an inconsistency that is significant, it might lead you to conclude that the witness is generally not to be relied upon; or, that only a part of his or her evidence is inaccurate. In the alternative, you may accept the reason he or she provided for the inconsistency and consider him or her to be reliable as a witness.
- [18] Madam and Gentlemen 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.
- [19] 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.
- [20] 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 charge. 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.
- [21] 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 offence charged.
- [22] 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.

- [23]** 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.
- [24]** In order to illustrate this direction, I will give you a very simple example. Imagine that when you walked into this Court room this afternoon, 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.
- [25]** I must emphasize, it does not matter whether that evidence was called for the prosecution or for the defense. You must apply the same standards, in evaluating them.
- [26]** 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.
- [27]** 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 offence charged. The fact that the accused has given evidence does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence.
- [28]** 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?
- [29]** 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 offence 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.
- [30]** It is for you to decide whether you are satisfied beyond reasonable doubt that the prosecution has proved the elements of the offence, 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.

- [31] You should disregard all feelings of sympathy or prejudice, whether it is sympathy for victim 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.
- [32] Let us now look at the charge contained in the Information.
- [33] There is one charge preferred by the Director of Public Prosecutions (DPP), against the accused:

### **FIRST COUNT**

#### ***Statement of Offence***

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

#### ***Particulars of Offence***

**JESE MATEAVULA TOMA**, on the 20<sup>th</sup> day of October 2018, at Delaivuna Settlement, in Taveuni, in the Northern Division, with intent to cause grievous harm to **LEONE LEQEUA**, unlawfully wounded the said **LEONE LEQEUA**.

- [34] 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.*

- [35] In this case the prosecution has charged that the accused intended to cause grievous harm to the complainant.
- [36] Therefore, in order for the prosecution to prove the charge 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 20 October 2018);

- (iii) At Delaivuna Settlement, in Taveuni, in the Northern Division;
- (iv) Unlawfully wounded Leone Lequea;
- (v) With the intention to cause grievous harm to the said Leone Lequea.

[37] Let me now elaborate on these elements.

[38] 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.

[39] 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.

[40] The fourth element is that the accused unlawfully wounded, Leone Lequea, the complainant. The word "unlawfully" simply means without lawful excuse. The term "wound" has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the complainant.

[41] The fifth and final element the prosecution must prove is that the accused intended to cause grievous harm to Leone Lequea. 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 Leone Lequea.

[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 20 October 2018, unlawfully wounded Leone Lequea, with the intention to cause grievous harm to the said Leone Lequea, then you must find him guilty of the charge 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] 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 Leone Lequea; as an alternative, you are then allowed to look at the lesser offence of Causing Grievous Harm, in terms of Section 258 of the Crimes Act, though the accused is not formally charged in the Information for that offence in the first count.
- [48] In terms of Section 258 of the Crimes Act *"A person commits an indictable offence (which is triable summarily) if he or she unlawfully and maliciously does grievous harm to another person"*.
- [49] Therefore, in order for the prosecution to prove the offence of Grievous Harm, they must establish beyond any reasonable doubt that;
- (i) The accused;
  - (ii) On the specified day (in this case the 20 October 2018);
  - (iii) At Delaivuna Settlement, in Taveuni, in the Northern Division;
  - (iv) Unlawfully and maliciously does (caused) grievous harm to Leone Lequea.
- [50] Let me now elaborate on these elements.
- [51] 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.
- [52] 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.
- [53] The fourth element is that the accused unlawfully and maliciously caused grievous harm to Leone Lequea, the complainant. The word "unlawfully" simply means without

lawful excuse. The term 'maliciously' has not been specifically defined in the law. However, the English Dictionary meaning for the term malicious means "intending or intended to do harm".

[54] Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully and maliciously caused grievous harm to the complainant.

[55] 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 the Leone Lequeua beyond reasonable doubt. If you are satisfied that the prosecution has established all the elements constituting the offence of Act with Intent to Cause Grievous Harm beyond reasonable doubt, then you must find the accused guilty as charged.

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

[57] In terms of the provisions of Section 135 of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), the prosecution and the defence have consented to treat the following facts as "*Agreed Facts*" without placing necessary evidence to prove them:

1. **THAT JESE MATEAVULA TOMA** (hereinafter referred to as "Jese") is charged in this case with one count of Act with intent to cause grievous harm, to his brother in law, **LEONE LEQUEUA** (hereinafter referred to as "the victim") on the 20<sup>th</sup> day of October 2018 in Taveuni.
2. **THAT** Jese and his wife had gone to Taveuni in September of 2018 and thereafter they went to stay at the residence of the victim for some time up to the time of the alleged offending mentioned in para 1 above.
3. **THAT** Jese and his wife were drinking liquor with the victim and his wife on the 19<sup>th</sup> of October 2018 from the afternoon up to early hours of the following morning.
4. **THAT** it was around 3.00 a.m. on the 20 October 2018, that one Iovani Vakaurereqa drove his vehicle with victim's children to the place where the victim was bleeding and lying outside, unable to move.
5. **THAT** Jese struck the victim with a cane knife on the victim's body, several times.

THAT THE ONLY ISSUE FOR TRIAL IN THIS MATTER IS WHETHER JESE TOMA MATEAVULA HAD THE INTENTION TO CAUSE GRIEVOUS HARM TO THE VICTIM LEONE LEQUEUA ON THE 20<sup>TH</sup> DAY OF OCTOBER 2018.

[58] Since the prosecution and the defence have consented to treat the above facts as “Agreed Facts” without placing necessary evidence to prove them you must therefore, treat the above facts as proved beyond reasonable doubt.

### **Case for the Prosecution**

[59] The prosecution, in support of their case, called the complainant, Leone Legeua and Dr. Kasanita Emmanuel. The prosecution also tendered the following documents as a prosecution exhibits:

Prosecution Exhibit **PE1** – The Medical Examination Report of the complainant.

Prosecution Exhibits **PE2A, PE2B & PE2C** – Photographs taken by the Medical Officer during the course of the medical examination.

### **[60] Evidence of the complainant Leone Legeua**

- (i) *The complainant testified that he is currently residing at Delaivuna, in Taveuni. He is unemployed.*
- (ii) *The accused Jese is married to his wife’s sister. His wife’s name is Aqela Dorotea Balata. Aqela is his second wife. His first wife had passed away. The complainant has 12 children. He said “they are all my children”.*
- (iii) *The complainant testified that the accused and his wife had come over for a wedding in Taveuni in September 2018. Later the witness said “for our wedding”. When they came over the accused and his wife was staying with the complainant, his wife and their 12 children in Taveuni.*
- (iv) *The witness testified to the incidents that took place after 11.00 pm (on 19<sup>th</sup> October 2018). He said after the drinking party they were at home - his home. He had told the accused (the witness referred to the accused sometimes as Jese and sometimes as Toma), he had told the accused “not to wake up his wife because it was too late in the night – to let the wife sleep and they can eat in the morning”.*
- (v) *The complainant said “My wife told Toma to wait for a while for her to cook some food for them”...“The drinking was over we were just sitting down – myself and Jese. I could not recall (the time) may be it was between 10.00 or 11.00. We were drinking alcohol”.*
- (vi) *At this time the witness testified that the accused went outside. At that time the complainant’s wife had said that Jese was holding a knife and striking the door with a knife. Later the witness said that the accused went outside and brought the knife from the kitchen.*

- (vii) *The witness said: "As soon as the accused went outside the door was closed (by his wife). I was sitting down on the floor. I heard my wife calling Maria saying her husband is striking the door with the knife".*
- (viii) *Maria is the wife of the accused. Her full name is Maria Reba. Maria was sleeping at the time. Maria had gone off to sleep while they were still drinking. At the time, the complainant's wife was still awake. She had been sitting beside the complainant.*
- (ix) *After his wife had closed the door, she had been holding the door. At that time the complainant had stood up. He too had heard a knife striking the door. He knew it was Jese because he could hear Jese's voice from outside. The witness could not recall exactly what Jese was saying. However, he knew he was swearing.*
- (x) *At the time only his 5 month old child was sleeping. The rest of his children were awake. The complainant said his eldest child was 17 and youngest was 6 years old. And he had a 5 month old baby as well.*
- (xi) *The complainant testified that he went and opened the door. When he opened the door Jese had struck him with the knife on the back of his palm on his left hand. The witness showed the scar on the top part of his left hand.*
- (xii) *The complainant further testified that the accused had also struck him below the left elbow, on the left elbow and on the upper arm and on his upper shoulder. The witness removed his shirt and t-shirt to show the scars he sustained.*
- (xiii) *The witness was asked to explain the sequence of his injuries and how they happened. The witness said as follows: "When I opened the door he struck me on top of my palm. I told Toma that he had struck my hand. Then he continued to strike me with the knife. I blocked with my left hand (the witness showed the manner in which he was protecting his head when the accused was striking him). He could see the knife when Jese was striking him".*
- (xiv) *At this point in time the witness said he too had grabbed a cane knife that was inside the house to try to defend himself. Although he got hold of the knife he could not strike back. He had been holding the knife in his right hand and with his other hand he was blocking the accused who was striking him with the knife. The witness said "There was no chance for me to strike him back. My wife and children they were all crying".*

- (xv) *Thereafter, the witness said he had run outside with the knife he was holding. He was trying to escape from the accused, because his wife had told him to escape. He had run about 20 metres and hidden behind some banana plants. He said he was sitting down behind the banana plants.*
- (xvi) *The complainant testified that he was in fear. He was also thinking about his children. They were all crying. "They were crying out to Toma not to strike and kill their father".*
- (xvii) *When asked as to what happened thereafter, the witness said: "Then Jese came. He went and brought a light (Sankin solar light). When he found me he cut me on two areas on my back". The witness showed his rib and hip areas as the places where the accused had struck him. At the time, the knife the complainant brought was lying on the ground.*
- (xviii) *At this point in time the complainant's wife had come and hugged him. She had pleaded to Toma that the complainant was badly wounded and for him to stop. The accused had cut (chopped) all the banana trees right from top to where they were sitting. These were the banana trees behind which the complainant had been sitting. Thereafter, the accused had been dancing with the knife on the road.*
- (xix) *Thereafter, the witness testified that a vehicle (a twin cab) had come there and he had gone in the vehicle. His wife, the driver of the vehicle and the accused had helped him to get into the vehicle. The vehicle belonged to one Iowani. The witness knows him as Wani, who is his cousin brother. The complainant's wife had sent 2 of his children (his 17 year old son and 15 year old daughter) to look for a vehicle to transport the complainant to hospital.*
- (xx) *After the complainant had been helped into the vehicle, he had seen the accused also in the vehicle. He had then told the accused to wait for his children in the morning. The accused had then got down from the vehicle and told the complainant that he is going to kill him. "He told me he is going to kill me. And he went out of the vehicle and ran for the knife to come and kill me".*
- (xxi) *At this point his son had called out to the driver to leave as the accused was running for a knife. The driver Iowani had then left.*
- (xxii) *The complainant then testified that he was taken to the Vuna Health Centre, in Waimaqare. Thereafter, the complainant had been taken to the Waiyevo Hospital. This is about 20 kilometres from the place*

*where the incident happened. The Waiyevo Hospital is opposite the court house in Taveuni. From Waiyevo Hospital he had been taken to the Divisional Hospital in Labasa. From Taveuni to Labasa he had travelled by boat. The complainant said that during the time he had been transported he was getting unconscious on and off.*

*(xxiii) The witness said that he cannot clench his left hand into a fist. Prior to the incident he could do so.*

*(xxiv) The complainant was cross-examined at length by the Learned Counsel for the Defence.*

*(xxv) The complainant confirmed that he, his wife, the accused and the accused's wife were drinking homebrew (homemade alcohol) that night. It was suggested that the accused went out of house that night to look for food, since there was no food in the house.*

*(xxvi) It was suggested to the complainant that he didn't like the accused and his wife living (in his house) with his family. However, the complainant answered: "I like them. We even worked together in order to earn some money to pay for their fare back to Suva".*

*(xxvii) The complainant agreed that he had told the accused not to fight in front of his children.*

*(xxviii) It was suggested in cross-examination that after the accused had left the house to look for food that the complainant had followed him with the cane knife. The complainant denied this suggestion.*

*(xxix) It was suggested that whilst the complainant was near the banana trees that he was swearing and yelling threats at the accused. The complainant denied this suggestion.*

*(xxx) It was also suggested to the complainant that he had said "au sega ni taleitaki kemudrau, lako tani mai noqu vale" meaning I don't want you two here, get out of my house. The complainant explained that he uttered those words whilst he was running for his life. At that point in time he hadn't reached the banana trees as yet. The complainant also clarified that he had only mentioned about the accused (and not about the accused's wife). He had told the accused to leave his house because he had struck the complainant on his hand.*

*(xxxi) The following questions were put to the complainant in cross-examination:*

Q: Now when you went to the banana trees you had already hidden yourself?

A: I was not hiding. When I reached that place I lost my strength.

Q: You were lying there with your knife when Toma approached you?

A: I wasn't lying there. I was seated there.

Q: And the accused was striking the space with the knife?

A: No. The place where I was seated it was exposed.

Q: And it wasn't until you yelled out "oilei" that he knew that you were lying there?

A: I was seated there. He came and he sliced me.

(xl) It was also suggested to the complainant that the accused never struck him with the knife near the door of the house. The complainant denied this suggestion. He said all the strikes from the back of his palm up to the shoulder were done at the door of his house. Only the area of his back was sliced when he was near the banana trees.

(xli) It was further suggested that the only time the accused had a knife was at the time he came looking for the complainant at the banana plantations. While denying this suggestion, the complainant said that the accused had already got hold of a knife when he started striking him.

**[61] Evidence Dr. Kasanita Emmanuel**

- (i) The witness testified that currently she is a Medical Officer at the Labasa Hospital. She has been serving as a Medical Officer for the past 5 years. In October 2018, she was based at the Taveuni Hospital.
- (ii) She conducted a medical examination on the complainant, on 20 October 2018 at 6.00 in the morning. The examination was conducted at the Taveuni Hospital, Emergency Department. The Medical Examination Report of the complainant was tendered to Court as Prosecution Exhibit **PE1**. Photographs taken by the doctor during the medical examination were tendered to court as Prosecution Exhibits **PE2A, PE2B and PE2C**.
- (iii) The Doctor testified as to her specific medical findings (column D12) of the Medical Report. She has described that there were:

- a) *Multiple linear wounds sustained on the left upper arm. (She has said to please make reference to the images found in Appendix 1). The wounds were not actively bleeding; and*
  - b) *An open fracture noted on the left dorsal aspect of left hand (left middle, ring and little finger). This has been further described as being 8cm x 2cm deep, with cut tendon noted [Depicted as E in Appendix 1]. This injury is further illustrated by the photograph which has been tendered as Prosecution Exhibit **PE2A**.*
- (iv) *The doctor has also noted one 2 cm x 0.5 cm deep, superficial, linear wound and one 3 cm x 1 cm deep linear wound on the left elbow [Depicted as C and D in Appendix 1]. This injury is further illustrated by the photograph which has been tendered as Prosecution Exhibit **PE2B**.*
  - (v) *The Medical Officer has noted that the most severe wound was on the upper left arm of the victim. She has explained that the injury was a 15 cm x 10 cm deep linear gaping wound (about 4 cm width) and that the triceps muscle had been lacerated [Depicted as B in Appendix 1]. This injury is further illustrated by the photograph which has been tendered as Prosecution Exhibit **PE2C**.*
  - (vi) *The doctor has also noted one linear laceration 3 cm x 0.5 cm (depth) on his left flank/posteriorly on the left flank; and one linear laceration 4 cm x 0.5 cm (depth), which was located below the earlier noted injury [Depicted as F and G respectively in Appendix 1].*
  - (vii) *A 4 cm x 3 cm deep linear laceration was noted on the supra-clavicular (not on the shoulder) [Depicted as A in Appendix 1].*
  - (viii) *The doctor testified that the injuries noted at A, F and G were superficial wounds that she was able to clean and suture at the hospital. However, with regard to the other injuries, she testified that she had washed the wounds again and approximated the wound edges (stitching not the whole wound but the edges of the wound). Due to the seriousness of those injuries she had referred the patient for further treatment to the Labasa Hospital.*

**[62]** That was the case for the prosecution. 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. However, the accused opted to offer evidence under oath.

**[63] Evidence of the Accused – Jese Mateavula Toma**

- (i) *The accused testified that he is married to Maria Reba. They have been married since January 2018.*
- (ii) *Leone's wife and his wife are sisters. So he is Leone's brother-in-law.*
- (iii) *Before October 2018, he testified that his relationship with Leone was good.*
- (iv) *He testified to the events that took place in the night of 19 October 2018. At the time he was staying with Leone's family. He and his wife had come to attend Leone's wedding. He said he didn't know Leone prior to this visit to Leone's house.*
- (v) *In the evening of 19 October 2018, he had been drinking with Leone, Leone's wife, his wife and one of Leone's sons. They had come back from plantation after weeding and started drinking. They had been drinking homebrew.*
- (vi) *While they were so drinking Leone had said: "My grandmother is from Kiribati" and he had also said that they can use the knife to strike. Leone had then said: "If I'm having a fight with my wife and if my children are there watching me and my wife fighting then you will see me there".*
- (vii) *The witness said that he had felt that Leone did not like them staying in his house (due to the tone of his voice and the manner in which he was speaking). Therefore, he had looked at his wife and told her to pack their clothes for them to look for some other place to stay.*
- (viii) *After this Leone had stood up and was walking around the house. From Leone's actions he had sensed that he didn't like them staying at their house. Therefore, the witness had stood up and gone outside the house. Leone had followed with a knife.*
- (ix) *He said the reason he left the house to go outside was because he had asked his wife to prepare some food but there wasn't any food in the house. So he had told his wife to wait there for him until he goes and looks for some food. When he had gone outside he could not go any further because it was dark, raining and cold outside. It was roughly around 3.00 o'clock in the morning at the time.*
- (x) *The witness said that when he went out that night he went to the washroom. When he came back to the house, his wife had informed him that Leone had followed him with a knife. This is how he knew that Leone had followed him with the knife*

- (xi) *The witness testified that at the front door entrance of Leone's house he called out to Leone. He said he was concerned about him. He had called Leone to come back home since it was dark, raining and cold outside. He said that Leone responded with swear words and said for them to leave the house. Leone had said that he did not want them in the house.*
- (xii) *When the witness heard Leone swearing, he had told his wife to close the door and pack their clothes, whilst he goes out and look for Leone. At this point in time Leone had come beside the kitchen where he used to stock their knives. Leone had approached the witness and struck him with his knife. It had missed the witness and hit the door. The witness had then moved back and pulled out his knife. However, when the witness pulled out his knife, Leone was not there. He went around his house and ran away.*
- (xiii) *The witness then testified that he had gone towards the road to look for Leone. Whilst he was walking towards the road, the surrounding was such that it was raining and cold. He could not see anything. The witness said: "And I was swinging the knife side to side when I walked". He added: "Just to be on the safe side I was swinging the knife from side to side because of Leone. When the lightning struck he could see just beside the road there were some banana trees. Around that place it was bushy. "I thought to check there. So I swung the knife at that bushy area where the banana trees were. And I got a shock that he (Leone) was actually there".*
- (xiv) *The witness continued: "Whilst I was weeding that place I cut his hand. And I knew that he was there when he cried out in pain by stating the word "oilei." He hadn't known Leone was there because it was dark.*
- (xv) *When asked what happened thereafter, the witness responded: "I was freaked out when he said those words. I was not sure who that was. Then I ran back home to get a solar light. Then I told Leone's wife and my wife that I think that Leone got injured at the banana trees. He had realized that Leone was lying near the bushes when he had brought the solar light from inside the house.*
- (xvi) *The witness testified that when he saw Leone lying down then he had come back to his senses.*
- (xvii) *The witness described as to how Leone had been taken to hospital.*
- (xviii) *The witness was cross-examined at length by the Learned State Counsel.*

(xix) *The witness agreed that Leone and his wife Aqela's wedding was on Friday 29 September 2018.*

(xx) *The State suggested that the witness was at Leone's house in Taveuni since September.*

(xxi) *He also admitted that the front door of the house can be properly locked only from the inside.*

(xxii) *The following suggestions were put to the witness in cross-examination:*

Q: *So you knew behind the door was safe but still you went behind that person? You followed?*

A: *Yes, I followed Leone.*

Q: *According to you the place you went was dark?*

A: *Yes.*

Q: *And the first source of light was lightening striking?*

A: *Yes.*

Q: *And you were hunting for Leone by swinging your cane knife?*

A: *I was defending myself from Leone. And from the place he was lying down from those bushes I was just weeding them.*

.....

Q: *I put it to you that you were the one who went hunting for Leone in order to hurt him?*

A: *No.*

Q: *So your position is that you were leaving the house (which was safe) and going towards the road to defend yourself from someone who was not there?*

A: *All I can say is that I was not hunting him.*

.....

Q: *So you are saying that you were out there at 3.00 in the morning to do your weeding when there is no light.*

A: *When I went that night it was all bushy then I was weeding....*

Q: *I put it to you that on that particular night you struck Leone's hand when he was trying to open the door for you that night?*

A: *No.*

Q: *I put it to you that you were the one who was locked out of the house, because the house can only be locked from inside?*

A: *There was no striking of the knife at the doorway as being alleged. The only time the striking was at the banana plantations when I was clearing of the bushes.*

.....

Q: *I put it to you that you intended to cause grievous harm to Leone because you pursued him that night with the cane knife even when you could not see him?*

A: *I did not mean or intend to cause injuries to Leone.*

Q: *I further put it to you that it is not possible that after you struck him several times he yelled out only once – I put it to you that is not possible?*

A: *Yes.*

### **Analysis**

**[64]** The above is a brief summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant, Leone Legeua and Dr. Kasanita Emmanuel to prove its case. The defence relied on the evidence of the accused himself.

**[65]** The prosecution is relying on the evidence of the Medical Officer, Dr. Kasanita Emmanuel. 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.

- [66] 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.
- [67] As I have informed you earlier, the burden of proving each ingredient of the charge rests entirely and exclusively on the prosecution and the burden of proof is beyond any reasonable doubt.
- [68] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [69] As I have stated before, in this case it has been agreed by the prosecution and the defence to treat certain facts as agreed facts without placing necessary evidence to prove them. Therefore, you must treat those facts as proved beyond reasonable doubt. Based on the said agreed facts the identity of the accused, the date of incident and the place of incident are not in dispute. The accused has also admitted that he struck the complainant (victim) with a cane knife on his body, several times.
- [70] Actually the only issue for determination in this matter is whether the accused had the intention to cause grievous harm to the complainant.
- [71] The accused is denying that he intentionally struck the complainant and he also denies that he intended to cause grievous harm to the complainant.
- [72] The prosecution states that the version of the events given by the accused cannot be believed. The prosecution states that the accused had intentionally struck the complainant with the cane knife and that he had the intention to cause grievous harm to the complainant on the 20 October 2018.
- [73] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, Leone Lequeua, and the Medical Officer, Dr. Kasanita Emmanuel, 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 charge, 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 offence of Act with Intent to Cause Grievous Harm, beyond any reasonable doubt.
- [74] It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the prosecution evidence, also when you are assessing the evidence of the accused. You must consider his evidence also for its consistency and also the probability of his version. If you find the evidence of the accused is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.

[75] If you neither believe the evidence adduced by the accused nor disbelieve such evidence, in that instance as well, there is a reasonable doubt with regard to the prosecution case. The benefit of such doubt should then accrue in favour of the accused and he should be found not guilty of the charge.

[76] However, I must caution you that even if you reject the evidence of the accused as not truthful and also unreliable that does not mean the prosecution case is automatically proved. The prosecution have to prove their case independently of the accused and that too on the evidence they presented before you.

[77] In summary and before I conclude my summing up let me repeat some important points in following form:

- i. *If you believe the evidence of the accused, then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- ii. *If you neither believe nor disbelieve the evidence of the accused, then again you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- iii. *If you reject the version of the accused, then you must proceed to consider whether there is truthful and reliable evidence placed before you by the prosecution;*
- iv. *If you find the prosecution evidence is not truthful and or not reliable then you must find the accused not guilty of the charge of Act with Intent to Cause Grievous Harm;*
- v. *If you find the prosecution evidence is both truthful and reliable, then only you must consider whether the elements of the charge 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.*
- vi. *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 Causing Grievous Harm.*

[78] Any re directions the parties may request?

[79] 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.

[80] Your possible opinions should be as follows:

**First Count**

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

If not guilty,

In the alternative,

Grievous Harm - Guilty or Not Guilty.

[81] I thank you for your patient hearing.

  
Riyaz Hamza  
**JUDGE**  
**HIGH COURT OF FIJI**



AT LABASA

Dated this 27<sup>th</sup> Day of June 2019

**Solicitors for the State** : **Office of the Director of Public Prosecutions, Labasa.**  
**Solicitors for the Accused** : **Office of the Legal Aid Commission, Labasa.**