

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Case. No. HAC 26 of 2021**

**BETWEEN** : **THE STATE**

**A N D** : **VILIMONE BALEVIREWA**

**Counsel** : Mr. T. Tuenuku for the State.  
Ms. S. Ali and Mr. F. Singh for the Accused.

**Dates of Hearing** : 11, 12, 13, 17, 18 October, 2022

**Closing Speeches** : 24 October, 2022

**Date of Judgment** : 24 October, 2022

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**JUDGMENT**

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1. The Director of Public Prosecutions charged the accused by filing the following information:

**FIRST COUNT**

***Statement of Offence***

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

***Particulars of offence***

VILIMONE BALEVIREWA on the 16<sup>th</sup> of January 2021, at Vunikulu Settlement, Rakiraki in the Western Division, attempted to murder TARUSILA QOLI.

## **SECOND COUNT**

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

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

### ***Particulars of offence***

VILIMONE BALEVIREWA on the 16<sup>th</sup> of January 2021, at Vunikulu Settlement, Rakiraki in the Western Division, on an occasion different from the first count, attempted to murder TARUSILA QOLI.

## **THIRD COUNT**

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

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

### ***Particulars of offence***

VILIMONE BALEVIREWA on the 16<sup>th</sup> of January 2021, at Vunikulu Settlement, Rakiraki in the Western Division, attempted to murder MELI VUIYASAWA.

2. In this trial, the prosecution called nine witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of all the offences of attempted murder as charged.

## **BURDEN OF PROOF AND STANDARD OF PROOF**

3. As a matter of law, the burden of proof rests on the prosecution throughout the trial and it never shifts to the accused. There is no obligation on the accused to prove his innocence. An accused is presumed to be innocent until he or she is proven guilty. The standard of proof is one of proof beyond reasonable doubt.
4. The accused faces three counts of attempted murder and there are two complainants. The evidence in respect of each count and each complainant will be considered separately if the accused is guilty of one

count, it does not mean that he is guilty of the other counts as well. This also applies with the findings of not guilty.

### **ELEMENTS OF THE OFFENCE**

5. To prove the above counts the prosecution must prove the following elements of the offences of attempted murder beyond reasonable doubt:
  - a) The accused;
  - b) engaged in a conduct; and
  - c) the said conduct was an attempt to cause the death of the complainants; and
  - (d) the accused intended to cause the death of both the complainants by his conduct.
  
6. In this case the prosecution is alleging that the accused intended to cause the death of both the complainants by his conduct. The first element of the offence of attempted murder is concerned with the identity of the person who allegedly committed the offences of attempted murder.
  
7. 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.
  
8. For the accused to be guilty of attempted murder, the accused's conduct must be more than merely preparatory to the commission of the offences. The question whether a conduct is more than merely preparatory to the commission of the offences is one of fact.

9. The third element is that the said conduct of the accused was an attempt to cause the death of both the complainants.
10. The final element is concerned with the state of mind of the accused that he intended to cause the death of both the complainants. 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, one can construe the state of mind of the accused from the facts and circumstances proved.
11. In order for this court to conclude that the accused intended to cause the death of both the complainants, this court should be satisfied that the accused intended to kill both the complainants as a result of his conduct. In this regard this court should consider all the evidence and draw appropriate inferences to ascertain whether the accused had the intention to cause the death of both the complainants.
12. In this trial the accused has denied committing the offences of attempted murder. It is for the prosecution to prove beyond reasonable doubt that it was the accused who had intended to kill the complainants and with that intention he did something which was more than merely preparatory.
13. 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 of the circumstances that surrounds what he or she does. 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. This court will decide intention by considering what the accused did, by looking at his actions before, at the time of, and after the act.
14. The prosecution must also prove that with the intention to kill, the accused did something which was more than merely preparatory. Before this court can find the accused guilty of the offences of attempted murder it must be

satisfied beyond reasonable doubt of two things: first that the accused intended to commit the offences of murder and second, that, with that intention, he did something which was more than merely preparatory for committing that offence.

15. In other words, did he actually intend to commit the offences of murder on both the complainants, in which case he is guilty of attempting to commit murder, or that he only got ready, or put himself in a position, or equipped himself, to do so, then he is not guilty.
16. A person commits the offence of murder if:
  - (a) *the person engages in conduct; and*
  - (b) *the conduct causes the death of another person; and*
  - (c) *the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct.”*
17. The prosecution says the accused had intended to kill both the complainants. In respect of the first complainant Tarusila the accused had punched her with such a force that she fell on the ground. He then sat on her stomach and started choking her by using both his hands. The head of the complainant was submerged in a pothole filled with water and the accused was trying to drown her. The complainant wanted to scream but she could not the accused only released the complainant’s neck after he was punched by Ilivasi the complainant’s uncle.
18. In respect of the incident in the evening the prosecution says the accused sneakily took a knife in his hand and whilst Tarusila was asleep in the bedroom with her two children the accused stabbed her with the knife.
19. In respect of the second complainant Meli Vuiyasawa the prosecution says when Meli went to assist his sister Tarusila he was stabbed multiple times on his back, shoulder and behind his left ear. If this court accepts the

accused did this, then it is for this court to decide whether what he did went beyond merely preparatory.

20. If this court is satisfied that the prosecution has proved all the elements of the offences of attempted murder beyond reasonable doubt then this court must find the accused guilty as charged.
21. If on the other hand, this court finds that the prosecution has failed to prove any of these elements beyond reasonable doubt then this court must find the accused not guilty of attempted murder.
22. Furthermore, the law provides that when a person is charged with an offence and the court is of the opinion that he is not guilty of that offence but guilty of a lesser offence, the court may find the accused guilty of that lesser offence. In this regard, I direct myself that if this court finds the accused not guilty of attempted murder that is whether the accused had intended to kill both the complainants then it should consider the offence of act intended to cause grievous harm.
23. To find the accused guilty of the offence of act intended to cause grievous harm the prosecution must prove the following elements beyond reasonable doubt:
  - a) The accused;
  - b) with intent to do some grievous harm;
  - c) unlawfully does grievous harm to the complainants by any means.
24. In law grievous harm means any harm which—
  - (a) amounts to a maim or dangerous harm; or
  - (b) seriously or permanently injures health or which is likely so to injure health; or

*(c) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense.*

25. The term harm has also been defined as any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).
26. The first element of the offence of act intended to cause grievous harm is concerned with the identity of the person who allegedly committed the offence.
27. The second element relates to the intention of the accused that he intended to do some grievous harm to both the complainants.
28. The final element relates to the conduct of the accused that he did some grievous harm to both the complainants by any means.
29. As I mentioned earlier intention of the accused is decided by considering what the accused did, this court should look at his actions before, at the time of, and after the act. Furthermore, unlawful means without lawful excuse and grievous harm means any dangerous harm to the body of another person.
30. If this court is satisfied that the prosecution has proved all the above elements of the offence of act intended to cause grievous harm beyond reasonable doubt, then it must find the accused guilty of the lesser offence of act intended to cause grievous harm. However, if there is a reasonable doubt with respect to any element of the offence of act intended to cause grievous harm then it must find the accused not guilty of this lesser offence.

## **ADMITTED FACTS**

31. In this trial the prosecution and the defence have agreed to certain facts titled as admitted facts. These facts are part of the evidence and I have accepted these admitted facts as accurate, truthful and proven beyond reasonable doubt.
32. I will now remind myself of the prosecution and defence cases. In doing so, it would not be practical of me to go through all the evidence of every witness in detail. I will summarize the important features for consideration and evaluation in coming to my final judgment in this case.

## **PROSECUTION CASE**

### **EVIDENCE**

33. The first complainant Tarusila Qoli informed the court that the accused is her husband they got married in 2010 and they have three children. On 16<sup>th</sup> January, 2021 the complainant was at Vunikulu settlement, Rakiraki with the accused and their children with her family.
34. At about 4 am the complainant and the accused were returning home (to her brother's house) after a grog session. The accused was not drinking grog but smelt of liquor having joined the complainant and her cousins around midnight the previous night (that is on the 15<sup>th</sup>).
35. The complainant was carrying the torch, due to heavy rain the walk way in the settlement was muddy. According to the complainant her relationship with the accused was not good according to the complainant the accused was in a relationship with one of her cousins.
36. When she confronted the accused about her suspicion he denied the allegation. When the couple were on the road the accused asked the complainant why she was hurting him through the past week. The



complainant told the accused since he had been drinking it would be better to talk about the issue later.

37. At this time the accused asked for forgiveness the complainant said this was not the first time he had done this. At this time, the accused said *“it can’t be like this, if it’s going to be like this, it’s better that I kill you.”* The complainant got scared when she heard this so she started talking slowly and said that he should think about the children. This led to further argument between the two, shortly after the accused said he wanted to bath in the river and asked the complainant to switch off the torch. The complainant refused because she was scared the accused may do something to her at the river. The accused insisted in going to the river.
38. Whilst saying this, the accused came near to the complainant and put his hands around her neck and told her not to shout and if she did he was going to stab her with the lighter he had in his hand. The complainant was terrified so she screamed and called out her cousin Sailosi’s name since Sailosi’s house was near.
39. When she screamed the accused punched her, at this time she fell on the ground. The accused then sat on her stomach held her neck and was choking her. The place where the complainant fell there were potholes filled with water. The accused was choking her and her head was submerged in the pothole. The complainant wanted to scream but she could not because the accused was choking her by using both his hands. The accused also bit her cheek.
40. When asked to explain how the accused was able to bite her cheek, the complainant said *“when he was choking me he was bending towards me, that’s how he bit me, when I tried to scream I could not, I could only feel the mud going in my mouth.”*

41. The complainant tried to remove the accused hands away but could not the only thing that came to her mind was to grab the accused testicles which she did but still the accused did not release his hands and continued choking her for 15 to 20 minutes. The complainant could not scream she was short of breath she realized if someone did not come to help her soon she will die. At this time the complainant's uncle Ilivasi came and punched the accused who then released the complainant's neck.
42. By this time, it was around 6 am the complainant's brothers Meli and Jone then brought her home. After washing the complainant was able to see her bruises and her neck was painful. The police came and took her to the hospital then to the police station and then dropped her home.
43. When the complainant came home she was scared that the accused might do something to her again. All the windows and doors were locked this was the first time the accused had done something like this to her and she was really scared. Since her eldest son Tomasi wanted to go to his grandfather Niko's house the complainant allowed him to go.
44. At around 8 pm the complainant took her medication which included sleeping pills and went to sleep with her children in one of the bedrooms. The complainant was sleeping on a mattress on the floor the children were 7 and 3 years old respectively.
45. The complainant woke up when she heard some movement in the house the light in the living room was off she stood up and went in the living room here she saw her mother standing at the door shouting. The complainant saw Meli and Vilimone running and she heard Meli ask for help at one of their uncle's house Meli was bleeding.
46. At this time the accused left, when the complainant went to Meli he told her to look for a transport to take him to the hospital otherwise he will die.

Up to this time the complainant did not realize that she was injured as well and she was bleeding from her face, neck and hands the complainant also felt her hand was heavy.

47. However, she did not care about her injuries and she started crying when she saw Meli. Meli and the complainant were taken to the hospital, her left hand was x-rayed and she received three stitches for her injuries which were not that serious. The complainant was admitted overnight at the Rakiraki Hospital. The complainant further told the court that after she woke up she saw Meli and the accused punching each other.
48. In cross examination, the complainant stated that the distance where the alleged incident happened and her cousin Sailosi's house was less than 100 meters away and it will take less than 5 minutes to walk to her cousin's house.
49. The witness clarified that when she was holding the torch whilst standing the accused was not choking her but had his hand on her neck. She further mentioned that when the accused punched her she fell on the ground and at this time the torch fell from her hand.
50. When it was suggested that the accused had only intended to hurt her, the complainant disagreed and stated that the accused was trying to kill her because he had already told her that he will kill her. The complainant agreed when she told the accused she wanted to live separately from him the accused got upset.
51. The second complainant Meli Vuiyasawa informed the court that Tarusila Qoli is her elder sister and the accused is his brother in law. In the evening of 16<sup>th</sup> January, 2021 the accused had entered into the bedroom of his house where his sister Tarusila was sleeping. The door was locked so he broke the door to enter.

52. When he went inside he saw the accused holding his sister with a pillow over her head and fisting his sister's head. When the accused saw Meli he ran towards Meli and said "*do you want to die?*" at this time the witness punched the accused who fell on the floor, shortly after the accused stood up and tackled the witness. At this time both fell on the wooden floor with the accused on top of him.
53. According to Meli numbness was coming over him and he was about to blackout so he ran out of the house. The accused followed him according to Meli he received two injuries on his back, one on his shoulder and one behind his left ear. The witness remembered that when the accused was punching him it was not straight the accused had clenched his fist and was hitting downwards so when he ducked the fist landed behind his ear and shoulder.
54. When outside the house Meli's other cousins came so at this time the accused ran away. The witness fell unconscious he was then taken to the hospital where he was admitted.
55. In cross examination, the witness stated that when the accused entered his house he saw the accused go into the bedroom. He denied that when he had broken into the bedroom he had seen the accused sitting with the complainant and that he had tackled the accused. The witness maintained that he was not angry and upset with the accused. The reason why he was calling the accused outside the bedroom was because he wanted to save his sister who was in the bedroom so that the accused follows him out of the house.
56. The third witness Dr. Shiu Narayan informed the court that he graduated with MBBS degree from the University of Fiji in 2017. In 2018 he completed his internship at the CWM Hospital, since February 2019 till

March 2022 he served as a Medical Officer at Rakiraki District Hospital. Currently he is based at the St Giles Hospital.

57. On 16<sup>th</sup> January 2021, the witness had examined Tarusila Qoli at about 7.15 am at the Rakiraki District Hospital. His specific medical findings were:

- (a) Head: Bite mark was present on the right and left cheeks about 1cm long with 2 x 2 cm area of swelling which was tender to touch meaning when he touched the particular area the patient complained of pain;
- (b) Right temporal region that is the patient's right side of the face multiple bruises were present. Bruises meant accumulation of blood under the skin caused by blunt trauma. Patient also had pain opening her mouth;
- (c) Anterior neck meaning front part of the neck had multiple bruise marks on the left lateral and anterior part of the neck meaning left, front and side of the neck. According to the witness the bruise marks can be caused by blunt trauma or if the patient was being strangulated or by punching the skin. The witness said to get this kind of injuries substantial force had to be applied which was tender to touch.
- (d) Back of the Head: Occipital region there was a 3 x 3 cm swelling noted which was tender to touch which could have been by falling on the ground or by trauma to the head;
- (e) Left elbow: multiple abrasions were present such as scratch marks, breaks in the skin caused by coming in contact with any irregular surface due to dragging or struggle.

- (f) Right elbow: Multiple abrasions and lacerations were seen on the posterior aspect of the elbow meaning on the outer side which can be caused by a sharp object or trauma.
58. In the professional opinion of the witness the patient was allegedly physically assaulted who was clinically stable and was not admitted at the hospital.
59. The witness had also documented his medical findings at appendix 1 of the medical examination form. The witness admitted he had not labelled the right cheek mark in the diagram. The Fiji Police Medical Examination Form of Tarusila Qoli dated 16<sup>th</sup> January, 2021 was marked and tendered as prosecution exhibit no. 1.
60. In cross examination, the witness said it was possible for someone to strangulate another with one hand. In respect of the bruises on the neck the witness said it was 3cm long to 4cm long and also if a person is being strangled with both hands then there will be bruises on both sides of the neck depending on the force applied bruising can happen within 30 minutes to a few hours.
61. In re-examination the witness said that it would have taken substantial force on the neck since there was a lot of swelling and the patient was not able to actively move her neck on the left side.
62. The fourth witness Jone Vunibola informed the court that the accused is married to his cousin sister Tarusila. On 16<sup>th</sup> January, 2021 he was sleeping at home when he heard someone call for help, he ran to the place from where the cry for help was coming.
63. When he arrived at the scene he saw the accused choking Tarusila in a puddle of water, Nacanieli a cousin of the witness was there as well. The

witness explained the accused was sitting on top of the complainant and with both his hands was choking Tarusila and trying to drown her in the puddle of water.

64. The accused also bit Tarusila's neck and cheek by this time the witness brother Sailosi Waqatabu arrived so all three Sailosi, Nacanieli and the witness tried to pull the accused away but were not able to do so. At this time Sailosi punched the accused who then released Tarusila. Tarusila was crying, she had bite marks and mud all over the witness brought Tarusila home.
65. In cross examination, the witness stated that he heard the screams of Tarusila three times and he also denied the suggestion that he was not present at the alleged scene.
66. The fifth witness Vinaina Babiau the mother of the first complainant Tarusila informed the court that the accused is her son in law. In the evening of 16<sup>th</sup> January, 2021 the witness was in the sitting room of her son Meli's house. The door was open so the accused entered the house she told him to sit down and listen to her, but the accused did not listen and went into the bedroom where Tarusila was with her children. At this time, she called out to Meli and told him that the accused was inside the bedroom. According to the witness the accused was holding something under his t-shirt. When the accused was inside Meli banged the open door of the bedroom and went inside.
67. The witness saw the accused stabbing Tarusila who was covering her head with a pillow. Meli held the accused and both fell down and they had a tussle. The accused had a knife in his hand and he did something on Meli's back. The witness maintained she saw the above from two steps away since there was light coming from the dining room. The tussle between Meli and the accused was for a short time after sometime Meli ran out of

the bedroom and the house and his back was injured. The accused was chasing Meli and both went out of the house.

68. In cross examination, the witness stated that the light in the bedroom of Tarusila was on. The witness stated that she was able to see from the light in the dining room. The witness maintained that she was near the bedroom when the accused and Meli were tussling on the floor and she saw everything that was happening between Meli and the accused in the bedroom.
69. The sixth witness Dr Vasiti Sabua informed the court that she graduated with MBBS degree from University of Fiji in 2013 and is currently doing post Graduate Diploma in Public Health.
70. On 16<sup>th</sup> January, 2021 at 11pm she was on duty at the Rakiraki Hospital when Meli Vuiyasawa was brought to the hospital lying on his stomach. He had a lot of injuries and was confused at the time. The witness had started her examination of the patient at 11.10 pm. The patient was in pain and state of shock.
71. The specific medical findings were:
  - (a) There was a 12cm horizontal laceration on the right lower back with a likely depth between the 10<sup>th</sup> or 11<sup>th</sup> rib or the 9<sup>th</sup> and 10<sup>th</sup> rib cutting through internal intercostal muscle. The witness explained this was a deep muscle so the cut went through the skin then the fats and finally reached the muscle which was really close to the spine. According to the witness a laceration is a deep cut. The witness stated to get such an injury it was definitely going to be by the use of a long knife. According to the witness this was a case of stab and pull injury;



- (b) A 3cm vertical laceration was seen on the left mastoid area which is the bony prominence behind the ear up to the connective tissue. This tissue is under the skin of the scalp which contained all the very important blood vessels and nerves.
72. The witness explained in respect of the first injury her main worry was the object used to cause the injury was close to hitting the base of the lung and if it had punctured the lung the patient would have died called pneumothorax which was a deadly situation.
73. As for the second injury laceration on the head the patient could have had a traumatic brain injury and severe bleeding because of the vicinity of the blood vessels could have led to death.
- c) There was a puncture wound on the left shoulder and the depth was just at the skin caused by a knife;
- d) There was another puncture wound in mid-back up to the skin level.
74. The injuries in (c) and (d) were not so deep. The patient was admitted at the emergency department, the witness had also completed appendix 1 and illustrated the specific medical findings in the diagram. The Fiji Police Medical Examination Form of Meli Vuiyasawa dated 16<sup>th</sup> January, 2021 was marked and tendered as prosecution exhibit no. 2.
75. This witness had also examined Tarusila Qoli on the same night after she had stabilized Meli Vuiyasawa. Tarusila was in a state of shock and anxious. The specific medical findings were:
- (a) 3cm superficial laceration which was not that deep but was on the skin at the occipital area back of the head caused most likely by the use of a knife;

(b) 3 puncture wounds on the left hand as follows:

(i) 1 at the back of index finger;

(ii) 1 at the base of 3<sup>rd</sup> finger;

(iii) 1 at the base of 5<sup>th</sup> finger.

76. According to the witness puncture meant the object was pushed in and out not dragged. In the professional opinion of the witness the head injury was mild secondary to laceration, fracture of the left 5<sup>th</sup> finger due to the puncture wound. The patient was admitted in the hospital, x-ray was ordered, no injury was found on the skull but the 5<sup>th</sup> finger was fractured. The patient was stabbed 4 times. The Fiji Police Medical Examination Form of Tarusila Qoli was marked and tendered as prosecution exhibit no. 3.

77. In cross examination, the witness stated that on visual examination of Meli she could see layers of the back from the skin epidermis, the fats and then right down to the bottom of the muscle and she could see the muscle had been penetrated. The witness had put her finger to feel how deep it was. The witness stated that from the injuries suffered by Meli most likely a knife was used because it was a clean drag laceration which was 12cm long.

78. In respect of Tarusila the witness stated that she took the history of this patient while she was treating her.

### **DIRECTION ON EXPERT EVIDENCE**

79. This court has heard the evidence of Dr. Narayan and Dr. Sabua who had been called as experts on behalf of the prosecution. Expert evidence is permitted in a criminal trial to provide the court with information and opinion which is within the witness expertise. It is by no means unusual for evidence of this nature to be called the medical examination reports of

both the complainants are before this court and what the doctors said in their evidence as a whole is to assist this court.

80. An expert witness is entitled to express an opinion in respect of his or her findings. When coming to my conclusion about this aspect of the case I have borne in mind that if, having given the matter careful consideration, I do not accept the evidence of the expert I do not have to act upon it. Indeed, this court does not have to accept even the unchallenged evidence of the doctor.
81. I have also kept in mind that this evidence of both doctors relate only to part of the case, and that whilst it may be of assistance to me in reaching my decision, I must reach my decision having considered the whole of the evidence.
82. The seventh witness ASP Clifford Waqabaca informed the court that on 18<sup>th</sup> January, 2021 at around 8.05 am the witness was on duty at the Rakiraki Police Station. He was the crime officer, he came to know that during his caution interview the accused wanted to show the weapon used in stabbing the complainants.
83. The witness with Constable Amani, WPC Liti and Cpl. Naca went to the place where the accused had thrown the knife, the team with the accused went to Naivuvuni Assemblies of God Church compound. The accused pointed at the spot where he had thrown the knife which was just beside the church compound in the overgrown shrubs.
84. The witness was able to find the knife which was a black handle kitchen knife which he had tagged with a blue police exhibit card. The witness handed over the knife to the crime scene investigator Cpl Naca. The knife was marked and tendered as prosecution exhibit no. 4.

85. The eighth witness was Cpl 3354 Amani Waqetia who had interviewed the accused on 17<sup>th</sup> January, 2021 at the Rakiraki Police Station. The witnessing officer was WPC Litiana Nabuta, the interview was conducted in the Itaukei language and he had translated the same in the English language.
86. The interview was recorded by the use of a computer in the question and answer format for two days. The accused had answered all the questions asked, the caution interview in the Itaukei language was marked and tendered as prosecution exhibit no. 5 with the English translation as exhibit no. 5 (A).
87. In cross examination, the witness agreed that he was aware of the facts of the case before he commenced the interview. The witness denied there were certain things he was told by the accused which was not recorded in the caution interview.
88. The witness also denied that he had fabricated the answers in the caution interview he maintained that all the answers recorded in the caution interview were given by the accused. The witness stated that the accused had told him about his intention to kill himself and his wife.

### **CAUTION INTERVIEW**

89. The answers in the caution interview is for this court to consider as evidence but before the admissions are accepted, this court must be satisfied that the answers were given by the accused and they are the truth. It is entirely a matter for this court to accept or reject the answers given in the caution interview.
90. It is for this court to decide whether the accused made those admissions and whether those admissions are the truth. If this court is not sure

whether the accused made the admissions in his caution interview then those admissions will be disregarded. If this court is satisfied that those admissions were made by the accused, then this court should consider whether those admissions are the truth. What weight is to be given to those admissions is a matter entirely for this court.

91. The defence stated that the accused did not give the answers mentioned in the caution interview. The answers were fabricated by the interviewing police officer to match both the complainants statements since this officer had read their police statements and was fully briefed about the facts of the case.
92. The final witness A/Inspector DC 3033 Nacanieli Dralivi informed the court that he was the crime scene investigator in this case. As part of his duty he was instructed to take photographs of the crime scene and the exhibits. The photographic booklet prepared by the witness was marked and tendered as prosecution exhibit no. 6. The witness explained the photographs in the booklet.
93. This was the prosecution case.

### **DEFENCE CASE**

94. At the end of the prosecution case, the accused was explained his options. He could have remained silent but he chose to give sworn evidence and be subjected to cross examination. This court must also consider his evidence and give such weight as is appropriate.
95. The accused informed the court that on 16<sup>th</sup> January 2021 he was residing at Vunikulu settlement, Rakiraki. He is married to Tarusila Qoli and they have three children together. On the 16<sup>th</sup> at about 4 am the accused and his wife Tarusila left the house of Sailosi (Tarusila's cousin brother) after the grog session ended.

96. On the way home to Meli's house the accused requested Tarusila to stand still since he wanted to tell her something in regards to the arguments they were having throughout the week. The reason for the argument was his wife was suspecting him of having an affair with her cousin.
97. The accused at this time touched Tarusila's shoulder and said *"Taru please forgive me because of the arguments that we have been having and the issue about us being separated. I cannot leave you and the children."* The accused was angry because he did not want a broken family, however, Tarusila did not listen and wanted to be separated from him.
98. He punched Tarusila who fell down the accused then sat on her stomach and held her neck but he was not choking her. The reason why he sat on the complainant was for her to talk to him about what they were going through and he was holding her neck to intimidate her.
99. Tarusila called her cousin brother Sailosi, at this time he bit her cheek. Tarusila was able to turn into a puddle of water on the gravel road. When she turned the accused pushed her head down in the puddle of water. After a little while Tarusila looked up again. At this time, a punch landed on the accused when he looked around he saw it was Tarusila's uncle Ilivasi. The accused fell and Tarusila was taken away, the accused ran into the bush since he was worried Tarusila's relatives might beat him.
100. At about 9 am from the main highway the accused was able to get a ride to Rakiraki town. The accused was able to buy new clothes then he went to Ba, whilst thinking about what had happened in the morning the accused purchased a knife. At around 5 pm he boarded a bus to go back to Rakiraki reaching Vunikulu after 7 pm.
101. The accused waited under a mango tree for nightfall so that he could go to Meli's house. At around 9 pm the accused met his eldest son and he came

to know that Tarusila was sleeping with his two children. He then entered the house his mother in law was sitting on the settee who said “*son in law please sit down so we can talk*”. The accused did not stop but entered the bedroom where Tarusila was, he closed the door and locked it by placing the nail across the door.

102. The accused knelt down and touched his sleeping daughter and son and his wife who was lying face up. The knife was in his right hand Tarusila covered her face with the pillow and leaned forward. The accused held her head and was calling her to look up. When she suddenly looked up the knife that he was holding hit her head behind her ear.
103. At his time Meli came and punched him and he fell Tarusila ran outside, the accused stood up and at this time Meli slammed into him on his stomach. The accused pushed Meli on his shoulder since he had the knife in his hand the knife hit Meli’s shoulder. Meli then held the accused by the waist and lifted him. The accused gripped Meli with his hand which had the knife and this is when the knife hit Meli’s back.
104. Meli then put the accused down on the floor and ran to the sitting room. After putting the knife in his pocket the accused challenged Meli for a fist fight. Before he could reach Meli, Tarusila started shouting that the accused had a knife upon hearing this Meli ran outside to his uncle’s house. The accused left after this.
105. The accused denied attempting to kill Tarusila and Meli as alleged.
106. In cross examination, the accused agreed that before joining Tarusila for the grog session he was drinking alcohol with Jone. The argument he was having with his wife was about his extra marital affair but this allegation was not true. When asked why he was asking for forgiveness if he was not having an affair. The accused responded by saying that to avoid a

separation and for the sake of the family togetherness he had sought forgiveness.

107. The idea of separation by Tarusila had made him angry so he punched her to try and make her change her mind when questioned further the accused said “*what I was trying to do was not to really harm her and what I did was proportionate to what I thought would change her mind.*” The accused explained when he sat on Tarusila’s stomach he did not put his full weight on her but was sitting lightly and holding her neck and not choking her.
108. In respect of the neck injuries the accused said when he was holding her neck the complainant was moving her head around and that was how she got the injuries. The accused further stated that he was holding the complainant’s neck with both his hands and she was moving her head sideways.
109. The accused maintained that at no time he had choked the complainant’s neck at this time the complainant was trying to turn not because she was breathless and when she turned she got her head into the puddle of water.
110. When it was put to the accused that during the early morning incident he was trying to kill the complainant the accused said he was only trying to intimidate her. The accused admitted he had purchased the knife to kill Tarusila and himself. The accused did not surrender himself at Ba Police Station because he wanted to go back to see Tarusila to clarify their conversation about their family by taking the knife with him. The accused agreed he had gone into the bedroom where the complainant was sleeping with his two children and he had locked the door because he did not want anyone to come inside the room.
111. The accused denied stabbing the first complainant in the bedroom and also he had no intention to kill her. As for Meli the accused explained “I



*was pushing him off by his shoulder he held me by my waist and he was lifting me up then I had my grip on his back and the knife hit Meli on his back.”* When it was suggested that he had not told the truth the accused said he told the truth in court.

112. This was the defence case.

### **ANALYSIS**

113. The prosecution alleges that on 16<sup>th</sup> January, 2021 the accused had intended to kill both the complainants. Firstly, he punched the first complainant Tarusila making her fall on the ground then sat on her stomach and with both his hands was choking her. Secondly, the accused submerged the head of the complainant with the view to drown her in the pothole filled with water.

114. Finally, the accused did not stop until he was punched by Illivasi the complainant’s uncle who came to rescue the complainant. The complainant was examined by a doctor a few hours after the incident and it was revealed that the complainant had suffered multiple injuries. The doctor in his evidence had stated that the injuries in front of the neck was due to substantial force being applied on the neck of the complainant possibly from strangulation.

115. The accused fled from the scene and went to Ba where he bought a knife and took it with him to Vunikulu Village where Tarusila was. He waited for night fall and with the knife in hand he entered the bedroom of Tarusila who was sleeping with her two young children. The accused locked the bedroom door and stabbed the complainant a number of times. The accused had time to “cool off” after the first incident but he did not and the fact that he bought a knife and took it with him into Tarusila’s bedroom shows that he intended to kill Tarusila. The sequence of events narrated

by the accused in his evidence also shows that he had planned to kill Tarusila.

116. Vinaina the mother of the complainant saw the accused stab Tarusila from a close range and she told the truth about what she had seen. The medical report of Tarusila is self-explanatory which shows multiple injuries. Furthermore, Meli came to the rescue of his sister and he also got stabbed a number of times the injuries sustained by Meli were life threatening that got the examining doctor worried. The accused was not acting in self-defence when Meli went into the bedroom to save Tarusila, it was the accused who had the knife in his hand whereas Meli was unarmed.
117. Finally, the prosecution is asking this court to consider the admissions of the accused in the caution interview which gives details about the planning and the execution of the plan to kill Tarusila and the details of the attack on both the complainants. The admissions in the caution interview were not fabricated by the interviewing police officer as alleged by the accused. The prosecution is also asking this court to look at the medical report of Meli and consider the evidence of Dr. Sabua which mentions life threatening injuries caused to Meli.
118. On the other hand, defence says this court should consider the fact that the accused is a husband and father who did not want to lose his wife and children. The defence is asking this court to look at the acts of the accused holistically and not in isolation.
119. In respect of the first incident the accused did not choke Tarusila but had held her head in his hands. Tarusila was able to move her head and was able to turn around. The accused had not put all his weight on Tarusila although he was sitting on her stomach. The very purpose of the accused was to stop Tarusila from leaving him he could have exerted extreme violence on Tarusila but he did not, showed that he did not have any intentions to kill her.

120. The defence further submits there was never any intention on the part of the accused to kill Tarusila or Meli even though the accused had bought a knife. It is unfortunate that Meli came and punched the accused when the accused was with Tarusila in the bedroom. At this time the knife accidentally hit Tarusila and Meli.
121. The medical examination of Tarusila and her own evidence suggests that the injuries were not serious. For Meli his medical report does not specifically reveal life threatening injuries.
122. The defence says no weight be given to the admissions in the caution interview of the accused which was a fabrication by the interviewing officer who was fully briefed about the case. The interviewing officer had read the police statements of both the complainants hence he had made up the answers to strengthen the police case by putting down what the complainants had told the police.
123. The defence is asking this court to consider the facts that led to the injuries on Tarusila and Meli in the context of an accident since the knife was in the hand of the accused when Tarusila suddenly looked up the knife struck her head. The same thing happened when the accused was tackled by Meli, lifted in the air and then when both fell the knife struck the back of Meli.
124. Finally, the defence submits that the accused was never intending to kill either Tarusila or Meli there was no motivation on the part of the accused to do so. The defence is asking this court not to given any weight to all the prosecution witnesses. The medical reports do not specifically make it known that the injuries were life threatening.

## **DETERMINATION**

125. I would like to once again remind myself that the burden to prove the accused guilt beyond reasonable doubt lies with the prosecution throughout the trial and it never shifts to the accused. Even if I reject the version of the defence still the prosecution must prove this case beyond reasonable doubt. In this case the prosecution has to disprove self-defence beyond reasonable doubt.
126. When the accused was giving evidence this court in fairness had cautioned him against self-incrimination which was explained to him in the Itaukei language.
127. There are two incidents involving the first complainant and one incident involving the second complainant. The medical reports of both the complainants are self-explanatory in respect of the injuries suffered by them. The issue in this case is whether the accused intended to kill both the complainants by his conduct and what he did was more than merely preparatory.
128. For this court to come to a decision it is important to consider all the evidence holistically.
129. In respect of the first incident I accept the version of the first complainant Tarusila as truthful and reliable. She told the truth when she told the court that the accused had punched her, was sitting on her stomach and had choked her neck by using both his hands. The injuries seen by the examining doctor also supports the account given by the complainant. This court also accepts the medical findings of the doctor as reliable evidence. The doctor stated that from his findings substantial force was applied to the front region of the complainant's neck possibly a case of strangulation.

130. I reject the evidence of the accused that he was not choking the complainant but holding her head as unbelievable on the totality of evidence.
131. In respect of the two incidents in the night after carefully considering the evidence of the prosecution witnesses and the accused I accept the evidence of all the prosecution witnesses as honest and reliable. Both the complainants also gave an honest account of what the accused had done to them and how they had sustained the injuries.
132. The opinion of Dr. Sabua upon the medical examination of both the complainants is also acceptable and it supports the version given by the complainants. The doctor had also illustrated her specific medical findings in the Fiji Police Medical Examination Forms of both the complainants. Although both the complainants did not specifically say anything about the type of weapon used on them in the bedroom it is completely understandable considering the circumstances prevailing in the bedroom at the time.
133. Tarusila was sleeping after taking her medication naturally oblivious to what could happen to her and Meli in the heat of the moment just ran into the bedroom after he came to know that his sister was under threat by the accused. I accept that the altercation was happening fast and there was no time for the complainants to realise how they got injured. The fact that they had escaped and were alive was important over anything else.
134. Vinaina Babiau was present when the accused went into the bedroom and she was able to see what the accused had done to both the complainants. The accused in his evidence admitted that he had entered the bedroom where Tarusila was sleeping with the knife (prosecution exhibit no. 4) in his hand. I am unable to accept that the injuries sustained by both the complainants were accidental. The accused knew what he was doing and the consequences of his actions and there is no doubt in my mind that

both the complainants were injured by the accused who had stabbed them with the knife he was carrying with him when he entered the bedroom.

135. After the accused was arrested he was interviewed under caution and I accept that the accused told the truth in his caution interview. I reject the defence assertion that the answers stated in the interview were fabricated by the police officer as far-fetched lacking any merits. A perusal of the answers will show that only the accused would have known what he did and no one else. Even though the interviewing officer had read both the complainants police statements and was fully briefed about the facts of the case by his superiors does not mean that the answers were not given by the accused and were not the truth.

136. The following questions and answers are worthy of consideration and there is no way the interviewing officer would have made up these answers. The narration can only be given by the accused and no one else, in his evidence the accused told the court most of the things he had done along the lines mentioned in his caution interview as well.

137. *Q 29: Can you recall on Saturday, 16/1/21 at about 9.00 pm?*

*A : Yes.*

*Q 30: Where were you at this time?*

*A : I was at Vunikulu Settlement at my wife's place.*

*Q 31: Who were there with you at Vunikulu Settlement?*

*A : I was at the other side of the settlement, I met my son, Tomasi, 10 years old, whereby I asked him as where were his mother at that time.*

*Q 32: What did your son says?*

*A : He said that his mother must have slept in the room.*

Q 33: *What did you do next?*

A : *I told my son to go and checked his mother whether she was in the room or not.*

Q 34: *What happened next?*

A : *My son went and came back to me and told me that his mother was in the room sleeping.*

Q 35: *What did you do next?*

A : *I then proceeded to my wife's family house.*

Q 36: *Who were at home when you entered the house?*

A : *My mother-in-law, Meli (brother-in-law) and his wife and Wati (sister-in-law).*

Q 37: *What were they doing when you arrived?*

A : *My mother-in-law was sitting in the sitting room and Meli was drinking yaqona in the kitchen.*

Q 38: *What did you do when you entered the house?*

A : *I went straight to the room and found my wife sleeping.*

Q 39: *Did anyone talk to you when you enter the house?*

A : *Yes, my mother-in-law talked to me saying for me to sit down and for us to have a talk.*

Q 40: *Did you response to her?*

A : *No.*

Q 41: *What did you do after that?*

A : *I locked the room and went forward to look for my wife since the room was dark.*

Q42: *Why did you lock the room?*

A : *So that I can kill my wife and kill myself.*

Q 43: *Then what happened?*

A : *My mother- in- law yelled out where by Meli came and forcefully opened the room door.*

Q44: *Can you explain what happened in the room at this time?*

A : *When Meli came inside the room, I could see my wife from the light of the sitting room. At this time I moved closer to my wife and stabbed her neck with the kitchen knife I was holding. When I was still in the process of stabbing her for the second time, Meli punched me behind my neck and I turned to Meli. So Meli again tackled me down and in the process, I stabbed Meli 3 times, on lower side of this ribs near to his hips, on the neck and his back.*

Q45: *What happened after that?*

A : *Meli ran outside and I ran after him.*

138. Q 46: *Was there anyone still inside the house this time?*

A : *No, the house was empty this time.*

Q 47: *what did you do next?*

A : *I ran outside and heard that my wife was calling out that I have a knife with me. I then left them and ran towards the bush.*

Q 48: *Can you explain to me as where did you get the kitchen knife from?*

A : *I bought it from Ba Town (Bargain Box).*

Q 49: *How much is the kitchen knife?*

A : *\$1.50.*



Q50: *Can you explain to me as why did you buy the kitchen knife for?*

A : *Since I was having a dispute with my wife since Monday 11/1/21, accusing me for having an extra martial affairs with her cousins and somehow I tried my best to convince my wife that it was not true. In the process, my wife informed me that we are going to be separated and she will keep our children with her, and on top of that, we were planned to build our house and buy our new car this year and this rumours spoilt everything. So my next step was to kill my wife and myself.*

Q 51: *Since you have stabbed your wife and your brother- in- law, where is this kitchen knife you were using that night?*

A : *I placed it somewhere in Naivuvuni, near the AOG Church.*

139. Q58: *Vilimone Balevirewa, since you have said that you went to Ba Town on Saturday. What is the purpose of going to Ba on that day?*

A : *Since there was a report with the Police because I assaulted my wife that morning, I decided to run away to Ba. When I reached Ba, I then planned to buy a kitchen knife to kill my wife and myself.*

Q59: *Why did you do this?*

A : *Refer to my answer in Q48 above, rumours of extra marital affairs spread over and I tried to convince my wife that early morning of Saturday that it was not true. So, I begged my wife to forgive me for the rumours but she refused to. I asked my wife not to spoil our family but she finally told me that we will be separated, for me to go away and she will look after our three children.*

Q60: *Then what did you do?*

A : *I then told her that, that day will be a last day for us. I will kill both of us. After that, I then punched her and strangled her neck.*

Q61: *What happened next?*

A : *My wife shouted for help and my uncle Baba came and punched me. I then fell on the ground.*

Q62: *What happened after that?*

A : *I then stood up and ran away to the bush and went by bus to Ba.*

140. Q63: *Why did you go to Ba?*

A : *I want to run away from Police so that I can have time to come back in the afternoon and kill my wife and myself.*

Q64: *Why did you got off at that place?*

A : *Because I don't want anyone to see me as I wanted to go through the jungle and hide somewhere near to Vunikulu Settlement. (Wife's family house).*

Q65: *Did you go straight home or you wait somewhere in the forest?*

A : *I waited under a mango tree until nightfall.*

Q66: *Why can't you go straight home?*

A : *Because I wanted to fulfil my intention, to kill my wife and myself at night time.*

Q67: *Refer to Q42, you thoroughly explained what you have done in the room. Can you tell me, did you say anything to your wife before you stabbed her in the room?*

A : *No, I didn't say anything because we had already talked in the morning that I will end our lives that day.(Q.60)*

141. Q71: *It was stated that you also stabbed Meli. What can you say?*

A : *Yes, I stabbed Meli as well because he disturbed my mission to kill*

*my wife and myself. When Meli disturbed us, I then stabbed him as well.*

*Q72: Did you say anything to Meli whilst stabbing him? What can you say?*

*A : No, I didn't say anything.*

*Q73: How many times did you stab Meli?*

*A : Three times.*

142. The above questions and answers give a true picture of what the accused had done to both the complainants. The sequence of events explained by the accused above without doubt makes it clear that the accused had intended to kill Tarusila and it is unfortunate that when Meli went to save Tarusila he got seriously injured by the accused.

### **SELF DEFENCE**

143. It is also noted that during cross examination of Meli and when the accused was giving evidence he told the court that it was Meli who had attacked him first when Meli entered the bedroom. Hence the accused had no choice but to defend himself.
144. This aspect of the accused evidence directs me to consider whether the accused was acting in self-defence. Self-defence if validly made out is a complete defence, so if this court thinks the accused was acting in self-defence then this court will find the accused not guilty of the offence of attempted murder in respect of Meli. Since the prosecution must prove the guilt of the accused it is for the prosecution to prove that the accused was not acting in self-defence.

145. It is not for the accused to establish that he was acting under self- defence. This court must consider this defence in light of the situation which the accused honestly believed he faced. Firstly, whether the accused honestly believed that it was necessary for him to use force to defend himself. Secondly, whether the type and amount of force the accused used was reasonable. Obviously a person who is under attack may react on the spur of the moment and he cannot be expected to work out exactly how much force he needs to use to defend himself.
146. On the other hand, if the accused goes and uses excess force or force out of all proportion to the anticipated attack on him or more force than is really necessary to defend himself, the force used would not be reasonable so this court must take into account both the nature of the attack on the accused and what the accused did as a result.
147. The accused informed the court that Meli had attacked him first to the extent that he was lifted by Meli and in the process the knife in his hand had accidentally injured Meli.
148. If this court is sure that the force the accused used was unreasonable then the accused could not have been acting in self-defence, but if this court is satisfied that the force used by the accused was or may have been reasonable then this court should find the accused not guilty of anything.
149. The prosecution is saying that Meli was unarmed and there was no need for the accused to stab Meli three times with the knife he was carrying with him with excessive force. The doctor's evidence and the medical examination report confirms excessive use of force which resulted in serious injuries to Meli which was not proportionate to what the Meli had allegedly done to the accused.

150. Upon considering the evidence adduced this court accepts that the force used by the accused was not proportionate and reasonable therefore self-defence is not available in the circumstances of this case.
151. The prosecution has proven beyond reasonable doubt that the accused was not acting in self-defence on the evidence before this court.
152. The accused on the other hand did not tell the complete truth I accept he told the truth to the interviewing officer during his caution interview in respect his of his intention, planning and attack on both the complainants. The evidence of the accused is not plausible on the totality of the evidence.
153. The defence has not been able to create a reasonable doubt in respect of the offences of attempted murder in counts one and three, however, there is a reasonable doubt with regard to count two for the offence of attempted murder but not for the lesser offence of act intended to cause grievous harm.

### **CONCLUSION**


154. Upon considering the evidence adduced by the prosecution and the defence this court is satisfied beyond reasonable doubt that for the first count the accused on 16<sup>th</sup> January, 2021 had attempted to murder his wife Tarusila Qoli by choking her with both his hands and submerging her head in a puddle of water by sitting on her stomach. What the accused did was more than merely preparatory.
155. For the reasons given in this judgment, the accused is found guilty for the first count of attempted murder as charged and he is convicted accordingly.
156. As for the second count this court after considering the evidence of the doctor who had examined Tarusila after the second incident in her

bedroom and the fact that the injuries caused were not life threatening, acquits the accused for the offence of attempted murder but finds him guilty of the lesser offence of act intended to cause grievous harm and convict him accordingly.

157. In respect of the third count this court is satisfied beyond reasonable doubt that the accused on 16<sup>th</sup> January, 2021 had attempted to murder his brother in law Meli Vuiyasawa by stabbing him with a knife multiple times. What the accused did was more than merely preparatory.

158. This is the judgment of the court.



  
**Sunil Sharma**  
**Judge**

**At Lautoka**

24 October, 2022

**Solicitors**

**Office of the Director of Public Prosecutions for the State.**

**Office of the Legal Aid Commission for the Accused.**