

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

High Court Criminal Case No. HAC 309 of 2020

BETWEEN : STATE

AND : DINESH CHAND

Counsel : Ms S Tivau for the State
Ms Kean and Ms Manueli for the Accused

Dates of Hearing : 26 & 27 October 2020

Closing speeches : 28 October 2020

Date of Summing up: 30 October 2020

SUMMING UP

Ladies and gentleman assessors,

1. I must now sum up the case to you. You must then retire to consider your opinion. I will direct you on the law that applies. You must accept those directions I give you on matters of law. You are to decide the facts of the case, based on the evidence that has been led before this court. You will then apply those directions to the facts and give me your opinions as to whether the Accused is guilty or not guilty.

2. You are bound by the directions I give you as to the law. But you are not obliged to accept any opinion I may express or appear to have expressed during the trial. If you do not agree with that opinion you will ignore it and form your own opinions with that evidence.
3. You must base your opinions only on evidence given by the witnesses and the documents tendered in court. But a few things that you heard in this court are not evidence. Opening submission, closing submissions, statements, arguments and comments made by the counsel and this summing up are not evidence. But you may consider those as a guidance when you evaluate evidence and the extent to which you do so is entirely a matter for you. If you have acquired any knowledge about the facts of this case outside this court room, you must exclude that information from your consideration. Make sure that external influences play no part in forming your opinion. You will also not let any sympathy or prejudice sway your opinions.
4. I will give you only a summary of evidence. I will not go through every word uttered by the witnesses in this case, and if I leave out something that seems to be important, nothing stops you from taking that into account. Because you decide the facts.
5. After this summing up, you may give your individual opinion as the representatives of the community. You may reject or accept any evidence in forming your opinions. Your opinions need not be unanimous. And you need not give reasons for your opinions.
6. Your opinions will assist me in giving my judgement. I will give the greatest weight to your opinions in my judgement. However, I am not bound to conform to your opinions.

7. I will now mention some considerations that may assist you in evaluating evidence. As I said before you may reject the whole evidence of a witness, accept the entirety or even accept only a part of a witness's evidence and may reject the rest. You have to decide whether a witness has spoken the truth or correctly recalled the facts and narrated it. You must take into account the manner in which the witness gave evidence. Was the witness evasive? How did the witness respond to cross examination? You are to ask yourselves, 'was the witness honest and reliable?'
8. You have seen the demeanour of the witnesses and how they gave evidence in court. You have seen whether they were forthright or evasive in giving evidence. But you may also bear in mind that some witnesses have good memory, some may not remember every detail and it is also likely that some may perceive the same incident differently and narrate differently. You have to use your common sense in assessing the reliability and credibility of witnesses. Remember, that many witnesses are not comfortable in giving evidence in a court room, they may act in anxiety specially when they give evidence about a traumatic experience and they may get distracted in this environment.
9. When you have decided the truthfulness and reliability of evidence, then you can use that credible 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 guilty. You decide what facts are proved and what inferences you could properly draw from those facts. You then apply the law as I explain it to you and form your own opinions as to whether the Accused person is guilty or not guilty.
10. 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

inferences which could be drawn from those given sets of circumstances. You as assessors, in determining a question of fact, should utilise your common sense and wide experience which you have acquired living in this society.

11. A charge can be proved with direct or circumstantial evidence or with both types of evidence. In some instances, you may find that some facts can be proved by direct evidence. For example, if there is reliable evidence from a witness who actually saw the Accused committing the offence; or if there is a video recording of such an incident that plainly demonstrates his guilt; or if there is reliable evidence of the Accused himself having admitted it, these would all be good examples of direct evidence against the Accused.
12. Sometimes the Prosecution has to rely on circumstantial evidence to prove an element or elements of the offence. That simply means that the Prosecution is relying upon evidence of various circumstances related to the crime and the Accused, which the Prosecution says, when taken together with other evidence will lead to the sure conclusion that it was the Accused who committed this crime. A common example of circumstantial evidence is fingerprint evidence. Suppose a person's fingerprints are found on an object at the scene of a crime, such as a murder weapon. It could be inferred that the person has handled that weapon and been present at that place. The inference could be drawn even though there is no direct evidence that the person was seen there.
13. On some occasions evidence like fingerprints may be the only circumstance relied upon by the Prosecution as proof of guilt. However, it is not unusual to find a criminal case that evidence is given of a number of facts and circumstances. One witness proves one thing, and another proves another thing. None of those things alone may be sufficient to establish guilt but, taken together, one circumstance building upon the other, they may lead to the conclusion that the Accused is guilty of the crime.

14. Therefore, you must first consider all the evidence and decide what facts have been proved. From those facts you are entitled to draw proper inferences. An inference is a logical deduction from facts that have been proved. It must not be mere speculation or guesswork. It is not sufficient that the proved circumstances are merely consistent with the Accused having committed the crime. To find him guilty you must be satisfied so as to feel sure that an inference of guilt is the only rational conclusion to be drawn from the combined effect of all the facts proved. It must be an inference that satisfies you beyond reasonable doubt that the Accused committed the crime. If the inference to be drawn from the circumstantial evidence falls short of that standard then your opinion must be not guilty.
15. You should be careful to distinguish between arriving at conclusions based on reliable circumstantial evidence, and mere speculation. Speculating in a case amounts to no more than guessing or making up theories without good evidence to support them.
16. Another consideration may be; Does the evidence of a particular witness seem 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. 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. When you evaluate evidence, you should see whether the version of a witness is probable or improbable.
17. According to the law the prosecution must prove its case beyond reasonable doubt. For the prosecution to discharge its burden of proving the guilt of the Accused, it is required to prove beyond reasonable doubt that he is guilty. The burden of proof remains on the prosecution throughout the trial. For this purpose, the Prosecution must prove every element of the offence, which I will discuss later, beyond reasonable doubt.

18. The Accused need not prove his innocence. The fact that the Accused has given evidence in this case does not imply any burden upon him to prove his innocence. It is not his task to prove his innocence. The burden is on the prosecution to prove the guilt of the Accused. That means you must be satisfied that the state has proved every element of the offence beyond reasonable doubt. That doubt should be a reasonable one and if you are left with a reasonable doubt you must find the Accused not guilty. If you are not left with any such doubt and if you are sure that the prosecution proved every element of the offence you must find him guilty.

19. Now let me explain to you the elements for the offence of attempted murder. As you have heard from the beginning of this trial the Accused is charged with one count of attempted murder contrary to section 44 and section 237 of the Crimes Act. The particulars of the offence are that;

“Dinesh Chand on 22nd August 2019 at Suva in the Central Division attempted to murder Shakunthala Devi.”

20. Section 44(1) and (2) of the Crimes Act explains the definition of attempt, where it states that:

- i.* A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.
- ii.* For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

21. Section 237 of the Crimes Act provides the definition of murder, where it states that;

A person commits an indictable offence if —

- i.* the person engages in conduct; and
- ii.* the conduct causes the death of another person; and,
- iii.* the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.

22. Accordingly, the main elements for the offence of attempted murder are that;

- a. the Accused,
- b. engaged in a conduct; and
- c. the said conduct was an attempt to cause the death of the complainant; and
- d. the Accused intended to cause the death of the complainant by his conduct.

23. In this case the Prosecution is alleging that the Accused attempted to cause the death the complainant. The first element is the identity of the Accused. You have to be sure that it was the Accused and no one else committed the alleged offence.

24. The second element relates to the conduct of the Accused. To engage in a conduct is to do an act which is the product of the will of the Accused and it was not accidental. The Prosecution has to prove beyond reasonable doubt that the conduct of the Accused was deliberate and not accidental. For the Accused to be guilty of attempted murder, the Accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offence is one of fact for you to decide.

25. The third element is that the said conduct of the Accused was an attempt to cause the death of the complainant.
26. The final element is concerned with the state of mind of the Accused that he intended to cause the death of the complainant. It is not possible to have direct evidence regarding an Accused's state of mind since no witness can look into the Accused's mind and describe what it was at the time of the alleged incident. However, you can construe the state of mind of the Accused from the facts and circumstances you would consider as proved.
27. In order for you to conclude that the Accused intended to cause the death of the complainant, you should be satisfied that the Accused intended to kill the complainant as a result of his conduct. You should consider all the evidence and draw appropriate inferences to ascertain whether the Accused had the intention to cause the death of the complainant.
28. Intention is not something that can be easily proved. It is something that has to be judged by the acts or words of a person or the circumstances that surround what he does or does not do. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events. You decide intention by considering what the Accused did and he did not do. You should look at his actions before, at the time of, and after the act and the words he had uttered, the weapon used, the number of injuries inflicted, the place of the body where the injuries were inflicted. All these things may shed light on the intention of the Accused when he committed the alleged act.
29. As I have mentioned at the beginning of the trial the Prosecution and the Defence have agreed to some facts pertaining to this case. You can accept those admitted facts as facts proven beyond reasonable doubt and you can

rely on those facts. You must accept those facts as accurate and truthful evidence.

30. Now I will refresh your memory and give a brief outline of the evidence adduced in this case. However, you should consider the entirety of the evidence adduced in this case when forming your opinions.

31. The Prosecution called the complainant, Shakunthala Devi and she gave evidence that she has been married to the Accused, Dinesh Chand for 20 years. She said that they have three children from the marriage. According to her evidence they have been separated for four years. She said the reason for the separation was the fights between them. On 21 August 2019 the Accused had called her, and she had gone to his place at around 7 pm to see her children. The complainant said that she was sick, and the Accused took her to the hospital.

32. After she came back from hospital she had gone to sleep. At that time there was only the Accused and their eldest son were at home with her. She had gone to sleep in a room. The complainant said that the Accused pressed her neck with a scarf, and he was angry. Then she had tried to go outside. But the front door had been locked. She said that the Accused refused to open the door.

33. The complainant said that she then went and slept on a sofa in the sitting room. When she was fast asleep, she had felt suffocated as someone was covering her face. She had not seen who covered her face. She said that she felt a lot of pain on her neck. When she woke up, she had seen the Accused standing in front of her with a rod in his hand. She said that she was bleeding from her neck. She said that she went outside, and she was feeling dizzy. Then she had been taken to Valalevu hospital.

34. She further stated that she was then taken to CWM hospital and a four-hour surgery was performed on her.
35. During the cross examination the complainant said that the Accused is a good person, but he gets angry sometimes. She denied that her neck was swollen when she came to the Accused's house. She admitted that her toenail was swollen. She denied that she had bruises on her neck when she came to his house. The complainant admitted that the Accused covered her mouth at the hospital for the doctor to pull the toenail.
36. Under cross examination the complainant admitted that after they came home from the hospital she went to bed and the Accused went to his brother's place to drink grog. She said during cross examination that when the Accused came back, he tapped on her leg and grabbed her neck and pressed it. She reiterated that when she tried to go outside the Accused refused to open the door.
37. The complainant admitted that once the Accused took her to the toilet when she was feeling dizzy. However, she stated that he took her to the washroom when they were sitting in the sofa and not when she was sleeping on the sofa.
38. It was suggested to the complainant that she saw the Accused with the rod when she woke up as he came to see her when she was screaming. However, the complainant said that she cannot say anything as she was sleeping. She denied that the Accused wrapped a cloth around her neck to stop bleeding. She denied that she spoke to the family before she was taken to the hospital. The complainant said that her son came running when he heard the noise.
39. At this point I must caution you to disregard the portion of evidence given by the complainant about what her son had uttered as the Prosecution requested that piece of evidence to be disregarded.

40. During the cross examination the complainant admitted that she did not see the Accused stabbing her. She said that she was sleeping, and she only felt the pain.
41. She further confirmed during cross examination that the Accused strangled her when she was in the bed.
42. During re-examination the complainant explained what she meant by grabbing her neck. She said that when she was sleeping in the room the Accused wrapped a scarf around her neck and pulled it.
43. The Prosecution called the medical doctor who examined the complainant at Valalevu Health Centre. Dr Akash Biman Prasad tendered the medical report of the complainant as Prosecution Exhibit 1. He gave evidence that on 22 August 2019 the patient, Shakunthala Devi was brought to the Health Centre around 12 to 2 am in the morning.
44. He said that the initial impression was that the patient had an injury with an iron rod stuck into her neck. He further stated that it was a life-threatening injury given the mechanism of the injury and the anatomical location of the injury. He explained it further by saying that it was a penetrating injury with and rod. The witness also said that the injury was located on the neck which has major blood vessels which supply blood to the brain. He said that if the blood vessels are broken it could cause life threatening bleeding.
45. The witness further testified that he noticed a quite a bit of blood loss as there were blood stains all over her clothes and on her neck. However, he said that there was no active bleeding when he examined her. The witness gave evidence that the patient had 3 cm long and 2 cm deep laceration on her neck.

He explained the laceration as a discontinuity of any soft tissue in the body. He further went on to explain a laceration as a cut on the skin and muscles.

46. He also stated that there was an abrasion above the laceration and explained an abrasion as a scratch or a scraping injury to the skin.

47. The witness also stated that he observed left shoulder tenderness. He explained it by saying that the patient complained of pain on her left shoulder when he touched the left shoulder.

48. He further gave evidence that there were bruises over right jaw and face. He said it showed signs of asphyxiation. Which he explained as signs of choking. The witness stated that it could have been from the fingers of someone trying to strangulate her. He said that the bruises on her face may have been caused due to the blood vessels popping as a result of the pressure secondary to choking.

49. The witness said that his professional opinion is that the complainant sustained potentially life-threatening injury. He has further stated that there was potential of airway compromise or exsanguination secondary to the edge of a heavy object with signs of strangulation.

50. He explained potential of air way compromise or exsanguination as follows;

“Why I wrote that is because there was no signs of things happening on the patient at that particular time. But there was a risk that it could have happened or that it could eventuate later on. Airways compromise, we use this term to describe anything that can block flow of air into the lungs. So that could arise from damage to the windpipe which also in the anterior neck which could result also from the injury this person sustained. So whatever caused the injury in front of the

neck could have damaged the cartilage or the tissue which the windpipe is made up of. That could have caused the windpipe to collapse and could have caused the patient her life or this could have eventuated in exsanguination as well. Which means excessive loss of blood which makes it impossible for vital organs to function or it basically means bleeding out to death.”

51. The witness further said that the injury could have resulted from the edging of whatever the object was used. He said that it is likely to have been used in a stabbing pattern rather than a hit. He stated that he is unaware of the treatments received by the patient after she was transferred to CWM.

52. During the cross examination it was suggested to the witness that the injury was not fatal enough to cause her death seconds or minutes after she was brought in or after the incident. The witness stated that the patient made it to the hospital and bleeding had stopped by then. But he further said that the blood clots could dislodge and if there was any injury to the vessels she could have started bleeding again at that point in time. He confirmed that there was a chance for her to die after examination and that is why they transferred her to CWM for surgical attention. He also said that after injury to any tissue of the body there is some swelling which could have added to airway compromise as well.

53. At this point I must explain you about expert evidence. It is the general rule that witnesses are normally not allowed to give opinion and only allow to give evidence on what they have seen, heard, or felt by their physical sense. However, the exception is that the evidence of expert witnesses. Expert witnesses are those who are learned and experts in a particular subject or field with relevant experience. Such witnesses are allowed to give evidence of their opinion. In this case Dr Akhash Biman Prasad gave evidence as an expert witness about the injuries received by the complainant.

54. Expert evidence is permitted in a criminal trial to provide you with scientific and professional information and opinion, which is within the witness' expertise, but which is likely to be outside your experience and knowledge. It is by no means unusual for evidence of this nature to be called; and it is important that you should see it in its proper perspective, which is that it is before you as part of the evidence as a whole to assist you with regard to the injuries, the physical and medical condition of the victim subsequent to this alleged offence. You should bear in mind that, having carefully considered, if you do not accept the evidence of the expert, you do not have to act upon it.
55. After calling the complainant and the medical witness the Prosecution closed their case. After the closure of the prosecution case the Accused was explained his rights. The Accused decided to give evidence. You must bear in mind that although those options were given, still the burden is on the prosecution to prove the guilt of the Accused and he need not prove his innocence.
56. The Accused gave evidence that on 22 August 2019 he was at home with his son Vishal Chand. He said that they have been separated since 2017 as there was a DVRO against him as well as against the complainant. He said that on 21 August 2019 the complainant called him, and he picked her up from the bus stop. He confirmed that he took her to a doctor as the complainant was having a swollen toe. He also said that the right-side cheek and her chin was also swollen.
57. The Accused stated that the doctor told him to put his hand on the complainant's mouth when the toenails was pulled out. He said then they came home, and the complainant went to sleep in his room. The Accused had then gone to his brother's place to drink grog which was beside his house. He said that he returned home around 11.20 pm and had dinner. He further

stated that the complainant wanted to go and sleep in the couch as he could hurt her leg if he sleeps on the same bed. The Accused said then he took her to the washroom and sat with her for a while on the couch. He had then gone to the room to sleep.

58. He further gave evidence that around 3.30 am he heard a noise from the sitting room. He said then he rushed to the sitting room and saw the complainant was sitting on the couch. He stated that he saw a rod in her neck. He said that he called the son and pulled out the rod and took into his hand. He stated that there was a cloth and he wrapped it around her neck. He also said then his son called his uncle and his brother and mother came.

59. The Accused said that him and his son picked her up and took her in his car. He said that his brother drove the car as the Accused was wearing shorts. However, when he was asked whether he also went to the Valalevu health Centre the Accused said that "they went".

60. The Accused denied all the allegations.

61. During the cross examination the Accused was asked whether they had constant arguments. In response he said that the complainant had an affair with another man since 2015. However, he said that he never got angry. The Accused confirmed that the complainant took a DVRO against him in 2017 and he said that he does not know the reason. Under cross examination the Accused said that the complainant did not come to see the children during 2017, 2018 and 2018. However, he later said that the complainant came to see the children before 21 August 2019 as well.

62. The Accused admitted under cross examination that it was only the complainant, his son and him were at home that night. He stated that after he locked the door, he went to see the complainant in the room. He denied that he wrapped a scarf around her neck. Also, he denied that she wanted to leave the house. When it was suggested to him that he did not open the door for her

to leave, he said that she did not want to leave the house and she only went to the sitting room. He denied that he stabbed the complainant with a rod when she was sleeping on the sofa.

63. The Accused denied that the complainant fainted after the incident. He also said that there was no blood on her clothes. He said that when he pulled out the rod there was only a little bit of bleeding from her neck. He denied that it was a big injury.

64. That was the case for the Defence.

65. In this case the Prosecution alleges that the Accused on 22 August 2019 attempted to murder the Complainant, Shakunthala Devi. The Prosecution adduced evidence in this case that the Complainant once felt like someone trying to choke her with that person's hands on her face. When she woke up she had seen the Accused pulling her neck with a scarf. Then she had tried to leave the house, but she could not do so as the Accused did not let her leave the house. Then the Complainant had slept on a sofa in the sitting room. She later felt a pain on her neck and when she woke up, she had seen the Accused standing in front of her with a rod in his hand. She was taken to the hospital by the relatives and the Accused had not gone to the hospital. The medical evidence is that the injury was caused on the neck which is a life-threatening injury.

66. The Complainant had not seen anyone stabbing her neck with a rod. But it is for you to draw reasonable inferences from the evidence available as to how she sustained injuries as per the directions I have given earlier. It is for you to decide whether the Complainant's evidence is reliable and credible and whether you can rely on her evidence.

67. The Defence on the other hand denies that the Accused tried to strangle the Complainant's neck and later stabbed her neck with a rod. The Accused gave evidence that he is separated from the Complainant since 2017 as the

Complainant was having an extra marital affair with another person. However, he said he was not angry about that. Further the Accused said that there was a Domestic Violence Restraining Order against him. However, he said he does not know the reason for the domestic violence order. The Accused said that he was in the room when he heard a noise and he rushed to the sitting room when he heard the noise. He said that he pulled a rod from the Complainant's neck and it was not bleeding much. Further he said that he did not take her to the hospital as he was wearing shorts.

68. As it was said before, it is the duty of the prosecution to prove the elements the offence against the Accused. The Accused need not prove his innocence.

69. Which version you are going to accept, may it be the prosecution version or the defence version, is a matter for you. You must decide which witnesses are reliable and which are not. You observed all the witnesses giving evidence in court. You decide which witnesses were forthright and truthful and which were not. Which witnesses were straight forward? You may use your common sense when deciding on the facts. Assess the evidence of all the witnesses and their demeanour in arriving at your opinions.

70. You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by the complainant, 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. 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 has proved the elements of the offence, beyond any reasonable doubt.

71. It is important that you must employ the same considerations which you employed in assessing truthfulness and reliability on the Prosecution evidence, when you are assessing the evidence given by 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.

72. 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. You must still consider whether the evidence given by the complainant proved all the elements of the offence of attempted murder beyond reasonable doubt.


73. I have now given you the directions of law and summarized the evidence adduced in this case.

74. If you believe that the prosecution has proved the elements of attempted murder beyond reasonable doubt, you must find the Accused guilty.

75. If not, you must find the Accused not guilty.

76. You may now retire and consider your opinions. Before you do so, may I ask the counsel of both parties whether you wish to request any redirections?

77. When you are ready with your opinions, the Court will reconvene for you to inform your opinions to court.



Rangajeeva Wimalasena
Acting Judge

At Suva

30 October 2020

Solicitors for the State: Office of the Director of Public Prosecutions

Solicitors for the Accused: Office of the Legal Aid Commission