

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Crim. Case No: HAC 182 of 2022

STATE

vs.

AMINIO ATANINANO TANIORIA

Counsel: Ms. P. Mishra for the State
Mr. J. Biaukula for Accused

Date of Hearing: 11th -13th April 2023

Date of Closing Submission: 14th April 2023, 18th April 2023

Date of Judgment: 27th April 2023

JUDGMENT

Introduction

1. The Director of Public Prosecutions charged the accused for the following offences as per the Information dated 13th June 2022;

COUNT ONE

Statement of Offence

ACT INTENDED TO CAUSE GRIEVOUS HARM: contrary to Section 255
(a) of the Crimes Act, 2009.

Particulars of Offence

AMINIO ATANINANO TANIORIA on the 24th day of August, 2019 at Suva, in the Central Division, with intent to do some grievous harm to **RUPENI MATEYAWA**, unlawfully did grievous harm to the said **RUPENI**

MATEYAWA by punching him several times and throwing him on the cement foot path.

Admitted Facts

2. The following are admitted:
 - (i) *Mr. Aminio Ataninano Tanioria was 39 years old, was a construction worker and resided at Howell Road, Suva.*
 - (ii) *Identity is not an issue in this case.*
 - (iii) *It is agreed that on the 24th day of August 2019 at around 4.15am, Mr. Aminio Ataninano Tanioria assaulted Rupeni Mateyawa along the Westpac Bank branch in Suva.*

3. The trial commenced on 11th of April 2023 and the prosecution led the evidence of 6 witnesses and upon the defence being called the Accused gave evidence. The trial concluded on 13th of April 2023. Accordingly I would endeavor to pronounce my judgment upon the consideration of the evidence and submissions.

4. This charge is based on Section 255 (a) of the Crimes Act No 44 of 2009 (“Crimes Act”) which reads as follows:

*“A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or **to do some grievous harm to any person**, or to resist or prevent the lawful arrest or detention of any person—*

 - (a) *unlawfully wounds or **does any grievous harm to any person** by any means; or*
 - (b) *.....”*

(Emphasis added).

5. The prosecution alleges that the accused person punched and threw the victim on the cement foot-path with the specific intent to do some grievous harm to the complainant and that did grievous harm to the complainant.

6. Thus the main elements of the offence of “Acts Intended to Cause Grievous Harm” are that;
 - i. The accused person;
 - ii. with intent to do some grievous harm;
 - iii. did grievous harm to the complainant.

7. The first element is concerned with the identity of the accused person, which is admitted. The second element relates to the intention of the accused that he intended to do some grievous harm to the complainant, whilst the final element relates to the result of the alleged conduct of the accused of doing grievous harm to the complainant.

8. “Grievous harm” as defined under Section 4(1) of the Crimes Act, is as follows;

"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;”*

8. “Unlawful” means without lawful excuse and the term “wound” has been defined at Section 4(1) of the Crimes Act to mean any incision or puncture which divides or pierces any exterior membrane of the body, and any membrane is "exterior" for the purpose of this definition which can be touched without dividing or piercing any other membrane. Therefore, to establish this element, the prosecution should prove beyond reasonable doubt that the accused unlawfully wounded the complainant as defined herein.

9. As the offence of Act with intent to cause a grievous harm has a specific intent the prosecution is required to prove beyond reasonable doubt that the Accused did act with the said specific intent to cause grievous harm to the victim. In **R v. Belfon [1976] 3 All ER 46** [English Court of Criminal Appeal] dealing with the specific intent requirements under similar statute, held that:

"it was necessary to prove that the accused had done the acts in question with intent to cause grievous bodily harm; the fact that the accused had foreseen that such harm was likely to result from his acts, or that he had been reckless whether such harm would result; did not constitute the necessary intent".

10. In **Naosara v State [2007] FJHC 71; HAA047J.07S** (2 November 2007) the Appellant was charged with, Act with Intent to Cause Grievous Bodily Harm. It was alleged in the charge, that on the 3rd of June 2006 at Nasinu, the accused,

with intent to do grievous harm to complainant, unlawfully wounded him with a kitchen knife. During an operation the Appellant fled from a house and struck a Corporal with a kitchen knife causing him injuries. He swore at the Corporal and threatened to kill him. A tendered medical report showed that he had a 1-2cm cut on his chin and abrasions on the neck and jaw. Justice Shameem stated:

“Although greater analysis was called for after the review of the evidence, the issue was essentially a simple one. Did the Appellant strike at Cpl. Matou with a knife causing an injury and did he intend serious harm?”

Thus the *intent to cause grievous bodily harm* is an essential element in the offence defined by section 255 of the Crimes Act.

Burden of Proof

11. The Accused is presumed to be innocent until he is proved guilty. As a matter of law, the onus or burden of proof rest on the prosecution throughout the trial, and it never shifts to the Accused. There is no obligation or burden on the Accused to prove his innocence. The prosecution must prove the Accused’s guilt, beyond reasonable doubt. If there is a reasonable doubt, so that the court was not sure of the Accused’s guilt, or if there be any hesitation in my mind on any of the ingredients or on the of evidence led by of the prosecution the Accused must be found not guilty of the charge and accordingly acquitted. The Accused has a right to remain silent and no adverse inference can be drawn if the Accused opts to be so.

The Summary of Evidence

12. The victim is Rupeni Mateyawa. The prosecution did not call this witness it was reported that he is not in a fit condition, mentally and physically to give evidence. This was informed by the prosecutor and the evidence of the father and medical evidence also was led in support of this position. This will be considered subsequently. The prosecution led in evidence two witnesses who claimed to have seen this assault. The prosecution also called two medical witnesses and a police witness. The fact of the victim being assaulted by the Accused on the 24th August 2019 in Suva was admitted. The defence was one of self defence. He alleges that he was a victim of the theft of his phone and he was acting in self defence and did not have the intention to cause grievous harm.

The Prosecution Evidence

13. **PW1 Isei Verevakabau** was leaving with his brother around 4.15am after attending a nightclub in the Suva city. Whilst walking along the road opposite the Westpac Bank of Suva he sees a tall person punching the face and head of an i-Taukei man and as he was assaulting him violently this witness had intervened by jumping on his neck and locking the tall person. He said it was the Accused. He had seen the Accused lifting the victim off the ground, punching him and throwing him back to the cement walkway (side-walk). With this commotion several other by-standers, too have rushed to the scene to help the victim. Thereafter, they have informed the Totogo Police Station which was just a 2 minutes away and the officers have rushed to the scene. As the victim was lying on the walkway and appeared unconscious, a police vehicle was called and he was dispatched to the CWM Hospital.

14. **PW2 Aisea Salakai** was a security officer attached to BSP building nearby. He also hearing a commotion has rushed to the scene when the Accused was lifted the victim and threw him on the ground. He has seen the Accused trying to lift the victim again and pushed the Accused and prevented him from doing so.

15. **PW3 Mr. Napolioni Komatai** was a duty officer at the Totogo Police and has rushed to the scene upon receiving an emergency call. When he came to the scene he had observed the Accused punching the victim. He had intervened and stopped the Accused from further assaulting and then made arrangements to convey the victim to the CWM Hospital. Thereafter, the Accused had been taken to the police station.

16. These are three witnesses of the incident. All of them say the victim did not assault the Accused at any stage. He was in a state of semi-consciousness and lying on the side walk. The evidence of all three of them is that the Accused was punching the victim who appeared to be motionless and helpless and also was seen throwing him to the cement footpath. All of them say that there was no mobile phone found in the vicinity and the Accused did not have any injuries. None of these witnesses have seen the victim assaulting the Accused.

17. The father of the victim **PW4 Taikko Vakaloloma** said that the victim Rupeni Mateyawa is his son and he was about 26 years of age. His son was living with him and was working at the BBQ stalls opposite the Handicraft Centre adjacent to the Westpac bank. His son used to be away from home on some occasions. Similarly somewhere around 2019 (he could not remember the exact date), he had not returned for about a week when, he was informed that his son was in hospital. He had visited the CWM and seen his son in the ICU Ward with his hands tied to the bed. He was not in a position to communicate or talk and certain photographs taken by this witness were tendered in evidence showing the state in which the victim was at that time. After sometime he had taken his son home but was paralyzed on one side of his body and also suffered a serious loss of memory and did not know what has happened to him. The victim was in a vegetable state so to speak and could not attend to his day to day activities. He had been treated and looked after by this witness until March 2023 and then has sent him to Nadi to his sister to be looked after.

18. This witness informed court that his son was able to walk with some help and talk however, has suffered a serious loss of memory. He also said that his son is not in a position to give evidence coherently.

Medical Evidence

19. The prosecution summoned two medical witnesses. Namely, **PW5 Doctor Samuela Nanovou** and **PW6 Consultant Neuro Surgeon Doctor Alan Biribo**. Doctor Samuela Nanovou happened to see the victim during the early stages after he was brought to the CWM. His medical report was produced as exhibit PE3, the medical folder was produced as exhibit PE4 and Doctor Alan Biribo's report was produced as exhibit PE6. According to Doctor Nanovou he had seen the victim after he was admitted to the CWM Hospital. He had prepared and filled the medical examination form couple of years later. There had been a CT scan of the victim which had shown serious injury to the head due to blunt force trauma. He was unable to positively say if the injuries are permanent or temporary in nature. It may take 1 to 2 years to heal he opined. However, he confirms the possibility of partial paralysis due to the brain injury. He expressed the opinion that the injuries may be due to the punches on the face. He also in cross

examination admitted the possibility of drug use and alcohol toxicity being a contributory factor.

20. **PW6 Doctor Biribo** is a Consultant Neuro Surgeon. He expressed certain opinions based on the medical folder. He was attached to the CWM hospital and appears to have been involved in treating the victim at various times. The doctor could not remember the patient personally but remembers compiling the report. The victim has been in a state of comma but responsive. He explained that the victim has suffered Hypoxia due to deprivation of oxygen. This had resulted in Hypoxic ischemic brain trauma. This according to him was a consequence of the punches to his face/head leading to unconsciousness that intern may have affected his breathing for a brief moment. When that happens the brain does not receive a constant supply of oxygen and then the brain cells die. He said that the brain cells do not revive unlike other cells in the body. This had led to the partial paralysis of one side of the victim's body. To that extent his said condition appears to be permanent in nature. He confirms that this head injury may be due to blows to his face as well as the injury to the back of the head which he said may have been due to a fall or been thrown on a hard surface such as a cement walk-way.

The Accused's Evidence

21. The Accused gave evidence on his behalf and said that he was leaving after attending a nightclub and was walking towards the bus stand. Whilst so walking he had been speaking to his daughter over his mobile phone. He had felt someone tapping on his left side and when he looked another from his right side has snatched his phone and the two of them have taken to their heels. The Accused has giving chase when he has seen the two persons exchange something, parting ways and run in different directions. The Accused has given chase to one of them and caught up with him and asked for his phone. It was the Victim Rupeni. The victim had then thrown some punches at him. At this point the Accused says that he in self defence punched the victim.
22. The Accused had asked where his mobile phone was. He admits punching the victim. However, the Accused repeatedly said that he only wanted to retrieve his mobile phone which was of a sentimental value to him. He has raised the victim off the ground but denies throwing him on the ground. The sum total of his evidence is that he was acting in self-defence and was himself a victim of robbery.

23. The Accused also said that after about an year he happen to see the victim hanging around in this area and attending to various chores of the BBQ stalls. The Accused claims to have seen him in December 2022. The Accused said that the victim looked quite normal and was moving about.
24. The Accused admits the assault but denies throwing the victim on the side wall. In his evidence he was forthright and was truthful. Except for certain omissions and contradictions. Which arouse due to difference and failure to mention certain details of the incident as explained by him. No doubt the Accused was certainly advancing his defence of private defence. He did try to adjust his version in some aspects. It was not that he was not truthful but as an Accused defending himself he was trying to advance his position, basically they were not much of significance as far as the truthfulness was concerned therefore considering the totality of the evidence I am inclined to accept his evidence to some extent.

Evaluation

25. The incident by itself is not in dispute. It is admitted that the Accused assaulted Rupeni around 4.15am of the 24th August, 2019. The prosecution position is that this assault was committed with the intention to cause grievous harm. As opposed to this the defence position is this he did not act with such intention to cause grievous harm but was exercising his right of self-defence of property.
26. The victim Rupeni was not called as a witness on the basis that he is unable to come to court and also he is not able to remember any incident or event due to the loss of memory. However, the prosecution led evidence of three witnesses who happened to come to the scene when the incident was in progress. They have witnessed only the later part of the incident. The Accused testified and narrated the entire incident including the events that the three prosecution witnesses narrated. Therefore, the evidence as to how his incident commenced and as to what happened during the initial stages emanates only from the evidence of the Accused.
27. The Accused's version is that he was a victim of theft of his mobile phone and he pursued one of the two thieves and caught the victim Rupeni. When he so apprehended, Rupeni had thrown several punches at that Accused. The Accused has reacted and

punched Rupeni knocking him to the ground. The Accused claims he was acting in self-defence. The prosecution witnesses no doubt have arrived but it was after the Accused apprehended Rupeni. They saw the events that ensued thereafter, to be precise the last part of the incident. The fact that the Accused was demanding and asking for his mobile phone was heard and is confirmed by the prosecution witnesses. As the evidence reveals there is no other reason for the Accused to have got into this situation. In these circumstances, the evidence of the Accused as to the reason and the commencement of this incident cannot be rejected and should be considered and acted upon. The phone was not found on him. It is the position of the Accused that it may have been taken by the other who ran across the road.

28. The first issue is whether the punching and dropping the victim on the ground was committed in the exercise of his right of self-defence. The right as defined in Section 42 of the Crimes Act provides the right to protect property or person. Section 42 reads thus;

Self defence

42.—(1) A person is not criminally responsible for an offence if he or she carries out the conduct constituting the offence in self defence.

(2) A person carries out conduct in self defence if and only if he or she believes the conduct is necessary:

- (a) to defend himself or herself or another person; or*
- (b) to prevent or terminate the unlawful imprisonment of himself or herself or another person; or*
- (c) to protect property from unlawful appropriation, destruction, damage or interference; or*
- (d) to prevent criminal trespass to any land or premises; or*
- (e) to remove from any land or premises a person who is committing criminal trespass —*

and the conduct is a reasonable response in the circumstances as he or she perceives them.

(3) This section does not apply if the person uses force that involves the intentional infliction of death or grievous harm —

- (a) to protect property; or*
- (b) to prevent criminal trespass; or*
- (c) to remove a person who is committing criminal trespass.*

(4) *This section does not apply if—*

- (a) *the person is responding to lawful conduct; and*
- (b) *he or she knew that the conduct was lawful.*

(5) *for the purposes of sub-section (4) conduct is not lawful merely because the person carrying it out is not criminally responsible for it.*

29. The rationale and the basic principles of self-defence is set out in ***Palmer v R***, [1971] AC 814; approved in *R v McInnes*, 55 Cr App R 551 is that:

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but only do, what is reasonably necessary."

30. The right extends to the protection of property too. However, the protection of his property from unlawful appropriation is subject to a limitation by sub-section 3. The right is limited and will not extend to causing of intentional death or grievous harm. The availability of the right in respect of property will depend on the nature of the injuries caused to the victim.

31. The Accused said that when the victim was pursued and apprehended he did throw several punches at the Accused. At this point the Accused claims to have reacted and returned the punches, striking and knocking off the victim. He, no doubt commences with the exercise of his right in respect of property however at this point was he exercising his right of self-defence of his person?

32. The determining factor is to identify what triggered off the ensuing attack. We are left with only the Accused's evidence, and it appears that his punching and knocking off the victim was triggered by the punches of the victim. To that extent it appears that the Accused had acted in the exercise of his right of self-defence of person at that point. To my mind the Accused had the benefit of protecting his person.

33. In assessing the reasonableness of the force used, it is necessary to consider two questions:

- a. was the use of force necessary in the circumstances, i.e. Was there a need for any force at all?; and

- b. was the force used reasonable in the circumstances?

The courts have consistently indicated that both questions are to be answered on the basis of the facts as the accused honestly believed them to be (*R v Williams (G)* 78 Cr App R 276), (*R. v Oatbridge*, 94 Cr App R 367). To that extent it is a subjective and there is, however, also an objective element to the test. It should be ascertained whether, on the basis of the facts as the accused believed them to be; and if a reasonable person would regard the force used as reasonable or excessive. As stated above it is only the evidence that of the Accused that we are left with. To that extent it is possible that the victim in order to escape will resort to even causing serious harm and similarly the accused may have perceived it to be so.

34. Now it is necessary to consider if his action was proportionate to the perceived threat. It is important to bear in mind the words of Lord Morris in *Palmer v R* 1971 AC 814) when assessing whether the force used was reasonable in such circumstances. He said that;

"If there has been an attack so that self defence is reasonably necessary, it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his defensive action. If the jury thought that in a moment of unexpected anguish a person attacked had only done what he honestly and instinctively thought necessary, that would be the most potent evidence that only reasonable defensive action had been taken ..."

35. No doubt there is no evidence from any other source as to whether the victim attacked and if so what the nature of the alleged attack was. To ascertain the probable nature it is necessary now to consider the attendant circumstances. The Accused did not sustain any injuries. At the point the prosecution witnesses arrived, the Accused was punching the victim. According to the evidence of the witnesses the victim by this time was non-responsive and inactive and was being repeatedly punched on his face whilst he was lying on the cement walk-way. The Accused then lifts him off the ground and drops him to the ground which the witnesses described and demonstrated in court that to be more consistent with a deliberate 'dashing' on the ground of the victim. Accused in his evidence admits that he assaulted and let him down to the walk-way but denies that he deliberately threw him on the ground.
36. Upon an overall evaluation of the totality of the evidence including the nature of the injuries suffered by the victim this is no doubt an extreme form of assault by punching on the face and head of the victim. The medical evidence confirms of an injury to the

back of the head as well. This is consistent with the head striking on a hard surface, which is extremely probable was due to the dropping of the victim as described by the witnesses. The Accused is a person of considerable height and build. He was extremely agitated and disturbed by the loss of his mobile phone to which he appears to have a sentimental attachment. When the Accused was giving evidence he appeared quiet emotional on this issue. Thus, at that moment he appears to have been desperate to retrieve and find his mobile phone. In such circumstances he appears to have been reactive rather than pro-active in his conduct and responses.

37. As stated in *Palmer*, in such circumstances you cannot realistically and practically expect the Accused to have considered the pros and cons, the niceties of the law in determining the scope and extent of his conduct in the spur of the moment. Upon apprehending the victim his primary object and intention was to find his mobile phone. The Accused said that when the victim was so caught he did resist and throw punches at him. The evidence no doubt proves that the Accused did at this point embark upon a counter attack which continued even after the victim was immobilized. He said that was to defend himself.
38. The fact that an act was considered necessary and justified does not mean that the resulting action was reasonable. Where it is alleged that a person acted to defend himself from violence in the exercise of the right of self defence, the extent to which the action taken was necessary will, of course, be relevant and integral to determine the reasonableness of the force used. (*R v Clegg* 1995 1 AC 482 HL).
39. Continuing to assault the victim when he was apparently immobilized and disabled is highly disproportionate and not reasonable to say the least. To that extent he has clearly exceeded his right of self-defence and it was not a reasonable response in the circumstances. Thus the Accused is not entitled to the benefit of self-defence.

Credibility of the prosecution witnesses

40. The three prosecution witnesses confirm that when they arrived the attack was in progress and when they intervened the Accused did stop the attack. They have all seen the victim being dropped to the walk-way only once. The versions of the three witnesses do vary and are contradictory in some aspects. All three of them do claim that each arrived their first and took control of the situations. It is more probable that

with the commotion they have arrived independently almost at the same time and each of them now state what they recall. Witness No. 1 admits that he was returning after drinking from a nightclub. This may to some degree have affected his memory and perceiving the events precisely. This may be one reason for the inconsistencies inter se. However, on an overall evaluation I am satisfied that these witnesses are truthful but are not accurate in some aspects due to faulty memory. However, the evidence of the police officer PW 3 Napolini and of the security officer PW 2 Aisea appears to be more reliable than PW1 Isei. However, I accept them as truthful witnesses but as to the reliability there is some reservation.

Intention

41. A charge of Act with Intent to Cause Grievous Harm is primarily an offence of which the operative and the primary ingredient is the intent. The offence is committing of some act with the required intention as described which should be an intent to:
 - (a) Maim, disfigure or disable any person or,
 - (b) To do some grievous harm to any person or,
 - (c) Resist or prevent the lawful arrest or detention of any person.

42. Section 255 (a – g) specifies the effect or the result of the act so committed with that intention. They range from unlawfully wounding, grievous harm and even to mere attempt to strike any person with any kind of projectile or spear etc. Therefore, an act with the said intent whether it achieves its object or otherwise will be actionable so long as the initial act is proved to have been committed with the required intention. The result of said such act if any will be a further description that may be stated in the particulars.

43. It is the specific intent to cause great harm as described that is actionable and is the necessary ingredient of this offence. It is not the achieving of the end result. The punishment prescribed is life imprisonment. This shows the seriousness of this offence is almost in par with that of murder. Therefore, to prove an offence under Section 255 it is necessary to establish an intention to cause grievous harm something so serious and akin to that of and as vicious as the murderers' intention.

44. The converse position or the resulting position is that even when grievous harm is caused to a victim that per se will not prove an offence of act with intent to cause grievous harm under section 255. The prosecution must prove that extra ingredient of the serious and vitious intention as required by section 255 to cause grievous harm. If there be any doubt as to this intention an Accused cannot be convicted for an offence under section 255. However, depending on the actual harm or result of this action he may be convicted of the corresponding minor or cognate offence of either grievous harm under section 258, unlawful wounding under section 261, maliciously administering poison with intent to harm under section 260 or such corresponding offence as the case may be.
45. The high degree of intention required to prove the offence of acts intended to cause grievous harm will depend *inter alia* on the attendant circumstances, the utterances made by the Accused, the nature of the weapon used, the part of the body harmed and the nature of injuries. In the present case no doubt the injuries caused amount to grievous harm. However, the Accused happened to be a victim of a theft or robbery of his mobile phone. He was spontaneously reacting and trying to retrieve his phone and apprehends one suspect attempting to flee. In his great desire to extract some information in the heat of passion and agitation throws punches more in reaction than design.
46. When the victim was immobilized he was lifted off the ground, punched and thrown on to the walkway. The Accused at that moment was in an agitated frame of mind has clearly embarked upon a malicious and unlawful attack on the victim to wound him. No doubt his object and purpose was to retrieve his stolen mobile phone. The victim was not a known person and there was no other reason for his assault. However, when by standers intervened he immediately seized his attack and then waited for the police and also cooperated with the police. This conduct is not consistent with that of a person entertaining and acting with the vicious intent to cause grievous harm as required by section 255.
47. According to the medical evidence there were injuries affecting his brain due to hypoxia. The victim's alcohol level in his system also may have contributed to this

condition. Hypoxia according to Doctor Biribo is a condition resulting from the lack of oxygen to the brain. He explained that when someone is punched and loses consciousness there may be a temporary arresting of his breathing process and lead to a serious drop of his oxygen supply to the brain. When the brain is deprived of oxygen in this manner it will result in the death of brain cells of such portions of the brain. The victim appears to have suffered hypoxia in the area of the brain controlling his muscles on one side of the body as well as his memory. He describes this injury as a Hypoxic Ischemic brain injury.

48. This condition according to the doctor may have been exacerbated due to alcohol in the victim's system. The Doctor states that:

Judge: *Okay.of alcohol in this matter; pathologically is there [any contribution]...?*

Dr. Biribo: Yes, My Lord pathologically to alcohol being ait is also uses a vital stores or functions of the liver that would be otherwise used to treat the injury the body would use to; it would first expel the poison that is in the system. Alcohol is such a; is a nasty thing My Lord, because once you put alcohol in the body; the liver will stop all bodily functions to try to get rid of this poison, first. So it doesn't care that you are having trauma to the brain; it will try to get rid of this poison and attend to other essential things that are required for the liver to do. So yes it does worsen other situation or medical condition that we come across. Trauma is not exception; trauma and alcohol is a bad combination.

49. Thus, the state of hypoxia has been exacerbated due to the alcohol in his body. The Ischemic brain trauma would have been prevented by the natural mechanisms of the body if not for the intoxication and the presence of alcohol in the body. Thus, there is a doubt and uncertainty as to the actual nature of the injury that was caused by the Accused, ie. if it was grievous harm. However, there is evidence of a contusion and laceration on the lip and face which is a direct result and consequence of the assault. In these circumstances from the nature of the injuries it is not possible to infer that the Accused intended to cause grievous harm; though grievous harm was the end result, it cannot be attributed solely to the act of assault by the Accused. The victim had subsequently recovered to some extent without the intervention of any medical procedure.

50. The Accused had certainly stopped his assault no sooner the bystanders approached. He had been asking for his mobile phone right along. Considering the circumstances that led to this assault it was more of a sudden reactionary attack in the spur of the moment. Therefore, the evidence does not necessarily prove that the Accused was acting with an intent to cause grievous harm. However, his attack had been unlawful and malicious from the time the victim was immobilized.
51. In these circumstances, the prosecution is not able to prove beyond reasonable doubt that the Accused entertained the required intent to cause grievous harm and that it was the accused's act that caused the hypoxic ischemic head injury. However it is proved beyond reasonable doubt that injuries have been caused unlawfully. Therefore, I hold that the prosecution has proved beyond reasonable doubt the minor or cognate offence of unlawful wounding contrary to section 261 of the Crimes Act.

Conviction for Minor offence under Section 160 of the Criminal Procedure Act

52. Unlawful wounding is a cognate offence or is a minor offence in the sense that in combination with further particulars if proved would have constituted the substantive offence of, *act with intent to cause grievous harm*. Section 160 of the Criminal Procedure Act provides for the conviction of proved minor offences other than those charged.
53. Section 160 of the Criminal Procedure Act reads as follows:
-160 (1)... When a person is charged with an offence consisting of several particulars combination of some only of which constitutes a complete minor offence, and such combination is proved but the remaining particulars are not proved, the person may be convicted of the minor offence although he or she was not charged with it.*
- (2)... When a person is charged with an offence and facts are proved which reduce it to a minor offence, the person may be convicted of the minor offence although he or she was not charged with it.*

Section 160 enables and empowers a court to enter a conviction for a proved minor or cognate offence when such Accused is charged with a serious offence. If I may consider the import and the extent; section 160 is a general provision of Procedural Law which is intended to empower and enable a Judge or a Magistrate in a Criminal

matter to convict an accused of a cognate offence which amounts to a minor offence without a specific charge. Section 160 has two components incorporated as sub sections (1) and (2). Section 160 (1) provides that when the additional ingredients to constitute the serious offence has not been proved the Accused maybe convicted of the complete minor offence proved. This is a situation of the lack of evidence to prove the serious offence. Then section 160 (2) contemplates and provides for the situation in which the complete serious offence as charged has been proved but due to the proof of certain facts reducing such serious offence to a minor offence the culpability is reduced to a minor offence (i.e. Proof of a migratory plea). Then too the court is empowered to convict such Accused to such resulting minor offence.

54. However I happen to observe that in the case of State v Chand [2020] FJHC 973; HAC 309.2020 (3rd November 2020) Acting Judge Rangajeeva Wimalasena has opined that, in view of the definition of “minor offence” in section 2 of the Criminal Procedure Act, the application of section 160 is limited to an offence under the Minor Offences Act of 1971.

55. Certainly, the Interpretation section of the Criminal Procedure Act (Section 2) defines the words “minor offence” to mean any offence prescribed in the Minor Offences Act 1971. On the face of it, the view expressed in State v Chand appears to be in accordance with the literal interpretation of section 160 read with the definition of minor offence as in section 2 as aforesaid, which is as follows:

“2. In this Act, unless the context otherwise requires-

.....

Minor offence means any offence prescribed in the Minor Offences Act 1971.”

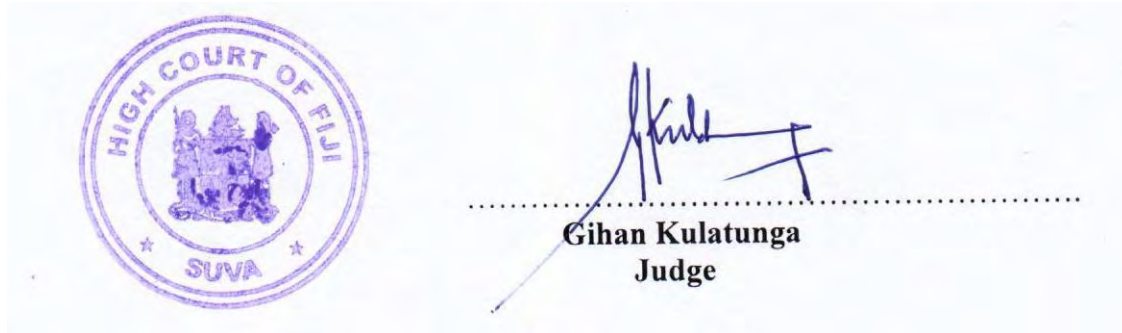
56. The qualification made by the phrase “*unless the context otherwise requires*” in section 2 is significant as all words defined are subject to and are qualified by the same. If I may elaborate, interpretation sections provides for definitions in various forms. Definitions of some words are qualified or introduced by the word “means”, and of others by “includes”. As a rule, the word “means” introduces an exhaustive definition whereas “Includes”, denotes an incomplete definition of an inclusive nature which

admits the possibility that it may cover other things as well. Nevertheless much depends on the context.

57. It is also common in statutes/Acts for an interpretation section to commence with the phrase: “*in this Act, unless the context otherwise requires*”. This phrase indicates that, in an Act where the word in question appears, (be it once or several times) there may be occasions where it would not bear and be limited to its defined meaning. Use of this phrase statutorily empowers a court to deviate from the given definition and interpret such term taking into consideration the context of such provision. But the statutory definition is displaced or departed only where there are strong indications to the contrary in the context. [**Police v Thompson** [1966] NZLR 813.]. This form affords a degree of flexibility and empowers a court to interpret such words taking into consideration the context in which such word appears in.
58. Acting Judge Wimalasena when expressing his view in state v Chand (supra) appears have not adverted and considered the import of the said qualification, ‘*unless the context otherwise requires*’ appearing at the commencement of section 2, and has proceeded on the premise of this being an exhaustive interpretation. To that extent the said interpretation in state v Chand (supra) to my mind is not accurate and is erroneous.
59. It is apparent that section 160 was incorporated and enacted to apply to all offences generally. The offences under the Minor Offences Act are few and trivial in nature that do not amount to a minor offence of a great majority of offences under the penal statutes. It is inconceivable that the Legislature would have intended to limit section 160 to such offences only. To my mind such a restriction or limitation will necessarily lead to an absurdity. In these circumstances, the context of section 160 necessarily requires that the words “*minor offence*” as defined in section 2 be purposively interpreted to avoid an absurdity and to give effect to the obvious purpose of section 160 of the Criminal Procedure Act. Accordingly, as the context of the provisions of section 160 so requires, I am inclined to interpret the words “*minor offence*” in section 160 to mean and include any cognate and minor offence of any nature and is not limited to offences under the Minor Offences Act of 1971.

Conclusion

60. Accordingly, I find the Accused guilty of the offence of committing unlawful wounding and convict him for the said lesser offence of unlawful wounding contrary to section 261 of the Crimes Act.
61. As I have convicted the Accused of a lesser offence the Accused will be acquitted of the charge of Act with Intent to cause Grievous harm.



At Suva

27th April 2023

Solicitors

Office of the Director of Public Prosecutions for the State.
Legal Aid Commission for the Accused