

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

Criminal Case. No. HAC 133 of 2020

BETWEEN: THE STATE

A N D: SUNNY RITESH NAND

Counsel: Mr. Rafiq for the State.

Mr. Singh & Ms. Ali for the Accused.

Dates of Hearing : 23rd, 24th, 25th April, 2024

Closing Speeches : 29th April, 2024

Date of Judgment : 20th May 2024

JUDGMENT

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 and 237 of the Crimes Act 2009.

Particulars of offence

SUNNY RITESH NAND on the 15th of July 2020, at Sigatoka, in the Western Division, **attempted** to **murder** SALESHNI DEVI.

SECOND COUNT
Statement of Offence

BREACH OF DOMESTIC VIOLENCE RESTRAINING ORDER: Contrary to section 77 (1) (a) and 237 of the Domestic Violence Act 2009.

Particulars of offence

SUNNY RITESH NAND on the 15th of July 2020, at Sigatoka, in the Western Division, having notice of an interim domestic violence restraining order by which

is bound a Standard Non Molestation Condition without reasonable excuse contravened such order vide Interim Domestic Violence Restraining Order No. 62/17by attempting to murder the Protected person Salesni Devi

2. In this trial, the prosecution called three witnesses and after the prosecution closed its case, this court ruled that the accused had a case to answer in respect of one count of **attempted murder** and one count of **Breach of domestic Violence Restraining Order** 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.

ELEMENTS OF THE OFFENCE

4. To prove the above count 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 complainant; and
 - (d) the accused intended to cause the death of the complainant by his conduct.
5. In this case the prosecution is alleging that the accused intended to cause the death of the complainant by his conduct. The first element of the offence of **attempted murder** is concerned with the identity of the person who allegedly committed the offence of **attempted murder**.
6. 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.
7. For the accused to be guilty of **attempted murder**, the accused's conduct must be more than merely preparatory to the commission of the offence. The question whether a conduct is more than merely preparatory to the commission of the offences is one of fact.
8. The third element is that the said conduct of the accused was an attempt to cause the death of both the complainant.

9. The final element is concerned with the state of mind of the accused that he intended to cause the death of the complainant. It is not possible to have direct evidence regarding an accused's state of mind since no witness can look into the accused's mind and describe what it was at the time of the alleged incident. However, one can construe the state of mind of the accused from the facts and circumstances proved.
10. To prove the intention to cause the death of the complainant, this court should be satisfied that the accused intended to kill the complainant 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 the complainant.
11. 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 complainant and with that intention he did something which was more than merely preparatory.
12. 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 cause 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.
13. 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 offence 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.
14. In this case prosecution did not called the complainant (Saleshni Devi) to give evidence given her mental status as confirmed by the psychiatrist Doctor Balram in his psychiatrist report. Hence, the prosecution had called three other witnesses who were present on the morning of 15th of July 2020 at Bilalevu settlement in Sigatoka. The witnesses are the complainant's mother (PW-1) and the complainants' daughter (PW-2) and the victim's aunty (PW-3). Prosecution witness 1 and 2 clearly saw the accused running away near the scene down the hill so close to their respective residence. Both prosecution witnesses said that they had asked the accused about the whereabouts of the victim and the accused told both of them that he had **assaulted the victim and threw her in a ditch near a mango tree**. *The third witness for the prosecution said that she heard and recognized the voice of the complainant who is her niece. She said she recognize the voice and confirmed it to be the complainant Saleshni as she was yelling out saying "Mosi"save me Ritesh is beating me" meaning "aunty save me Ritesh is beating me" the witness said she knew the voice was Saleshni's voice as she always called her "mosi" meaning aunty. The voice was coming from about 100 meters away*

Prosecution are saying that it was not in dispute that the accused was with the complainant on that morning on the 15th of July 2020 and the complainant later was found lying in ditch near a mango tree seriously injured later the accused immediately seen running away from the hill close to the scene and informing

prosecution witness 1 and 2 that he had assaulted the complainant and threw her under a mangoe tree. This Court will decide whether the prosecution has proven all the elements of the offence of attempted murder

15. 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.
16. 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**.
17. To prove count two the prosecution must prove the following; that the accused had a **Breach of Domestic Violence Restraining Order**

Elements **of** the offence **of Breach of Domestic Violence Restraining Order** beyond reasonable doubt:

- (a) The accused; breach Domestic Violence Restraining order no. 62/17 dated 3rd of February 2017.
 - (c) By physically assaulting the complainant a protected person.
18. If this court is satisfied that the accused had breached the **Domestic Violence Restraining Order** number 62 of 17 **of** the Magistrate's Court dated 3rd February, 2017 by assaulting the complainant a protected person then this court must find the accused guilty **of** the offence **of Breach of Domestic Violence Restraining Order**.
 19. If on the other hand there is a reasonable doubt with regard to any **of** those elements concerning the offence **of breach of Domestic Violence Restraining Order** then this court must find the accused not guilty.

ADMITTED FACTS

20. In this trial the prosecution and the defense 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. The facts are ;
21. The accused in this case is one Sunny Ritesh Nand (hereinafter referred to as the accused f/n Satya Nand) 37 years of age Mechanic of Kulukulu Sigatoka.
22. It is admitted that the accused is also known as "Papu".
23. It is admitted that the complainant in this case is one Saleshni Devi (hereinafter referred as the complainant is also known as "Babbi".
24. It is admitted that the complainant's husband demised in the year 2015.

25. It is admitted that the complainant has four children namely Kartik Parwan Singh, Diveshni Devi, Sonam Devi and Kartik Aman Singh.
26. That on the 15th of July 2024 the complainant in this case Saleshni Devi also known as "Babbi" was found in a ditch near a mango tree and was thereafter picked up and transported to Sigatoka Hospital by one Mr. Binnu Singh and his sons and labour.
27. It is admitted that Mr. Binnu Singh is a well-known person to the accused and the complainant and resides in the same settlement as the complainant in Bilalevu Settlement.

EVIDENCE

28. The first prosecution witness is Lalita Devi. She is the mother of the complainant. She resides in Bilalevu settlement for almost 45years. She has three children the oldest is the complainant Saleshni Devi who was 42 years of age, a son age 40 years and Ashika Devi who is of 38 years old.
29. She said the complainant lives at her own house just 5 minutes away from her house. Her son lives in Nabaka Valley road and the other daughter lives also at the same settlement at Bilalevu.
30. She recalled on the 15th of July 2020 she woke up that morning and was just lying in bed when she received a phone call from her sister Sunita Devi informing her that one sunny is assaulting her daughter Saleshni Devi and she was shouting and yelling for someone to help her.
31. She said her sister Sunita Devi resides few blocks away. She said she knew this Sunny as she used to come and do mechanical works since his child hood. She said that Sunny and her daughter Saleshni Devi are in a defacto relationship.
32. After receiving the phone call she went outside into her compound when she saw "Sunny" climbing down a hill and stand beside her house. She said Mr. ***She said she asked "sunny" as to where is Saleshni, "Sunny" replied that he had assaulted her and threw her under a mango tree.***
33. Sunny was in a rush. She said it was around 7.00am that morning and it was a bit foggy when Sunny came he was in a rush and ran towards the main highway. She said there was no obstruction to her view and the visibility was clear. She said the distance from where he was standing and where Sunny was standing was about 6 to 7 meters away.
34. She identified the accused to be wearing a white shirt sitting in Court. She said after that she called Binnu and inform him that Sani has assaulted her daughter Saleshni and threw her under a mango tree. Later Binnu and his labourers came and started looking for her daughter. She said she also went to the scene where her daughter was found. She said that the following people were at the scene Binnu, her sister Sunita, Robin and Sahul.

35. Thus, she saw her daughter lying near a tree and she saw blood coming out from her nose and her mouth. She also saw her daughter's hands also sustain injuries. She said she did not open and search the whole body.
36. According to her it was Sahil, Binnu, Atish and Robin took her daughter to the hospital. She said the scene where her daughter was found was a bit far from her house but close to Sunita's house.
37. She said she has to stay behind while the others take her daughter to hospital because her husband was a stroke patient. She said her daughter was admitted for one month and two weeks. She was in a coma and admitted in ICU. She visited her daughter after three weeks in the hospital.
38. She said all her daughters hair was removed and bandage were placed on her head. She said her face was swollen as well as her body and operation was done on her neck and she saw a tube in it for food purposes.
39. When she was released from the hospital she was not in her right state of mind and she did not recall what had happened at that time. Later she began to recall what had happened to her. She said that currently Saleshni is encountering bad headaches and she has body aches and leg pain and mostly sleeps. She is not able to do any work and she has got four children.
40. She said when Saleshni came from the hospital her leg was not working and she was on diaper. She often visits her daughter once a week or once a fortnight. She confirmed that all of the houses mentioned in this case are in Bilalevu Settlement.
41. In cross examination by defense counsel, the witness confirmed that the time was between 6.30.am to 7.00.am. She said she received the phone call from Sunita her sister and after talking to her on phone she went outside of the house.
42. In cross examination hence, she saw "Sunny" was coming down the mountain and jumped and then he looked both side. She asked Sunny where her daughter is. He replied he had assaulted her and threw her at the mango tree. She said her daughter Saleshni's house is a bit on the hill. She said Sunita's house is located near the highway you have to down from her house and go towards the highway.
43. In her daughter was being assaulted but she confirmed that she asked "sunny" and Sunny informed her that he had assaulted Saleshni and threw her near a mango tree.
44. She said when she came out to her compound "Sunny was in a rush as he jumped from the hill and she was near the place he had jumped onto, She met him and then he ran away from there. She said her house is a bit far from the scene but Sunita house is a bit near the place of the incident.

45. In cross examination she describes the scene as from Saleshni's house you have to go a bit far up the hill and go down the hill there is a bit of a hole in that area in the ground Saleshni was lying on that area and that palace of incident Sunita's house a bit near to the place of incident.
46. Again in cross examination She disagree with the suggestion by defense counsel putting it to her that Sunny on that day was running because he was assaulted by Binnu and other man. She said she did not see anyone beating Sunny at that point in time. She also did not see who assaulted her daughter but it's sunny who had informed her that he had assaulted her daughter and threw her near a mango tree.
47. The prosecution called their second witness **Diveshni Shanya Devi**. She said she is 21 years old and reside at Bilalevu settlement. Her mother is the complainant Saleshni Devi. She recalls on the 15th of July 2020 she was at her home at Bilalevu settlement on that morning. She saw Sunny running he came down from a hill and he was running. She said Sunny is her step father,
48. Thus, she said Sunny was her stepfather for five years and he does not stay with them full time. She said the sun was already up that morning and she could see him clearly. She said she was at the passage combing her hair when she saw Sunny running down the hill beside and close to their house.
49. She said visibility was clear and nothing was obstructing her view. She averred that it was about 8 to 10 meters away from where she was standing to where Sunny was running beside their home. Hence, she identified Sunny as her stepfather inside the courtroom as the person wearing yellow tie.
50. She said the direction she was running towards later he heard her grandmother shouting and yelling. Her grandmother Lalita was yelling from her compound. She said the distance would be around 100 meters. She said her grandmother's home is down the hill side of their house.
51. She said a lot of people in the area chased Mr. Sunny and caught him near the bus shelter area. She said she was in her driveway when the man had grabbed sunny. She asked Sunny where her mother is and after asking her several times **Sunny replied and said he had assaulted her and threw her away**. He mention it was under a mango tree but did not say which mango tree.
52. She started to look for her mother and heard a voice saying" **we have found Barbie**". She said Barbie is another name for her mother Saleshni Devi. It's her nick name. She said when she went to the scene she saw a big deep hole under the mango tree. They manage to pull her out from that hole she saw blood coming out of her moth and she was rushed to the hospital.

53. She said Robin was her cousin brother who pulled her out of the place. Those were present at the scene were Binnu, Sahil, Robin, Sanjia, Sunita and Lalita. She said Sunita is her Grandmother's sister. Her Grandmother is Lalita.
54. Hence, Sunita is her grandma's sister and she is the one who heard her mother yelling from the mountain area. She said my mother was asking for help at that time. Thus, her mother was admitted to Lautoka hospital for one month. Medical Examination Reported of Salesni Devi was tendered in **PEX 2**. The medical report of the accused was tendered by consent as **DEX 2**.
55. In cross examination she said that her mother was taken by the accused whilst she was asleep. She again confirmed that Sunny was running down the hill beside her house. She also confirmed that she heard her grandmother yelling and shouting saying that Sunny is running away. Witness statement shown to her. She said when her grandmother yelled from her house she could clearly see her from their house.
56. In cross examination she confirmed that the distance from her maternal grandmother's house to Salesni's house is about 30 meters. She also said that she thinks she did not see any injuries on Sunny.
57. The third prosecution witness was **Sunita Devi**. She was the sister of Lalita Devi and aunt of Salesni Devi. She resides at Bilalevu Settlement for about 18 to 19 years. Her house cannot be seen from the house of Salesni and Lalita Devi because the hill is blocking the view.
58. The distance of Lalita's house to her house approximately from the court house to the road. When coming from Sigatoka town you will first come to her house then Lalita's house.
59. She recalled on the 15th of July 2020 she was making roti at 7.30 am at her house. Her son Rahul was feeding the horse behind the kitchen. Then suddenly she heard Salesni yelling "**Mosi** meaning **Aunty save me Ritesh is hitting me**" Salesni is her niece. She said she can tell it's Salesni's voice because Salesni calls her "Mosi" meaning aunty and Salesni used to stay with her.
60. She said she ran and went near. Again she said Salesni yelled saying "**Mosi meaning Aunty save me, Sunny Ritesh is hitting me and she also was saying Robin brother save me, Papua is hitting me**". Papua is Sunny's nickname. She said she called Lalita on phone and informed her that daughter has died and for her to come.
61. The witness said that whilst she was running and near the place she saw them struggling with each other, pushing and yelling and when she went near she did not hear Salesni's voice but heard a "bang" noise it was three times.

62. She said that was the time sunny hit her and pushed her down. She said sunny hit her with a piece of wood. She said she was about 7 meters away when this happened. She said she saw sunny hit Saleshni with the piece of wood and push her into the drain than he put leaves on top of her.
63. She was afraid and she called Sazia Bano. She said Sazia Bano is Robin's wife her daughter in law. She said she also called Lalita. She said when Robin arrived at the scene Sunny ran away from there.
64. Mr. Binnu and others arrived and they went to pick Saleshni from the drain. Hence, the drain was a bit deep however they were able to pick Saleshni up from the ditch and they took her to the place where the lorry was parked. She was loaded into the vehicle and conveyed to Sigatoka Hospital.
65. She said she had known Sunny for 6 years and she pointed him out in Court as a person wearing white shirt and a yellow tie.
66. In cross examination she said the place Saleshni was taken was near her house. Her statement was shown to her. It was put to her that she was telling lies that Robin her son ran to the scene first before her. Her answer was "no".
67. In Cross examination she said that Sunny and Saleshni were pushing and scuffing one another. Her statement was put to her by Defence Counsel saying that none of what she had stated was mentioned in her statement. She said that she was frightened and did not want to give the statement.

PREVIOUS INCONSISTENT STATEMENT

68. This court directs its mind to the fact that the defence counsel during cross examination of the Sunita Devi had questioned the said witness about some omissions she made in her police statement and which they had given to the police when facts were fresh compared with their evidence in court.
69. It is obvious that passage of time can affect one's accuracy of memory. Hence it cannot be expected for every detail to be the same from one account to the next.
70. If there are any inconsistencies or omissions, it is necessary to decide firstly whether it is significant and whether it affects adversely the reliability and credibility of the witness. If it is significant, then it is for this court to consider whether there is an acceptable explanation for it. If there is an acceptable explanation, for the change, then the inconsistencies or omissions are so fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
71. During cross examination of the Sunita Devi, Defense counsel had questioned the witness about the inconsistency/omission in her evidence in court and her police statement which she had given to the police when facts were still fresh in her mind.

72. Thus, in her evidence in she court stated that she saw the complainant and the accused scuffling. But she had omitted the same and failed to mention the same in her statement dated 18th July 2020.
73. She said the reason why she did not gave a statement because she was frighten and she thought that Saleshni is dead and everything will come on her. The inconsistency/omission is fundamental, then it is for this court to decide to what extent that influences the reliability of the witness evidence.
74. This court will not reject all but parts of the evidence of Sunita Devi where the witness had stated that she identified the accused at the crime Scene, scuffling and hitting the complainant with a piece of wood
75. Thus, the court is allowed to take into consideration the inconsistencies or omissions between what the witnesses told the court in her police statement when considering whether these witness was believable and credible. However, the police statement is not evidence of the truth of its contents.

DIRECTIONS ON VOICE RECOGNITION

76. Prosecution will rely on Voice recognizance evidence of (PW3)the complainant by Sunita In this case, I would like to remind myself of the dangers of **voice recognition** which is more difficult than visual identification, and that the court should warn itself in a more stringent manner than that given in relation to visual identification. It is trite law that it is not necessary to hold a **voice** identification parade to render admissible evidence of identification by **voice**. In giving the judgment of the Court of Appeal in *R v Doherty* [2002] NICA B51; [2002] NI 263, [2003] 1 Cr.App.R.5 Nicholson LJ emphasized the need for a suitable warning in cases where evidence was given purporting to be identification of the **voice** of the accused in the following words:

*“We are satisfied that if the jury is entitled to engage in this exercise in identification **on** which expert evidence is admissible, as we have held, there should be a specific warning given to the jurors of the dangers of relying **on** their own untrained ears, when they do not have the training or equipment of an auditory phonetician or the training or equipment of an acoustic phonetician, in conditions which may be far from ideal, in circumstances in which they are asked to compare the **voice** of one person, the defendant, with the **voice on** tape, in conditions in which they may have been listening to the defendant giving his evidence and concentrating **on** what he was saying, not comparing it with the **voice on** the tape at that time and in circumstances in which they may have a subconscious bias because the defendant is in the dock. We do not seek to lay down precise guidelines as to the appropriate warning. Each case will be governed by its own set of circumstances. But the authorities to which we have referred emphasize the need to give a specific warning to the jurors themselves.”*

77. In this case the Sunita Devi (PW3) recalled on the 15th of July 20220. She was making roti at 7.00 am at her house. His son Rahul was feeding the horse behind the kitchen. Then suddenly she heard Saleshni yelling “**Aunty save Ritesh is**

hitting me” Saleszni is her niece. She said she can tell its Saleszni’s voice because Saleszni calls her “Mosi” meaning aunty and Saleszni used to stay with her.

78. She said she ran and went near. Again she said Saleszni yelled saying “**Mosi meaning Aunty save me, Sunny Ritesh is hitting me and she also was saying Robin brother save me, Papua is hitting me.**”
79. She said she was sure that it was the complainant’s voice as the complainant used to live with her and complainant always called her “Mosi” meaning “aunty”.

DIRECTION ON CIRCUMSTANTIAL EVIDENCE

80. The Prosecution case against the accused entirely depends on the circumstantial evidence. Hence, I shall briefly draw my attention to discuss the legal definition of circumstantial evidence. The Prosecution relies upon evidence of various incidents, acts, state of mind, affairs, and circumstances related to this incident and the accused. The Prosecution says, when taken together, will lead to a certain, indisputable, and undeniable conclusion that the accused has committed this crime.
81. Keith JA in **Naicker v State [2018] FJSC 24; CAV0019.2018 (1 November 2018)** has explained the nature of circumstantial evidence and its evidential effects, where his lordship held that;

It is sometimes said that circumstantial evidence is compelling than direct evidence. What better evidence can there be than that someone saw the defendant commit the crime? But eye witnesses can sometimes be mistaken, and they have also been known to lie. That is why it is also said that circumstantial evidence can be as compelling, if not more so. If I go to bed at night and the ground outside is dry, and I wake up in the morning to find that it is wet – true, I have not actually seen it rain, but the inference that it rained during the night is irresistible. As long ago as 1866, 8 years before Fiji became a Crown Colony, a distinguished judge likened circumstantial evidence to a rope comprised of several chords. He said that “one strand of the chord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength.”

82. The proof of primary facts; and, the inescapable inferences that the trial court could arrive at, established beyond reasonable doubt that the accused escaped from the crime scene soon after the offence was committed against the complainant Saleszni Devi.
83. The complainant did not give evidence in this case due to her psychiatric condition. The evidence in this case arises from the evidence of Sunita Devi (PW3), Lalita Devi (PW1) and Diveshni Devi (PW2). Sunita Devi in her evidence stated that she was making Roti on the morning of the of 15th July 2022 at his house when she heard someone yelling and shouting saying “mosi” meaning aunty save me Ritesh is hitting me “when she ran closer to where the voice was coming from again she heard the voice continue to come saying “aunty save me” ‘Papua” sunny Ritesh nickname is hitting me ”Sunita when hearing the voice knew it was Saleszni as she was used to

stay with her during Saleshni's younger days and Saleshni only calls Sunita "mosi" meaning Aunty.

84. Sunita Devi then called her sister Lalita Devi (PW1) and informed to come as her daughter shouting and yelling for help for someone to save her. Lalita after receiving the call from her sister Sunita went outside of her home and into her compound and suddenly saw Sunny Ritesh rushing down the hill and jumped and landed close to her compound. Lalita Devi said that Sunny Ritesh was about 7 to 8 meters away from her when she asked Sunny where is her daughter Saleshni. Sunny replied that **he had assaulted her and threw her near a mango tree**. Lalita then called Binnu and relay the information to him. Later Lalita Devi went to the scene where Saleshni was lying and saw her daughter severely injured.
85. Diveshni Devi (PW2) also gave evidence and stated that she is the daughter of the complainant Saleshni Devi. She stated that on the morning of the 15th of July 2020 she was at the passage of the house when she saw the accused her stepfather running down the hill. At the sometime she heard her grandmother yelling and shouting.
86. The complainants medical report contains the following;
 - i) Severe head injury – Comatose
 - ii) History of Assault to right side of the Head causing Parietal Hematoma.
 - iii) Base skull fracture injuries noted are recent and consistent.
87. She said a lot of people in the area chased Sunny and caught him. Thus, she went down to where Sunny was held and asked him where her mother is, **Sunny replied that he had assaulted her and threw her away**. Hence, she looked for mother and she heard someone calling "we have found Barbie" she said Barbie is her mother's nick name.
88. She said she went to the scene and saw her people pulling her mother out of a big deep hole underneath a mango tree.

Prosecution closes its case.

89. At the end of the Prosecution's case, Defence Counsel made an application for no case to answer on both counts of the information on Attempted Murder and Breach of Domestic Violence Restraining Order. Upon analysis prosecution evidence and after applying law and the "test" for no case to answer I find that there is reliable and admissible circumstantial evidence to prove all elements of the offence of one count of attempted murder and one count of Breach of Domestic Violence Restraining Order. The accused has opted to give evidence in support of his case.

DEFENCE CASE

90. The accused Sunny Ritesh Nand gave evidence and said in 2020 he resides at Kulukulu in Sigatoka. He said that Saleshni the complainant was his defacto partner for 10 years. He said he could not remember when the relationship started.

91. He recalls on the 15th day of July 2020 he was at complainants place in the morning. He said the complainant called him on phone to come to her place. He said she wants to speak to him about something.
92. He received the call at 5.00am on that morning and also left in a taxi at that time to go to Saleshni's place at Bilalevu Settlement. He said he was aware of the DVRO between Saleshni and himself at that point in time. He said he is a mechanic by profession and if he has a job in Kulukulu he stays there but if a job in Bilalevu than he goes there.
93. He said he cannot recall at what time he arrive at complainant's place. He said from Kulukulu to Bilalevu is almost 1hour is the travelling time. He said as he went her place she hugged him tightly. He said the complainant Saleshni told him that they go to the goat shed a seat down and sleep there.
94. He said that the goat shed is after a blue drum, there is a bit of hilly area and after the hilly area there is a flat area and there is a goat shed. He said that the goat shed is an open area with iron roof. He said the goat shed is about 8 meters away from Saleshni's place.
95. He said the goat shed is located after the chicken shed going up. He said when they reach the goat shed Saleshni told him to come and sleep with him, she don't know when he will come back.
96. He said he slept with her. He said they had slept about half an hour at the goat shed. He said they them left for the blue drum and Saleshni told him to wait while she brings his working tools. As soon as she left Binnu's van came and Binnu ask him what you are doing here. He said he told Binnu that Saleshni called him to come and take his tools.
97. He said Binnu and Robin started beating him up. Shaleshni upon her return ask why are they beating him. He said they were hitting him with fists, leg and a piece of wood. Robin was holding the piece of wood.
98. He said Robin was about to hit him with a piece of wood at the same time Saleshni went in front and she was hit with same piece of wood. He said they loaded her in the vehicle and they brought him down on the tarseal road. He said they took him down using the same road which was going up to Saleshni's house.
99. As they reach on the main road the police came and took him in their vehicle and escorted him to Sigatoka Police Station. He said whilst Robin and Binnu were assaulting him he did not see any lady there or even Lalita.
100. She said when they struck saleshni she yelled out saying Baba they are assaulting me. He said whatever all happened it happened in front of Saleshni Devi's house.
101. He said he tried to escape from them at the complainant's house but he couldn't because there was eight of them. He said he was unable to escape from them to go down to the road.

102. In cross-examination he said at that time he went to Bilalevu settlement. He said he knew he was on bail. He said the DVRO condition allow him to stay at Bilalevu but not to do anything to Saleshni. He denied taking Saleshni away from her home and into the bushy area. He denied taking saleshni and hit her head multiple times with a piece of timber accusing serious traumatic injuries. He denied whilst Saleshni was bleeding he had thrown her into the ditch and ran away.
103. He said he did not escape or run. He said they assaulted him first he never assaulted her.

ANALYSIS

104. The prosecution submits that on the 15th of July 2020 the accused Sunny Ritesh Nand had intended to kill the complainant by severely assaulting her multiple times causing her severe blunt force traumatic injuries to the head. The accused then threw the complainant into a ditch near the mango tree at remote place at Bilalevu settlement.
105. At that time the accused was on bail in another matter (whereby the complainant was same as in this matter) and there was an interim DVRO for the protection of the Complainant. The accused was discovered around the crime scene fleeing and running away by the complainant's mother, Lalita Devi and Diveshni Devi the complainant's daughter.
106. Thus, the incident was first discovered by the Complainant's Aunt Sunita (Devi) who heard and recognized the voice of the complainant yelling and shouting for her aunt and her cousin brother to save her from the accused
107. It was also submitted when the accused ran fleeing away from the scene he was seen by Diveshni Devi at the back of the complainants house descending down the hill towards her Lalita grandmother's house. She said at that same time her grandmother was outside her compound yelling.
108. The Prosecution submits that Sunita Devi the complainant's aunty made a phone called to Lalita Devi that her daughter is in great danger and for someone to save her and for Lalita to come. After the call from Sunita, Lalita went out to her compound.
109. Furthermore, when Lalita Devi was standing at her compound she saw the accused descending down the hill and was standing beside her house. Further she said that she asked the accused saying "*where is Saleshni?*". Accused answered saying "*he had assaulted her and threw her under a mango tree*". She said the accused was in a rush and it was around 7.00am.
110. Prosecution further submitted that Diveshni Devi clearly saw the accused running down the hill close to back of her home. She said there was no obstruction to her view and the accused was about 8 to 10 meters away from where she was standing. Later she heard her grandmother Lalita Devi (PW1) shouting and yelling from her compound.

111. Thus the witness said the man in her area were able to grab the accused and at the same time she proceeded down her driveway to where the accused was and she asked him as to where her mother was. Diveshni Devi asked the accused several times and then the accused replied that *“he had assaulted her and threw her under the mango tree”*. She said they started to look for her mother and she heard a voice saying *“We have found “Barbie”* which is her mother’s nickname.
112. The prosecution submit that Diveshni Devi went to the scene where her mother was lying. According to her it was a big deep hole under a mango tree. She said that they manage to pull her mother out and blood was coming out of her mouth and they rushed her to the hospital.
113. The Defence case is that the accused admitted that he was at Saleshni’s residence that morning on the 15th of July 2020. According to the accused the complainant told him that they go the goat shed and to sit down and sleep there.
114. He said the goat shed is after the blue drum a bit of hilly area. He said that the goat shed is a flat open area with iron roof. According to him he had slept with her there about half an hour.
115. The defence submits that after they had rested Saleshni told him that he should wait and she will bring his working tools. According to the accused as soon as the complainant left, Binnu’s van came and Binnu asked him *“what are you doing here”*. He said Binnu and his men started to beat him up and hit him with a piece of wood.
116. According to the Defence Robin one of Binnu’s man was holding a piece of wood. Robin was about to hit him at the same time Saleshni went in front of the accused and the piece of wood landed on her. They loaded her and they brought the accused down the tarsals road, using the same road which was going up to Saleshni’s place. He said he could not escape from Saleshni house as there were eight of them.
117. The evidence for the prosecution and the accused seemed to agree that the accused was present at Saleshni’s house on the 15th of July 2020. However, there was a difference altogether on where the incident of assault had taken place as well as what has transpired before, during and after the alleged place of assault.
118. Obviously, the evidence of the three prosecution witnesses are consistent reliable and credible. All three witnesses submitted when they arrive at the scene they saw the complainant lying a ditch hole under a mango true where she was pulled out of the ditch by Mr. Binnu and party. The medical report pointed out the following severe head injuries of the complainant;
- i) Severe head injuries – comatose state with GCS
 - ii) History of assault to the right side of the head causing right parietal Hematoma
 - iii) Base skull fractures injuries are noted recent and consistent.
119. The prosecution is asking this court to consider the following ;i)the admissions of the Diveshni and Lalita Devi saying that the accused had assaulted the complainant and threw her into a ditch under a mango tree, ii) and also consider the same with the evidence of Diveshni Devi and Lalita Devi who saw the accused running and rushing away from the area close to the scene that morning and (iii) consider the

evidence of Sunita Devi who had heard the voice of Complainant shouting and yelling saying “Mosi” meaning *aunty please save me Ritesh is hitting me*” when she ran closer to where the voice was coming from again she heard the voice continue to come saying “*aunty save me*” ‘*Papua*” *sunny Ritesh nickname is hitting me , brother Robin save me*”. (iv) Also consider the medical report of the complainant who was examined soon after the incident. The injuries were serious head injuries and fractures on the base of the skull which had led to the accused to Coma and admitted in hospital for over a month.

120. Prosecution submits that the circumstantial evidence of its witnesses were interlinked and very strong. The admissions made by the accused to the two witnesses that he had assaulted the complainant and threw near a mango tree were made right in front of witnesses’ face which also alerted the two witnesses to search and look for the complainant in the area. The complainant was found not moving and semi unconscious by the three witnesses lying in a ditch near a mango tree on a remote area part of Bilalevu settlement.
121. Prosecution submits that the semi unconsciousness condition of the complainant, the admissions made to the prosecution witnesses by the accused, the accused fleeing and running away from the scene, the serious head injuries noted in the medical report without any doubt draw an irresistible inference that the accused had intended to kill the complainant Saleshni Devi.
122. The defense version was totally different from the prosecution. Thus the evidence presented was that the scene of the incident was at Saleshni Devi’s Compound. The assault directed to the accused had missed and landed on the complainant Saleshni.
123. The accused was escorted to the main road following the road that leads to Saleshni’s residence. The Defence submits that he was not running away or fleeing from the scene. The Defence in their evidence has failed to rebut the admissions it made to Diveshni Devi and Lalita Devi.
124. It seems that the defence is agreeing to two versions of where the offence was committed, the first is at Saleshni Devi’s Residence. The second is that they have admitted to the agreed facts that on the 15th of July 2024 the complainant in this case Saleshni Devi also known as “Babi” was found in a ditch near a mango tree and was there after picked up and transported to Sigatoka Hospital.

CRIME SCENE VISIT

125. This Court had visited the crime scene at Bilalevu Settlement, Sigatoka together with the both counsels, the witnesses and the accused. The purpose of the scene visit was to give a clear picture to the court on the landscape outlook and features of Bilalevu Settlement. The crime scene visit was also made due to uncertainty of the locations of the witnesses’ residence, the crime scene was also to pinpoint the places where the accused was seen fleeing and running away by the witnesses.

Second Count: Breach of Domestic Violence Restraining Order

126. As for the second count. Both parties have tendered by consent a copy of the interim Domestic Violence Restraining Order number 62 of 17 and copies of work emails in

support of the prosecution case. The accused has breach such order by committing this offence against the complainant.

DETERMINATION

127. I wish to 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.
128. The Court has heard both the evidence of the prosecution and the defence. Prosecution is relying solely on strong circumstantial evidence. The accused totally denied the charge against him. For this court to come to a decision it is important to consider all the evidence holistically.
129. In respect of all the evidence presented I accept the version of the three prosecution witnesses together with the Police medical examination Report tendered by consent of both parties as credible, reliable and consistent to each other.
130. The issue in this case is whether the accused intended to kill the complainant by his conduct and what he did was more than merely preparatory. I accept the evidence of prosecution witness 3 Sunita Devi that she recognized the voice of her niece the complainant saying “aunty save me Ritesh is hitting me” when she ran closer to where the voice was coming from again she heard the voice continue to come saying “aunty save me” ‘Papua” sunny Ritesh nickname is hitting me, brother Robin save me”. She had called Lalita Devi on her mobile the mother of the complainant to come as her daughter was yelling and shouting for someone to help and save her.
131. I accept the version of the first prosecution witness Lalita Devi as truthful and reliable. She told the truth when she told the court that when she went out to her compound that morning at about 7.00am after receiving the call and she saw the accused coming down the hill and standing beside her house she asked him where is her daughter and the accused said he had assaulted her and threw her near a mango tree.
132. I accept the version of the second prosecution witness Diveshni Devi that she saw the accused running down the hill and was in a rush. Later the accused made similar admission to her after she had continuously questioned the accused as to the whereabouts of her mother the complainant. The accused person also told the second witness that he had assaulted the complainant and threw her near the mango tree. All three witnesses later saw the complainant lying in a ditch near a mango tree.
133. The injuries in the complainant’s medical report also supports the account given by the three witnesses. The medical report was tendered in by consent as part of the prosecution evidence. The doctor’s professional opinion column listed out his findings as follows;
 - i) Severe head injuries – comatose state with GCS
 - i) History of assault to the right side of the head causing right parietal Hematoma.

ii) Skull Base fracture are noted recent and consistent.

134. I reject the evidence of denial of the accused that he denied assaulting the complainant. I refuse to accept his denial as it was not credible and unreliable. I have watched his demeanor, he was evasive and he was untruthful. I accept the evidence of all the prosecution witnesses as honest, reliable and credible. All three prosecution witnesses gave an honest account of what they saw and heard from the accused and the complainant on the 15th of July 2020. Prosecution witness three also gave an honest account on how she recognize the voice of the complainant.

135. Obviously, the circumstantial evidence arising from the evidence of Sunita Devi, Lalita Devi, Diveshni Devi and the serious head injuries in the medical report of the complainant without any doubt draw an irresistible inference that the accused had intended to kill the complainant Saleshni Devi on the 15th of July 2020.

CONCLUSION

136. 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 15th July, 2020, had **attempted to murder** Saleshni Devi by assaulting her severely on her head causing severe head injuries and fractures on the base of her skull and threw the said Saleshni Devi into a ditch near a mango tree was more than merely preparatory.

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.

137. As for the second count this court after considering the evidence tendered by consent by both the prosecution and the defence a copy of the interim domestic violence restraining order No. 62 of 17. The accused has breached; the same by committing the offence above.

For the above reasons the accused is found guilty on the second count of **Breach of Domestic Violence Restraining Order** and convicted him accordingly for the same.

This is the judgment of the court.



At Lautoka
20th May, 2024


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Sekenaia. Vodokisolomone
Acting Puisne Judge