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

CRIMINAL APPEAL NO. AAU 078 of 2021
[In the High Court at Lautoka Criminal Case No. HAC 017 of 2018]

BETWEEN : **ARJUN**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Appellant in person**
: **Ms. L. Latu for the Respondent**

Date of Hearing : **18 October 2023**

Date of Ruling : **19 October 2023**

RULING

[1] The appellant had been charged and convicted in the High Court at Lautoka for having committed attempted murder of Sashi Kala, his girlfriend on 13 January 2018 at Tauvegavega, Ba, in the Western Division contrary to section 44(1) and 237 of the Crimes Act 2009. The information read as follows:

*'**COUNT 1***

Statement of Offence

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

Particulars of Offence

ARJUN, *on the 13th day of January 2018 at Tauvegavega, Ba, in the Western Division, attempted to murder* ***SASHI KALA****.*

SECOND COUNT

Statement of Offence

CRIMINAL INTIMIDATION: *Contrary to section 375 (1), (a), (i) and (iv) of the Crimes Act 2009.*

Particulars of Offence

ARJUN, *on the 13th day of January 2018 at Tauvegavega Ba in the Western Division, without lawful excuse, threatened* ***ASHNA*** *with a cane knife with intent to cause alarm to the said* ***ASHNA****.'*

[2] The assessors had opined that the appellant was guilty of both counts but the trial judge had acquitted him of the second count and convicted him of only of the first count. The trial judge had sentenced him on 23 December 2020 to mandatory life imprisonment and set a minimum serving period of 08 years. An untimely appeal against conviction had been lodged in person by the appellant.

[3] The factors to be considered in the matter of enlargement of time are (i) the reason for the failure to file within time (ii) the length of the delay (iii) whether there is a ground of merit justifying the appellate court's consideration (iv) where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed? (v) if time is enlarged, will the respondent be unfairly prejudiced? (vide: **Rasaku v State** CAV0009, 0013 of 2009: 24 April 2013 [2013] FJSC 4 and **Kumar v State; Sinu v State** CAV0001 of 2009: 21 August 2012 [2012] FJSC 17).

[4] The delay is about 10 months which is substantial. The appellant has stated that due to COVID 19 restrictions he could not forward his appeal in time to the Court of Appeal Registry. There is no way that this assertion could be verified by this court but it cannot be reasonably assumed that COVID restrictions on movements prevented him

from lodging his appeal for 11 months. Nevertheless, I would see whether there is a **real prospect of success** for the belated grounds of appeal against conviction in terms of merits [vide: **Nasila v State** [2019] FJCA 84; AAU0004.2011 (6 June 2019)]**.** The respondent has not averred any prejudice that would be caused by an enlargement of time.

[5] The grounds of appeal raised by the appellant are as follows:

> '***Conviction:***
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> ***Ground 1:***
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> *THAT the Learned Trial Judge may have fallen into an error of law when his Lordship failed to properly direct himself and the assessors on the burden and standard of proof at the conclusion of the Summing Up.*
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> ***Ground 2:***
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> *THAT the Learned Trial Judge may have fallen into an error of law when his Lordship failed to make an independent assessment of evidence.*
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> ***Ground 3:***
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> *THAT the Learned Trial Judge may have fallen into an error of law when his Lordship failed to consider the insufficient evidence adduced in support of the mens rea of the offence.*
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> ***Ground 4:***
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> *THAT the Learned Trial Judge may have fallen into an error of law when his Lordship inadequately directing/misdirecting that the prosecution had to prove its case beyond reasonable doubts and if there were serious doubts in the prosecution case, the benefit of the doubt ought to have been given to the appellant.*
>
> ***Ground 5:***
>
> *THAT the Learned Trial Judge may have fallen into an error of law and fact when his Lordships direction to the assessors failed to effectively canvass the defence case thereby encumbering the appellant the right to a fair trial.*

[6] According to the judgment the brief facts are as follows:

> *4. The complainant in her evidence explained the incident that took place in the kitchen of Ashna's home on the 13th of January 2018. The accused had come from her behind when she was making tea in the kitchen. He*

had then struck her with a knife on her head, causing a laceration of 8 to 9 cm in length and 3 cm deep. He had then assaulted her with the same knife, causing further injuries on her chin and fingers. The complainant said the accused had told her that he would kill her and he is not scared of the police when he was assaulting her with the knife.

5. Doctor Solei, in her evidence, explained the nature of the injuries she found in the complainant. She further explained the severity of those injuries. If the complainant were not taken to Lautoka Hospital for surgical intervention, she would have died due to those injuries.

9. In her evidence, Ashna said the accused did not say anything to her when she went to the kitchen. She felt scared of the accused after seeing the accused with a knife.

[7] The sentencing order states facts as follows:

'2. It was proved that you had come behind the Complainant, when she was making tea in the kitchen, at around midday of the 13th of January 2018. You had then struck her with a knife on her head, causing a laceration of 8 to 9 cm in length and 3 cm deep. You had then assaulted her with the same knife, causing further injuries on her chin and fingers. The Complainant, in her evidence, said you had told her that you would kill her and you are not scared of the police when you were assaulting her with the knife.'

01st ground of appeal

[8] The trial judge had amply directed the assessors on burden and standard of proof at paragraphs 6-8 and 56-61 of the summing-up and this complaint has no merits.

02nd ground of appeal

[9] The appellant argues that the trial judge had failed to make an independent assessment of evidence.

[10] When the trial judge agrees with the majority of assessors, the law does not require the judge to spell out his reasons for agreeing with the assessors in his judgment but it is advisable for the trial judge to always follow the sound and best practice of briefly

setting out evidence and reasons for his agreement with the assessors in a concise judgment as it would be of great assistance to the appellate courts to understand that the trial judge had given his mind to the fact that the verdict of court was supported by the evidence and was not perverse so that the trial judge's agreement with the assessors' opinion is not viewed as a mere rubber stamp of the latter [vide: **Fraser v State** [2021] FJCA 185; AAU128.2014 (5 May 2021)].

[11] On a perusal of the judgment, I find that the trial judge had considered the evidence adduced during the hearing, the closing addresses of the parties, the summing up, and the three assessors' opinion and observed the manner and the demeanor of the complainant and found the two other prosecution witnesses to be straight, coherent, and consistent. The judge had accordingly, accepted the evidence of the prosecution as credible, reliable and truthful evidence in respect of the first count.

03rd ground of appeal

[12] The appellant submits that there was insufficient evidence to support the fault element of the offending.

[13] The trial judge had referred to the fault elements of attempted murder at paragraphs 10(iii), 13 and 14 of the summing-up and narrated the relevant evidence as follows at paragraph 29:

> *'29. At about 8 a.m. the accused had come to Ashna's house to hand over the phone of the complainant. He had just left the phone with Ashna and left. The. The accused had come again between 11 a.m. to 12 p.m., while the complainant was in the kitchen, making her tea. The accused had brought her biscuits and juice. When she turned around, the complainant had felt the first strike of the knife on her head. The accused had struck her with a knife on her head. After the first strike, the complainant had fallen on the floor. She had shouted for help, asking to save her. The accused had struck her on her neck and hands, leaving scars. The complainant had not seen the knife. The accused had told the complainant while attacking her with the knife that he will kill her and he is not scared of the police. Ashna, who saw the complainant bleeding with wounds, had screamed for help. At that time, Bina had arrived from the town in a vehicle. Bina had then taken the complainant to Ba Mission Hospital in the same Vehicle. From*

there, the complainant was taken to Lautoka Hospital in an Ambulance, where she had an operation. You have seen the complainant identified the accused as the person who struck her with a knife on the 13th of January 2018.'

[14] I have little doubt that the evidence of the complainant coupled with the evidence of Ashna and Dr. Solei demonstrate that the appellant either intended to cause the death of the complainant, or if not, he at least knew/believed that his act could cause the death of the complainant. His position taken up at the trial that the injuries were self-inflicted was incredible. The injuries were life-threatening requiring surgical intervention without which the complainant would have died.

04th ground of appeal

[15] There is simply no merits in this ground of appeal.

05th ground of appeal

[16] The appellant complains that the assessors and the trial judge had not adequately canvassed the defense case, particularly the fact that he used the knife that was already was there at Ashna's place and not one he brought from outside.

[17] The complainant denied the suggestion that she hit the appellant with a beer bottle on the previous night but said that the appellant had assaulted her in that night as well. The complainant had further said during the cross-examination, that she did not report to the police about the assault that occurred in the previous night because the appellant had told her not to do so. This matter had been brought to the attention of the assessors. If the appellant's allegation is true, it may suggest a motive for preplanning and premeditation in respect of the appellant's attack in revenge on the following morning.

[18] The fact that the complainant was standing when the appellant attacked her was of no relevance to the fault element.

[19] As for inconsistency between the complainant and Ashna, the trial judge had said in his judgement that he found that the inconsistent nature between the evidence of the complainant and Ashana in respect of the nature of the visit made by the appellant at around 8 a.m., did not affect the credibility of their respective evidence. In other words the trial judge had concluded that the inconsistency was not capable of shaking the very foundation of prosecution case [vide: **Nadim v State** [2015] FJCA 130; AAU0080.2011 (2 October 2015)].

[20] It is true that the knife belonged to Bina, Ashna's mother and it was left outside the kitchen or is normally placed behind the door of the kitchen. The appellant too was not a total stranger to the house of Bina and Ashna. Anyway the fact remains that the appellant had got hold of the knife from wherever it was and attacked the complainant and if not for the arrival of Ashna upon hearing her cries, the appellant may well have inflicted more injuries on the complainant. Thus, the fact that he did not bring the knife from outside would not negate the fault element of attempted murder when considered in the context of the totality of evidence.

Order of the Court:

1. Enlargement of time to appeal against conviction is refused.

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