

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 372 of 2018

STATE

V

PETERO NUKU

Counsel : Mr. Saif Shah for the State
Mr. Isireli Romanu for the Accused

Dates of Trial : 18-19 November 2020

Summing Up : 20 November 2020

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 have addressed you on the evidence. After their addresses, it is my duty to sum-up the case to you. You will then retire to consider your opinions.
- [2] As the Presiding Judge, it is my duty to ensure that the trial is conducted fairly and according to law. As part of that duty, I will direct you on the law that applies. You must accept the law from me and apply all directions I give to you on matters of law.
- [3] It is your duty to decide questions of fact. But your determinations on questions of fact must be based on the evidence before us. In order to determine questions of facts, first you must decide what evidence you accept as truthful, credible and reliable. You will then apply relevant law, to the facts as revealed by such evidence. In that way you arrive at your opinions.

- [4] Please remember that I will not be reproducing the entire evidence in this summing up. During my summing up to you, I may comment on the evidence; if I think it will assist you, in considering the facts. While you are bound by directions I give as to the law, you are not obliged to accept any comment I make about the evidence. You should ignore any comment I make on the facts unless it coincides with your own independent reasoning.
- [5] In forming your opinions, you have to consider the entire body of evidence placed before you. In my attempt to remind you of evidence in this summing up, if I left out some items of evidence, you must not think that those items could be ignored in forming your opinions. You must take all evidence into consideration, before you proceed to form your opinions. There are no items of evidence which could safely be ignored by you.
- [6] After I have completed this summing up, you will be asked to retire to your retiring room to deliberate among yourselves so as to arrive at your opinions on the remaining 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 and the admissions made by the parties by way of Admitted 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 put before you since this trial began. Ensure that no external influence plays any part in your deliberations.
- [10] A few things you have heard in this Courtroom are also not evidence. This summing-up is not evidence. Statements, arguments, questions and comments by the Counsel are not evidence either. A thing suggested by a Counsel during a witness's cross-examination is also not evidence of the fact suggested, unless the witness accepted the particular suggestion as true. The opening submission made by the State Counsel and closing submissions made by both State Counsel and Defence Counsel are not evidence. They were their arguments, which you may properly take into account when evaluating the evidence; but the extent to which you do so is entirely a matter for you.

- [11] As I already indicated to you, a matter which will be of primary concern to you is the determination of the credibility of witnesses, basically the truthfulness and reliability of their evidence. It is for you to decide whether you accept the whole of what a witness says, or only part of it, or none of it. You may accept or reject such parts of the evidence as you think fit. It is for you to judge whether a witness is telling the truth and correctly recalls the facts about which he or she has testified.
- [12] Many factors may be considered in deciding what evidence you accept. I will mention some of these general considerations that may assist you.
- [13] You have seen how the witnesses' demeanour in the witness box when answering questions. How were they when they were being examined in chief, then being cross-examined and then re-examined? Were they forthright in their answers, or were they evasive? How did they conduct themselves in Court? In general what was their demeanour in Court? But, please bear in mind that many witnesses are not used to giving evidence in a Court of law and may sometimes find Court environment stressful and distracting.
- [14] 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 and in the circumstances of the case? 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 perceive (or know) in any other way 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] A statement made to the Police by a witness can only be used during cross-examination to highlight inconsistencies or omissions. That is, to show that the relevant witness on a previous occasion had said something different to what he or she said in Court (which would be an inconsistency) or to show that what the witness said in Court was not stated previously in the statement made to the Police (which would be an omission). You have to bear in mind that a statement made by a witness out of Court is not evidence. However, if a witness admits that a certain portion in the statement made to the Police is true, then that portion of the statement becomes part of the evidence.
- [17] This is how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that

inconsistency or omission 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 or omission, you may conclude that the underlying reliability of the account is unaffected.

- [18] However, if there is no acceptable explanation for the inconsistency or omission 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 and omission 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 or omission 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 or omission and consider him or her to be reliable as a witness.
- [19] Madam Assessor 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.
- [20] 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.
- [21] 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.
- [22] 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.
- [23] 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 or is direct evidence.

- [24] 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. This is also referred to as circumstantial 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.
- [25] 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.
- [26] I must emphasize, it does not matter whether that evidence was called for by the prosecution or by the defense. You must apply the same standards, in evaluating them.
- [27] 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.
- [28] 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. It is not required for the accused to prove his innocence.
- [29] 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?
- [30] 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.
- [31] 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.

- [32] You must not let any external factor influence your judgment. You should disregard all feelings of sympathy or prejudice, whether it is sympathy for the complainant in this case 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 also not speculate about what evidence there might have been. You must adopt a fair, careful and reasoned approach in forming your opinions.
- [33] Let us now look at the charges contained in the Information.
- [34] There are two charges preferred by the Director of Public Prosecutions (DPP), against the accused:

[COUNT 1]

Statement of Offence

ATTEMPTS TO COMMIT ARSON: Contrary to Section 363 of the Crimes Act 2009.

Particulars of Offence

PETERO NUKU, on the 30th day of December 2017, at Kadavu, in the Central Division, attempted to set fire to the dwelling house of **MARICA QOLI**.

[COUNT 2]

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375(1)(a)(i)(iv) and (2)(a) of the Crimes Act 2009.

Particulars of Offence

PETERO NUKU, on the 2nd day of January 2018, at Kadavu, in the Central Division, without lawful excuse and with intent to cause alarm threatened to burn **MARICA QOLI** inside her dwelling house.

- [35] As you are already aware at the end of the prosecution case this Court decided that there was no relevant or admissible evidence to establish that the accused had

committed the offence he is charged with in Count 2. Accordingly, the accused was found not guilty and acquitted of the said charge.

[36] Therefore, it is no longer necessary for you to make any determination on the second count. What is remaining for your determination is the first count, which is a charge of Attempted Arson against the accused.

[37] At this stage I must direct you that the fact that the accused has been found not guilty and acquitted of the second count should have no bearing in your determination of the first count against the accused. You must not believe that due to the fact that the accused has been found not guilty and acquitted of the second count that he must also be found not guilty and acquitted of the first count as well. You must also not believe that due to the fact that the accused has been found not guilty and acquitted of the second count that by that reason he must necessarily be guilty of the first count. You must make your decision on the first count purely based on the evidence present in Court during this trial.

[38] I will now explain to you the elements of the offence of Attempt to Commit Arson as defined in Section 363 of the Crimes Act No 44 of 2009 ("Crimes Act"). The said Section reads as follows:

A person commits an indictable offence if he or she —

(a) attempts unlawfully to set fire to any such thing as is mentioned in section 362; or

(b) wilfully and unlawfully sets fire to anything which is so situated that any such thing as is mentioned in section 362 is likely to catch fire from it.

[39] As you would observe the first count against the accused would clearly fall under Section 363 (a) of the Crimes Act.

[40] Since Section 363 makes a reference to *to any such thing as is mentioned Section 362*, I would have to now refer you to Section 362. Section 362 reads as follows:

"A person commits an indictable offence if he or she wilfully and unlawfully sets fire to —

(a) any building or structure (whether completed or not); or

(b) any vessel (whether completed or not); or

(c) any commercial plantation of trees;

(d) any stack of cultivated vegetable produce, or of mineral or vegetable fuel; or

(e) a mine, or the workings, fittings or appliances of a mine."

- [41] What is of relevance for the purpose of this case would only be Section 362 (a) which is *"any building or structure (whether completed or not)."*
- [42] The first count in the Information makes reference to the dwelling house of the complainant. The Crimes Act [in its Interpretation Section-Section 4 (1)] provides that a 'dwelling house' includes any building or structure.
- [43] Therefore, in order for the prosecution to prove the first count of Attempt to Commit Arson, they must establish beyond any reasonable doubt that;
- (i) The accused;
 - (ii) On the specified date (in this case on 30 December 2017);
 - (iii) At Kadavu, in the Central Division;
 - (iv) Unlawfully;
 - (v) Attempted to set fire to the dwelling house of Marica Qoli.
- [44] Let me now elaborate on these elements in respect of the first count.
- [45] 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.
- [46] The second element relates to the specific date 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.
- [47] The fourth element for the prosecution to prove is that the accused acted unlawfully. The term "unlawfully" simply means without lawful excuse. As such, it is for you as Assessors to consider and decide whether the accused acted in an unlawful manner in the given circumstances.
- [48] The fifth element for the prosecution to prove beyond reasonable doubt is that the accused attempted to set fire to the dwelling house of Marica Qoli. As I have informed you before a 'dwelling house' includes any building or structure.
- [49] Furthermore, Section 44 of the Crimes Act deals with Attempts, which is in effect an extension of criminal responsibility. Sections 44(1) and 44(2) are particularly relevant. The two sub Sections read as follows:

"(1) 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.

(2) 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."

- [50] If you are satisfied beyond any reasonable doubt that the accused, on 30 December 2017, at Kadavu, unlawfully, attempted to set fire to the dwelling house of Marica Qoli, then you must find him guilty of the first count of Attempt to Commit Arson.
- [51] 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 first count of Attempt to Commit Arson.
- [52] These are some of my directions on law and I will now briefly deal with the evidence presented before this Court.
- [53] 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 "*Admitted Facts*" without placing necessary evidence to prove them:
1. Petero Nuku is the husband of the complainant Marica Qoli.
 2. Between the months of December 2017 to January 2018, Petero Nuku resided at Gasele Village, Yale, Kadavu, together with his wife and children.
- [54] Since the prosecution and the defence have consented to treat the above facts as "*Admitted Facts*" without placing necessary evidence to prove them you must, therefore, treat the above facts as proved beyond reasonable doubt.

Case for the Prosecution

[55] The prosecution, in support of their case, called the complainant Marica Qoli.

[56] Evidence of Marica Qoli

- (i) *She is the complainant in this matter. The witness testified that she resides at Gasele Village in Kadavu. She is 40 years of age and is a housewife.*
- (ii) *The witness testified to the events which took place on 30 December 2017. On that day she said she was at home with her 5 year old daughter named Tepala. Her husband, the accused, had come home with a man named Peri, who is also known as Jah Ben. The two of them had been drunk and they also brought with them one can of Woodstock.*

- (iii) *The witness said that her husband had asked her for some money for them to go by boat and to buy some more drinks. She had told her husband that she didn't have any money. She added: "... I came down to the beach to get our benzine tank/gallon to hide it."*
- (iv) *The complainant was asked as to why she did this. She said: "Because I didn't want him to take the boat because he was drunk and because he will cause trouble to us when he comes back."*
- (vi) *The witness continued that she had hidden the gallon of benzine behind the door of the house.*
- (vii) *The witness testified that after that her husband kept swearing at her and threatened her that if she doesn't give him the money he will burn the house with her daughter.*
- (viii) *The witness clarified that her husband was forcing her to give him the money, but that she had not given him any money.*
- (ix) *The witness was then asked the following questions in evidence in chief:*
- Q. *What happened next?*
- A. *I was standing inside the house and then he pushed me in the house and he spotted the gallon which I had hidden. He brought the benzine gallon into our kitchen where the gas burner was. Then he opened the benzine gallon and then tried to switch on the gas burner. And then I thought of my daughter inside the house. So I just grabbed him and I pulled him outside.*
- Q. *What happened next?*
- A. *When he fell outside the benzine gallon also fell out of his hand and I took the benzine gallon to a place beside our house where there were stones and I poured out the benzine.*
- Q. *What happened after that?*
- A. *Whilst pouring out the benzine I told my daughter to run to our house in the village – to leave our house and to run into the village.*
- Q. *Where was Petero while all this was happening?*
- A. *He was still at the place I pulled him to and he was still swearing at me to give him the money.*
- (x) *The witness said that whilst Petero was lying on the ground a boy had come and taken him away.*

- (xi) When asked as to where Peni was when this incident was happening, the witness said that he went back and was sitting at the beach with some other boys. Peni had left when the complainant and Petero were arguing about the money and when her husband had started getting angry.
- (xii) The witness said the gallon of benzine was a 20 litre tank or gallon. At the time of the incident it contained about 5 litres of benzine, which is equivalent to one gallon.
- (xii) The witness testified that on 2 January 2018, the accused had still been having a hangover and was still swearing at her. She had asked her brother to take her down to the Vunisea Police Station to report the matter. Later the witness said this was on the same day when the accused tried to burn the house.
- (xiii) The complainant was cross-examined at length by the defence.
- (xiv) The witness testified that on 30 December 2017 her husband and his friend Jah Ben had returned home around 10.00 in the morning. They were returning from the wharf located in Kavala. They were both drunk at the time. They also had with them one can of Woodstock (which is an alcoholic drink).
- (xv) Upon returning home her husband approached her and had told her in an angry manner to give him money. The witness said that she did not give him any money. She also said that she did not have any money with her at the time to give her husband. She further said: "When he went to the wharf that morning he took all the money with him and he thought I was still keeping some money with me. He didn't know that he took all the money."
- (xvi) The witness testified that this is the stage at which the accused got really angry. Then she went to the beach, got the gallon of benzine and brought it home and hid it behind the door. She said the reason she did this was because she didn't want her husband to take their boat because he was so drunk.
- (xvii) Her husband had continued to search inside the house for the money, because he had thought the witness was hiding the money somewhere.
- (xviii) The following questions were then put to the witness in cross-examination:

Q. You said after that he pushed you into the house, got hold of the gallon, went into the kitchen and tried to open/switch on the gas burner?

A. Yes.

Q. And he tried to switch on the gas burner?
A. Yes. He tried to open the gas burner but the cylinder was still off. He was lifting the benzine gallon to try and pour it onto the burner.

Q. You said the gas cylinder that fits the burner was turned off?
A. Yes.

Q. And that is why he couldn't turn on the burner?
A. Yes.

Q. Did he manage to open the cap to the gallon of benzine?
A. Yes. He had already opened the benzine gallon and he was trying to open the cylinder but it was far away/out of his reach.

Q. So you grabbed the gallon from him, and you ran with the gallon outside?
A. I pulled him outside and at that same time the gallon of benzine came out of his hold.

(xix) The defence highlighted the following inconsistency in the testimony given in Court by the witness vis a vis her statement made to the Police on 6 January 2018:

i. In her testimony in Court, the witness had stated that the accused tried to open the gas burner but the cylinder was still off. He was lifting the benzine gallon to try and pour it onto the burner.

However, in her statement made to the Police, it is recorded as follows: "... When I looked into the kitchen I saw that the burner was on and he was trying to open the gallon of premix."

The witness explained that what she had told the Police was that the gallon was open, the gas burner was on, but the cylinder was off.

(xx) The witness confirmed that neither the gallon of fuel nor the gas stove have been produced in Court. The witness also confirmed that no pictures (photographs) of the gallon or the gas stove were produced in Court.

(xxi) The witness was also asked the following further questions in cross examination:

Q. You said you saw the accused in front of the stove with the gallon of benzine, but the stove was offed? Is that what you said earlier?
A. Yes. He has not turned the burner/stove on.

Q. *And the gas cylinder was also turned off?*

A. *Yes.*

Q. *Was the stove in a working condition?*

A. *Yes.*

(xxii) *In re-examination, the following questions were, inter-alia, put to the witness:*

Q. *Is it a 2 burner or 1 burner?*

A. *2 burner.*

Q. *While he was in front of the stove with the gallon of benzine in hand, was he turning the stove on while standing in front of it?*

A. *Yes. He was turning on the stove, but the cylinder was offed. And he kept turning on the stove thinking the cylinder was on.*

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Q. *On 30 December 2017, did you only go and lodge a report or did you also give a statement?*

A. *I just reported and came back home.*

Q. *Do you recall when did you give your statement to the Police?*

A. *I can't remember.*

[57] That was the case for the prosecution. At the end of the prosecution case Court decided to call for the defence in respect of Count 1. 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.

[58] In this case, the accused opted to offer evidence under oath.

Case for the Defence

[59] Evidence of Petero Nuku

(i) *The accused testified that he is now 40 years of age. He is a Farmer by occupation. He permanently resides in Gasele Village, Yale, Kadavu. The house in the village was built by him and is owned by him.*

(ii) *The accused said that he is married. The name of his wife is Marica Qoli. They have 3 children. He said that he married roughly 17 years ago.*

- (iii) *The witness testified to the events that transpired on 30 December 2017. He said that around 8.00 in the morning on that day he had gone with his one of his friends named Jah Ben to Kavala, which is about 1½ hours by boat. They had gone in his own fibre glass boat. The reason for going to Kavala was to buy drinks – Woodstock.*
- (iv) *He and his friend had bought 4 cans of Woodstock and drank 3 of them. They had returned to the village around 10.00 in the morning. At the time they had one can of Woodstock left with them.*
- (v) *Thereafter the accused had returned home and met his wife. He had asked her for some money to buy some more drinks. His wife had not given him any money. So an argument had taken place between he and his wife.*
- (vi) *The witness said that he had then searched for the money inside the room but could not find it. The witness testified that he had given his wife \$2,000.00, on the 29 December 2017, from the sale of 20kg's of yaqona.*
- (vii) *The witness was then asked the following questions in evidence in chief:*

Q. What happened next? When you could not find the money?

A. I then came and we argued. I then made her angry and I wanted to set fire to the house.

Q. What did you actually do to make her angry?

A. I came and was turning on the burner – burner for cooking.

Q. How do you cook your food daily?

A. We cook using the burner.

Q. What type of burner?

A. 2 burner.

Q. Is it a gas burner?

A. Yes. It is a gas burner.

Q. What type of gas burner are you talking about?

A. The one that has 2 burners.

Q. This burner is connected to a gas cylinder?

A. Yes.

Q. On 30 December 2017, were you still using this same gas burner that you just mentioned?

A. Yes.

Q. Was it working at the time?

A. Yes.

- Q. *When did you purchase this gas burner?*
A. *About 2 years before.*
- Q. *On 30 December 2017, to turn on one of the burners, what are the procedures you have to take to light the burner?*
A. *I would need a match to light it – because the stove’s knob was defective at the time.*
- Q. *At the time you bought the gas stove, did you need a match to light the stove?*
A. *No.*
- Q. *Then how did you on the gas stove/light the stove?*
A. *Just turn on the knob.*
- Q. *You don’t need the matches to light the stove – you turn on the knob and the burner works?*
A. *Yes.*
- Q. *On this particular day could the gas stove turn on by turning the knob or you needed the matches to light the gas stove?*
A. *I will need the match.*
- Q. *And it also needs the gas cylinder to be turned on?*
A. *Yes.*
- Q. *On this particular morning the allegation (against you) is that you were holding the gallon of benzine in your hand and was trying to turn on the gas stove. Did this actually happen?*
A. *Yes.*
- Q. *And did the gas stove turn on? Did you light the stove?*
A. *No.*
- Q. *What was the reason the gas stove did not turn on?*
A. *Because the knob was defective and it needs a match to light it.*
- Q. *Did you turn on the gas cylinder while you were doing this?*
A. *No.*
- Q. *Did you have any matches with you at the time?*
A. *No. I don’t smoke to use the match.*
- Q. *Did you know/were you conscious of what you were doing?*
A. *Yes.*
- Q. *You said you had no matches and you were trying to turn the gas stove on. Without the matches would you be able to light the gas stove?*

A. No.

Q. *If the gas cylinder was turned off, are you able to light the stove?*

A. No.

Q. *Where was your wife whilst you were trying to light the stove?*

A. *She was standing by the sink.*

Q. *Did she do anything when she saw you doing this?*

A. Yes.

Q. *What did she do?*

A. *She then took the gallon and ran outside.*

Q. *How did she manage to grab the gallon from you?*

A. *She took it from my hand.*

Q. *You remember which hand you were holding the gallon with?*

A. *My left hand.*

Q. *Did you see where she took this gallon?*

A. *Yes. I saw her take it and poured it out at a place beside our house.*

Q. *Do you remember where this gallon came from?*

A. *She took it from our boat when she was angry.*

Q. *So this is the gallon that is used to fuel the outboard engine of the boat?*

A. Yes.

.....

Q. *You said earlier this morning that when your wife refused to give you the money and when you searched and could not find any money, you wanted to burn the house?*

A. Yes.

Q. *Did you really intend to burn the house down?*

A. *No. I can't burn the house because it is our marital home. I just wanted to make her angry because she didn't want to give me the money.*

(viii) *The accused was cross-examined by the Prosecution and the Prosecution's version of events were suggested to him.*

(ix) *It was suggested to the accused that had he found matches or a gas lighter he would have ignited the stove and put the house on fire. The witness denied the suggestion and said it's not right to burn the house.*

(x) *It was put to the accused that he tried to light the house on fire while he was in the kitchen and he answered in the affirmative.*

Analysis

- [60] The above is a summary of the evidence led at this trial. The prosecution relied on the evidence of the complainant Marica Qoli, to prove its case. The defence relied on the evidence of the accused himself.
- [61] 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.
- [62] In assessing the evidence, the totality of the evidence should be taken into account as a whole to determine where the truth lies.
- [63] 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.
- [64] As per the said agreed facts, it has been agreed that the accused Petero Nuku is the husband of the complainant. It has also been agreed that between the months of December 2017 to January 2018, Petero Nuku resided at Gasele Village, Yale, Kadavu, together with his wife and children.
- [65] During the cross examination of the complainant the defence highlighted one inconsistency in the testimony given in Court by the complainant Marica Qoli *vis a vis* her statement made to the Police. I have already explained to you how you should deal with inconsistencies and omissions. You should first decide whether that inconsistency or omission is significant. That is, whether that inconsistency or omission is fundamental to the issue you are considering. If it is, then you should consider whether there is any acceptable explanation given by the witness for it. If there is an acceptable explanation for the inconsistency or omission, you may conclude that the underlying reliability of the account is unaffected.
- [66] However, if there is no acceptable explanation given by the witness for the inconsistency or omission 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 and omission 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 or omission 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 has provided for the inconsistency or omission and consider him or her to be reliable as a witness.
- [67] You have heard the evidence of the witness for the prosecution as well as the evidence of the accused. The accused has testified in Court and denies that he really had the

intention to burn down his house. He said that he only wanted to make his wife angry because she had not given him money when he had asked for it.

- [68] The position taken up by the Defence is that the gas burner/stove was not working properly at the time of the alleged incident (30 December 2017). The stove could not be turned on simply with the knob. You needed a match or a gas lighter to ignite the stove.
- [69] However, I must direct you that when the complainant gave evidence in Court, the fact that the gas burner/stove was not working properly at the time of the alleged incident and that the stove could not be turned on simply with the knob, but needed a match or a gas lighter to ignite was not put to her. Therefore, you should consider this portion of the evidence with that infirmity in mind.
- [70] The law provides that for a person to be found guilty of attempting to commit an offence, the person's conduct must be more than merely preparatory to the commission of the offence. The question whether the accused's conduct at the relevant time was more than merely preparatory to the commission of the offence is one of fact which you have to decide based on all the facts and circumstances of this case.
- [71] You must consider the evidence of the prosecution to satisfy yourselves whether the narration of events given by its witness, 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 has proved the elements of the offence, beyond any reasonable doubt.
- [72] 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 led on behalf of the accused. You must consider the defence evidence also for its consistency and also the probability of its version. If you find the evidence of the defence is truthful and reliable, then you must find the accused not guilty of the charge, since the prosecution has failed to prove its case.
- [73] If you neither believe the evidence adduced by the defence 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.
- [74] However, I must caution you that even if you reject the evidence of the defence 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.
- [75] 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 defence, then you must find the accused not guilty of the charge;*
- ii. *If you neither believe nor disbelieve the evidence of the defence, then again you must find the accused not guilty of the charge;*
- iii. *If you reject the version of the defence, 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;*
- v. *If you find the prosecution evidence is both truthful and reliable then only you must consider; whether the elements of the charge of Attempts to Commit Arson has been established beyond reasonable doubt. If so you must find the accused guilty. If not you must find the accused not guilty.*

[76] Any re-directions the parties may request?

The Learned Defence Counsel requested Court to direct the Assessors on the following matter. During the cross examination of the accused it was put to him that he tried to light the house on fire while he was in the kitchen and he answered in the affirmative. However, that in re-examination when the accused was asked whether he had a real intention to burn the house, he answered that he just wanted to make the complainant angry.

I directed the Assessors accordingly.

[77] 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.

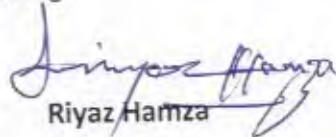
[78] Your possible opinions should be as follows:

Count 1

Attempts to Commit Arson- Guilty or Not Guilty.

[79] I thank you for your patient hearing.




Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

AT SUVA

Dated this 20th Day of November 2020

Solicitors for the State : Office of the Director of Public Prosecutions, Suva
Solicitors for the Accused : MIQ Lawyers, Barristers and Solicitors, Nasinu.