IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 166 of 2020
[In the High Court at Lautoka case No. HAC 128 of 2017]

BETWEEN	:	**VIMLESH GOUNDAR**
		Appellant
AND	:	**THE STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. Prasad for the Appellant**
	:	**Mr. R. Kumar for the Respondent**
Date of Hearing	:	**29 July 2022**
Date of Ruling	:	**01 August 2022**

RULING

[1] The appellant had been charged in the High Court at Lautoka with a single count of attempted murder contrary to contrary to section 44 (1) and 237 of the Crimes Act, 2009 on 09 June 2017 at Sigatoka in the Western Division.

[2] The assessors had expressed a majority opinion that the appellant was guilty of attempted murder. The learned High Court judge had overturned it and convicted the appellant for the lesser offence of act intended to cause grievous harm. He had been sentenced on 01 December 2020 to 3 years and 10 months imprisonment with a non-parole period of 2 ½ years.

[3] The appellant's appeal against conviction is timely. Both parties had tendered written submissions for the leave to appeal hearing.

[4] In terms of section 21(1) (b) of the Court of Appeal Act, the appellant could appeal against conviction only with leave of court. For a timely appeal, the test for leave to appeal against conviction and sentence is **'reasonable prospect of success'** [see **Caucau v State** [2018] FJCA 171; AAU0029 of 2016 (04 October 2018), **Navuki v State** [2018] FJCA 172; AAU0038 of 2016 (04 October 2018) and **State v Vakarau** [2018] FJCA 173; AAU0052 of 2017 (04 October 2018), **Sadrugu v The State** [2019] FJCA 87; AAU 0057 of 2015 (06 June 2019) and **Waqasaqa v State** [2019] FJCA 144; AAU83 of 2015 (12 July 2019) that will distinguish arguable grounds [see **Chand v State** [2008] FJCA 53; AAU0035 of 2007 (19 September 2008), **Chaudry v State** [2014] FJCA 106; AAU10 of 2014 (15 July 2014) and **Naisua v State** [2013] FJSC 14; CAV 10 of 2013 (20 November 2013)] from non-arguable grounds [see **Nasila v State** [2019] FJCA 84; AAU0004 of 2011 (06 June 2019)].

[5] The grounds of appeal urged on behalf of the appellant against conviction are as follows:

> ***Conviction***
>
> ***Ground 1***
>
> *THAT the Learned Trial Judge erred in law and in fact in misdirecting himself and the assessors on identification evidence which was contrary the principles, that has been laid down in R v Turnbull.*
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> ***Ground 2***
>
> *THAT the Learned Trial Judge's failure to adequately evaluate the evidence prior to returning a verdict of guilty as charged, and the failure of the Learned Trial Judge to independently assess the evidence before confirming the said verdict, have given rise to a grave and substantial miscarriage of justice.*
>
> ***Ground 3***
>
> *THAT the Learned Trial Judge erred in law and in fact in not directing himself and or the assessors to refer to any Summing Up the possible defence on evidence and as such by his failure there was a substantial miscarriage of justice.*
>
> ***Ground 4***
>
> *THAT the Learned Trial Judge erred in law and in fact in not directing adequately himself and the assessors on the confessional statement before accepting the same to be voluntarily and true.*

Ground 5

THAT the Learned Trial Judge erred in law and in fact in not directing himself and or the assessors when finding that the evidence of PW2 was credible when he failed to consider that there were several inconsistencies in his evidence in court. Failure to direct himself sufficiently on previous inconsistent statement of the PW2 caused a substantial miscarriage of justice.

Ground 6

THAT the Learned Trial Judge erred in law and in fact in not directing himself and the assessors adequately the laws and facts on circumstantial evidence and as such caused substantial miscarriage of justice.

Ground 7

THAT the Learned Trial Judge erred in law and in fact in misdirecting himself that the appellant was guilty on the lesser offence of act intended to cause grievous harm and as such caused substantial miscarriage of justice.

[6] The facts of the case could be succinctly stated as follows. As the complainant was walking home after a wedding, before he could reach his house he heard a sound and as he turned he was hit with an iron rod on his neck. When he was hit with the iron rod his assailant was about 01 meter away from him. The complainant punched the person in front of him but he could not see the face of the attacker clearly and he was once again hit from behind with a knife. When the complainant fell, the knife attack struck on his head several times. The complainant received injuries on his head and was taken to the Sigatoka Hospital and then transferred to the Lautoka Hospital where he was treated for 8 days.

[7] Archie Watkins is the neighbor of the appellant and knew him for 02 to 03 years. The appellant is also known as Sonam to the witness. According to him, on 08 June 2017 when he was at home after about 12 midnight he woke up from sleep when he heard somebody shouting and went outside his house. When he was standing outside, a young man wearing a long sleeve blue t-shirt, brown ¾ shorts ran past him from about one meter away whom the witness recognized as the appellant from moonlight and lighting from his house and his vision was not obstructed. He had seen the appellant for about 4 to 5 seconds when he was going past him. The appellant was holding something in his right hand. The witness identified the appellant in court.

[8] Mixed colored pompom, one right sided black flip flop a pair of blue, Nike slip-on had been uplifted from the crime scene all of which had been identified by the appellant during the cautioned interview as belonging to him. At the scene reconstruction the appellant had pointed to where he had hidden the clothes he was wearing on the night of the incident and as a result the police team was able to recover a black t-shirt and ¾ pants identified by the appellant as his.

[9] Multiple incision wounds to the forehead and scalp were seen on the injured; approximately 10 wounds ranging from 2cm to 6cm with blood oozing. There was fresh blood oozing or flowing from the left ear, also there was dried blood in the nostril and bruising and swelling of the right eye as well as minor abrasion that is scripting of the skin over the right shoulder.

[10] In his evidence at the trial the appellant had challenged his confession as being not voluntary and stated that he left the same wedding attended to by the complainant at 10.30 pm and while he was walking on the road towards his house he saw two strangers jumping out of the drain. Since it was dark he was not able to see their clothes. When he saw them he was so frightened and nervous that he ran back towards the road, got into a vehicle and went to Olosara to his mother's place.

01st ground of appeal

[11] The trial judge's directions to the assessors on Turnbull guidelines can be found at paragraphs 74-77 of the summing-up where he had dealt substantially with the said guidelines in relation to the evidence of Archie Watkins. The appellant has not demonstrated in what respect the trial judge had fallen short in his directions in so far as Turnbull guidelines go. In his judgment also the trial judge had given his mind to the issue of recognition of the appellant by Archie Watkins at paragraphs 12, 13, 45 and 46.

02nd ground of appeal

[12] The trial judge had overturned the assessors' unanimous decision to convict the appellant for attempted murder but decided to find him guilty only for the lesser offence of act intended to cause grievous harm.

[13] Although, the trial judge had disagreed with the assessors, his disagreement was to convict the appellant for a lesser offence. It is well-established that when the trial judge disagrees with the majority of assessors he should embark on an independent assessment and evaluation of the evidence and must give 'cogent reasons' founded on the weight of the evidence reflecting the judge's views as to the credibility of witnesses for differing from the opinion of the assessors and the reasons must be capable of withstanding critical examination in the light of the whole of the evidence presented in the trial. However, a trial judge is not expected to repeat everything he had stated in the summing-up in his written decision (which alone is rather unhelpfully referred to as the judgment in common use) even when he disagrees with the majority of assessors as long as he had directed himself on the lines of his summing-up to the assessors [**See Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[14] Having perused the judgment of the trial judge, I cannot see how the appellant's contention that the judge had not independently analyzed the evidence could be sustained. If he had not do so, the trial judge would not have acquitted the appellant of attempted murder and convicted him only of 'act intended to cause grievous harm'.

03rd ground of appeal

[15] The appellant complains that the trial judge had failed to direct the assessors and himself on possible defenses. The counsel for the appellant had not sought any redirections on any such possible defenses. Nor has he pointed out as to what those possible defenses were in his written submissions. The only defense taken up by the

appellant was based on his 'identity' or 'mistaken identity' which had been fully addressed by the trial judge in his summing-up and the judgment.

04th ground of appeal

[16] The trial judge had admitted the cautioned interview of the appellant after the *voir dire* inquiry. The appellant does not challenge the admissibility of it. The trial judge reduced the charge from attempted murder to 'act intended to cause grievous harm' based on the appellant's cautioned interview and the nature of injuries found on the injured. His complaint is on the directions of the judge to the assessors on the cautioned interview.

[17] Upon a perusal of the summing-up, I find that the trial judge had highlighted all the evidence relating to the cautioned interview; both that of the police witnesses and the appellant in great detail. Thereafter, his specific directions as to how the assessors should approach the cautioned interview is at paragraphs 101-104 where the assessors had been asked to consider not only the voluntariness but also whether the appellant had made it, its truthfulness and weight to be given.

05th ground of appeal

[18] The appellant complains that under cross-examination Archie Watkins admitted that he had not told in the police statement (defense exhibit 1) that he saw the appellant in that night. But, it appears that he had told the police that the person running past him was like the appellant. When it was suggested to the witness that he had told the police the person he saw was like Sonal who was his neighbour, the witness stated that he had told them that he saw the complainant's younger brother Sonal who is also known as Vimlesh. However, in giving evidence he was firm that it was none other than the appellant, his neighbor Sonal or Sonam known to him for a few years.

[19] In the first place it is questionable as to why the appellant's counsel had not asked for any redirections on the alleged inconsistencies if he considered them to be material to his defense. The appellate courts will not look favorably on cases where counsel have

held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge (vide **Raj v State** CAV 0003 of 2014: 20 August 2014 [2014] FJSC 12). Therefore, in the absence of any compelling reason for the failure, the appellant is not entitled to raise such points in appeal at this stage [vide **Tuwai v State** CAV0013.2015: 26 August 2016 [2016] FJSC 35 and **Alfaaz v State** [2018] FJSC 17; CAV0009.2018 (30 August 2018)].

[20] Secondly, the trial judge had very fairly put this position elicited in cross-examination to the assessors at paragraphs 63-68 and 174 of the summing-up. Then the judge had directed them equally proficiently how they should approach inconsistencies followed by Turnbull guidelines.

[21] The trial judge at paragraphs 44-50 of his judgment had devoted a great deal of space to examine the evidence of Archie Watkins and the aforesaid alleged inconsistency brought up by the defense in cross-examination in considering whether it was the appellant or someone else who had assaulted the complainant that early morning.

[22] Therefore, I do not think that it can reasonably be said that the trial judge had failed to direct the assessors and himself on previous statement of Archie Watkins.

06th ground of appeal

[23] The counsel for the appellant has not elaborated this ground of appeal other than citing the law regarding circumstantial evidence.

[24] The trial judge had addressed the assessors on circumstantial evidence at paragraphs 37- 43 of the summing-up. He had placed all items of circumstantial evidence before the assessors in the summing-up and himself in the judgment.

[25] *'The Court of Appeal observed that no special directions are required of a trial judge in directing on the use of circumstantial evidence. What is required is a clear direction that the tribunal of fact must be satisfied of the guilt of the accused beyond reasonable doubt (**McGreevy v Director of Public Prosecutions** [1973] 1 WLR 276,*

applied ***Kalisoqo v R*** *Criminal Appeal No.52 of 1984). See also* ***R v Hart*** *[1986] 2 NZLR 408. The adequacy of a particular direction will necessarily depend on the circumstances of the case'* - paragraph 05 of **Boila v State** [2008] FJSC 35; CAV0005.2006S (25 February 2008)].

07th ground of appeal

[26] The appellant argues that after acquitting the appellant of attempted murder the trial judge should not have convicted him for the lesser offence of act intended to cause grievous harm as he had no opportunity of defending himself against that charge. The counsel for the appellant has not demonstrated what material difference it would have made to the appellant's defense if the charge had been 'act intended to cause grievous harm'.

[27] It was held in **Prasad v Reginam** [1981] FJLawRp 16; [1981] 27 FLR 80 (2 April 1981) that:

> *'A preliminary point was raised as to the competency of the trial court to substitute the verdict of Grievous Bodily Harm when the charge had been Attempted Murder. The argument was based on Manuel (1960) 28 CCC 383. However, the court noted that by the provisions of S. 163(2) of the Criminal Procedure Code there was no necessity to prefer an alternative charge if the facts proved definitely established that some lesser offence had been committed; the offence of which accused was convicted in fact being minor offence the ingredients of which had been fulfilled by the evidence.*

[28] Section 160 of the Criminal Procedure Act, 2009 justify the conviction of the appellant for the lesser offence of act intended to cause grievous harm though he was not charged with it.

> *'160. — (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of the minor offence although he or she was not charged with it.*

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, the person may be convicted of the minor offence although he or she was not charged with it.

Order

1. Leave to appeal against conviction is refused.

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Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL