

IN THE HIGH COURT OF FIJI
AT LABASA
CRIMINAL JURISDICTION

Criminal Case No. HAC 85 of 2024

STATE

-v-

VISHWA NAND

Counsel: Ms. E. Thaggard for the State
Mr. A. Sen for the Accused

Date of Trial: 8 April – 10 April 2025

Date of Judgment: 19 May 2025

JUDGMENT

1. As in this case, it is not uncommon for trials involving allegations of domestic violence to take an unexpected turn.
2. On 19 May 2024, Mr. Vishwa Nand (“the accused”) volunteered to drive his wife, Asmin Lal (“Asmin”), to a priest to have her yellow fever “*blown*” (a traditional ritual). During that journey, both his wife and his mother-in-law, Sarda Devi (“Sarda”), fell from the accused’s moving vehicle and suffered very serious injuries.
3. This distressing incident led to the accused being charged, as per an Amended Information filed by the Director of Public Prosecutions as follows:

AMENDED INFORMATION BY THE
DIRECTOR OF PUBLIC PROSECUTIONS

Vishwa Nand is charged with the following offences:

COUNT ONE

Statement of Offence

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

Particulars of Offence

VISHWA NAND on the 19th day of May, 2024, at Bocalevu, Labasa in the Northern Division, without lawful excuse, with intent to cause alarm, threatened to kill **ASMIN LAL**.

COUNT TWO

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS: Contrary to Section 255 (a) of the Crimes Act 2009.

Particulars of Offence

VISHWA NAND on the 19th day of May, 2024, at Bocalevu, Labasa in the Northern Division, with intent to cause some grievous harm to **SARDA DEVI** unlawfully wounded the said **SARDA DEVI** by refusing to stop his motor vehicle whilst she was getting of the vehicle and running over her leg with the motor vehicle.

COUNT THREE

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS: Contrary to Section 255 (a) of the Crimes Act 2009.

Particulars of Offence

VISHWA NAND on the 19th day of May, 2024, at Bocalevu, Labasa in the Northern Division, with intent to cause some grievous harm to **ASMIN LAL** unlawfully wounded the said **ASMIN LAL** by pushing her out of his moving motor vehicle.

Prosecution Case

4. As opened by Ms. Thaggard, the prosecution case was that, on 19 May 2024, the accused picked up Asmin and Sarda from his brother-in-law's house in Tuatua and drove them towards Bocalevu. There was an exchange of words between the accused and Asmin in the course of which he punched and threatened her (count one).
5. Sarda intervened in support of her daughter and, when he failed to desist, she asked the accused to stop the vehicle. He slowed down and, as Sarda was in the process of alighting, he sped away causing her to fall, and the wheel of the vehicle drove over Sarda's left leg (count two). As Asmin opened the door of the vehicle, the accused pushed her out, as a result of which she suffered serious injuries (count three).

Prosecution evidence

6. Sarda is 69 years of age and lives with her son in Suva. In May 2024, she travelled to another son's place in Tuatua. Asmin was sick with yellow fever, and the arrangement was that her brother was going to drive her and Sarda to a priest for a ritual to be performed to cure her yellow fever. As they were preparing to leave, the accused rang and offered to drive them to the priest. He arrived in his twin cab. Asmin sat in the front passenger seat and Sarda sat behind her.
7. The accused said to Sarda that Asmin was pretending to be sick. He was slapping Asmin, and Sarda told him not to hit her as she was sick. The accused diverted towards his house and she asked him to stop the vehicle. She thought that he had stopped the vehicle and she tried to get out as it was moving very

- slowly. Her foot got caught. She had one foot on the ground and she fell when the accused drove away. The wheel went over her left leg.
8. The reason she wanted to get out of the vehicle was because the accused was saying that she was influencing Asmin to leave him. Sarda got angry when he called her a female dog.
 9. Sarda called her son to pick her up and, as she was waiting, she saw the accused lifting Asmin from the road and putting her in his vehicle. He then drove towards Bocalevu.
 10. When her son arrived, she told him to go and get his sister. After about 10 minutes, he returned with Asmin, and they went to Labasa Hospital. She was admitted for 9 days and Asmin was admitted for around 16 days.
 11. The accused is her brother's son. She has known him since childhood. He has been married to her daughter for about 25 years. She identified him in court.
 12. Under cross-examination, Sarda agreed that she got angry about what the accused said to her in the vehicle. She also agreed that they wanted to go to get the yellow fever blown, but the accused wanted to take Asmin home.
 13. When it was suggested to her that the road that goes to Bocalevu is a very bumpy gravel road with big potholes, she agreed. She said that the accused was steering the car too fast. She told him to slow down as she wished to get out. She thought she could get out because the car was going really slow. She felt like it stopped. Sarda agreed with Mr. Sen that the twin cab door is very heavy and said that it is quite hard to open and close. She fully opened the door, put her leg down, and the accused started driving off. Sarda said that she did not know whether the accused was aware that she was trying to get out of the vehicle.
 14. When it was put to Sarda that the accused had not hit Asmin, she said that he had hit her. When it was put to her that the accused never called her a female

dog, she replied that he had said it on that particular day and that is the reason she got really angry and upset.

15. Asmin testified that she was staying at her brother's place in Tuatua in May 2024. On 19 May 2024, she had an appointment to have her yellow fever blown. Her brother was going to take her there, but the accused said that he would take her. He picked her up around 3pm. Her mother went with her. On the way to the appointment at Qeleqa, the accused said that they should go home. When she asked the accused why they couldn't go to Qeleqa as she was sick, he said they would go home because she was not sick. When he started to get angry, she asked him to just drop them.
16. After her mother fell from the vehicle, she got afraid that the accused may assault her. She opened the door. The accused pulled her to stop her jumping from the vehicle, but she fell from the vehicle.
17. When asked by Ms. Thaggard whether she was having difficulty remembering the incident that day, Asmin said she had forgotten most of the things. She remembered that she had made a statement to police after her discharge from hospital, the content of which had been read and explained to her before she signed it. When she was shown her statement, however, it became apparent that it was recorded in the English language, a language she could not read. This created a problem for the prosecution because the written statement was obviously of no use for the purpose of refreshing Asmin's memory.
18. In fairness to the prosecution, and in the interests of justice, I permitted the prosecution to read extracts from the written statement, which were interpreted to Asmin, who was asked whether she could remember telling the statement taker those things.
19. Asmin said that she remembered telling the police some of the things interpreted to her, but did not tell the police some of the things recorded in her statement.
20. Under cross-examination, Asmin agreed that an issue arose between the accused and her mother on the journey to Qelaqa. Her mother did not want to

go to their home at Bocalevu. It was a small argument with no swear words or vulgarity. Her mother told the accused to stop the vehicle as she wished to get out.

21. The vehicle slowed, but did not stop. Her mother fell from the vehicle and the accused drove on for some distance. Asmin agreed with Mr. Sen's suggestion that she was trying to get out of the vehicle and the accused was trying to stop the vehicle and hold her back. Despite the accused trying to hold her back, she fell from the vehicle. Asmin also agreed with Mr. Sen's suggestion that the accused did not assault her inside the vehicle. She did not hear the accused call her mum a female dog.
22. When re-examined about the contradictions between what she had said in examination-in-chief and cross-examination, Asmin stated that whatever she told Mr. Sen was the truth.

Medical Evidence

23. Dr Deepika Ashwini was on duty as a Medical Officer at Labasa Hospital Emergency Department on 19 May 2024. She examined Sarda Devi at 6.50pm. Her left leg was swollen and tender. The blood vessels had burst under her skin. In her opinion, it would have required a very heavy force to be applied for the blood vessels to be burst inside the skin and the muscle and to cause such a big swelling and hematoma. Sarda's injuries were consistent with the history provided that a tyre had run over her leg.
24. Sarda was in severe pain and needed to be referred to the Surgical Registrar because of the risk of compartment syndrome – high pressure inside the muscle which can cause paralysis. Without surgical intervention, there was a risk of paralysis and potentially amputation. Surgery was performed under general anesthesia. The Police Medical Examination Form was adduced as prosecution exhibit "PE-1".
25. Under cross-examination, Dr. Ashwini confirmed that the injury suffered by Sarda was not a wound, but it was serious harm.

26. Dr Asahel Kishor was on duty as a Medical Officer at Labasa Hospital Emergency Department on 19 May 2024. He examined Asmin Lal from 4.47pm to 7pm. X-rays confirmed that she had sustained a fracture of her right thigh. She had a rod fitted by the orthopedics team to stabilize the bone. She also suffered a fractured pelvis. Dr Kishor said that this injury can be fatal. The Police Medical Examination Form was adduced as prosecution exhibit "PE-2".
27. At the close of the prosecution case, I allowed an application to amend counts two and three, the amendment being necessitated by the medical evidence that Sarda and Asmin did not suffer wounds. The particulars were amended to plead that they were caused grievous harm.

No case to answer submission

28. At the close of the prosecution case, Mr. Sen made an application pursuant to section 178 of the Criminal Procedure Act.
29. Mr. Sen submitted in relation to count two that Sarda testified that the accident was not the fault of the accused.
30. As to count three, Asmin gave contradictory evidence. She agreed that the accused was trying to stop the vehicle and hold her to stop her falling out of the vehicle.
31. I found that there was no case to answer on count one.
32. It appeared to me that a case was made out sufficiently to require the accused to make a defence on count two and count three.
33. The Court gave the accused his options and he elected not to give evidence or call any witnesses for the defence.

Closing submissions

34. In her closing speech, Ms. Thaggard submitted that due to her inconsistency Asmin's credibility was substantially undermined. Ms. Thaggard invited the Court to accept Asmin's testimony only to the extent that it was consistent with Sarda's evidence.

35. Ms. Thaggard further submitted that the Court may draw appropriate inferences from the evidence of the surrounding circumstances resulting in serious bodily harm being caused to both Sarda and Asmin.
36. In relation to count two, Ms. Thaggard submitted that the accused's deliberate act in driving away before Sarda had fully alighted from his vehicle constituted an unlawful act, namely assault.
37. Ms. Thaggard invited the Court to infer from all the surrounding circumstances that the accused must have intended to cause Sarda really serious bodily harm.
38. In relation to count three, Ms. Thaggard also invited the Court to draw an inference that the accused had committed an unlawful act with the specific intent of causing Asmin serious harm from the evidence that Asmin had fallen from the vehicle and the accused picked her up and drove towards their home rather than to the hospital.
39. Ms. Thaggard's fall-back position was that, in the event the Court was not satisfied that the prosecution had proven the fault element of the section 255 Crimes Act offences, the Court may find the accused guilty of the lesser offence of doing grievous harm to Sarda and Asmin, contrary to section 258 of the Crimes Act.
40. In his comprehensive oral and written submissions, Mr. Sen maintains that the prosecution has failed to make out both the physical and the fault elements of the section 255 Crimes Act offences.
41. Mr. Sen submitted that in order to prove the physical element, the prosecution would have to prove that:
- "a) The accused was driving on an empty road or had enough distance from other drivers whereby in immediately stopping the moving vehicle, he would not impede or be a danger to other drivers on the road;*
 - b) The accused had a reasonable amount time to stop the moving vehicle before both the victims jumped out of the moving vehicle;*

- c) *It would have been unreasonable to not stop the vehicle before the victims jumped considering the commotion and irrational activity that the accused was subjected to when the alleged offence occurred;*
 - d) *There was a reasonable amount of time for the accused to consider the rules set out in **LTA** and then make observations of his surroundings so that he could comply with the **LTA** and not endanger the public;*
 - e) *It would have been safe for the accused, the victims, other road users, and the public for the accused to immediately stop the moving vehicle; and*
 - f) *Immediately stopping the vehicle would not breach any rules of the **LTA**.”*
42. In a nutshell: *“The injuries sustained by the victims were a result of their misadventure whereby they intentionally took a serious risk and it did not work out in their favour”.*
43. As for the fault element of specific intent, the accused could not foresee the harm caused to Sarda as she had jumped from his moving vehicle: *“There is also no evidence to prove that the accused in any way shape or form specifically intended to cause grievous harm to Asmin Lal and that intention was as serious and vicious as that of a murderer.”*
44. Mr. Sen accepts that the Court is empowered to consider a lesser charge pursuant to section 160 of the Criminal Procedure Act. However, he contends that the prosecution have failed to make out any lesser offences: *“The defence contends that the accused should not be charged with any offence and that at best the prosecution could find the accused being in breach of section 268(a) of the CA.”*

Directions/Warnings

45. To establish count two the prosecution must prove beyond reasonable doubt that the accused deliberately did an act which caused really serious bodily harm to Sarda and did so with the specific intent of causing her really serious bodily harm.

46. To establish count three the prosecution must prove beyond reasonable doubt that the accused deliberately did an act which caused really serious bodily harm to Asmin with the specific intent of causing her really serious bodily harm.
47. For both counts, the issue is a straightforward one of causation. Did the injury result from the act of the accused? There is no requirement of physical contact between the accused and the complainants.
48. The prosecution must prove that the accused is guilty. The accused does not have to prove anything to me. The defence does not have to prove that the accused is innocent. The prosecution will only succeed in proving that the accused is guilty if I have been made sure of his guilt. If, after considering all of the evidence, I am not sure that the accused is guilty, my verdict must be not guilty.
49. The accused elected not to give evidence in his own defence. That is his right and I must not draw any adverse inference against him for exercising that right.

Analysis and determination

50. It is the experience of the courts that it is far from uncommon for the complainant in a domestic violence case to withdraw support for the prosecution, or to depart at trial from an earlier complaint made to the police. When this happens, the prosecution is in a difficult position, particularly in a case such as this where the prosecution case is heavily reliant on the view the Court takes of the complainant's credibility and reliability.

Count Two

51. Sarda gave straightforward and unembellished evidence about what occurred inside the accused's vehicle both before and at the time she fell from the vehicle. Indeed, she was prepared to go along with much of the defence narrative suggested to her by Mr. Sen.
52. There is the ring of truth about the accused's simmering resentment of her relationship with Asmin. It is not in dispute that the accused departed from the arrangement to drive Asmin and Sarda to the priest for a ritual to cure Asmin's

- yellow fever. It is only natural that emotions were heightened when the accused berated his mother-in-law/aunty and cursed her as a female dog. I note that Asmin sought to play down the heat in that argument, but that was in stark contrast to defence counsel's line of questioning that served to emphasise that Sarda became extremely angry. I reject Asmin's evidence that it was a small disagreement with no vulgarity. Were that the case, there would have been no reason for Sarda to have become so angry and to insist on immediately getting out of the car.
53. I find Sarda to be an honest and reliable witness. Indeed, there is not really much in dispute about her version of how she came to be seriously injured as she endeavoured to get out of the accused's twin cab. The defence did not challenge that she had asked the accused to stop the car. Likewise, the defence embraced that Sarda had opened the car door and stepped out of the vehicle whilst it was still moving at a very slow speed.
54. The key point of difference, of course, is that Sarda maintained under cross-examination that the accused drove away before she had fully exited his vehicle. The defence has not adduced any evidence to contradict Sarda on this central issue. Only the accused could speak to whether he was aware that Sarda had not fully exited the vehicle before he accelerated away. To my mind, the only reasonable inferences from Sarda's evidence are that: (i) the accused must have known that she wished to get out of the vehicle (that is why he slowed to a crawl); (ii) he must have been aware that Sarda had opened the heavy rear door; (iii) he must have been aware that the heavy rear door remained open at the point he decided to accelerate away.
55. The key issue for my determination in relation to count two is whether by deliberately accelerating away before Sarda had fully and safely alighted from his vehicle – an act that irrefutably caused her really serious harm – the accused intended to cause her really serious harm.
56. I have no doubt that the accused was riled up by his argument with his mother-in-law/aunty. I am sure that he deliberately accelerated away knowing that

Sarda had not fully exited his vehicle. I cannot, however, be sure that, in that moment, he intended to cause Sarda really serious harm.

57. It follows that I must find him not guilty of the offence of act with intent to cause grievous harm.

58. That, however, is not the end of the matter. I agree with Ms. Thaggard's submission that the offence of grievous harm, contrary to section 258 Crimes Act 2009, is an available alternative. The rationale for considering a lesser alternative is that the public interest in the administration of justice will be best served by the court considering any obvious alternative offence to the offence charged which there is evidence to support.

59. Section 258 Crimes Act 2009 provides that:

"258. A person commits an indictable offence (which is triable summarily) if he or she unlawfully and maliciously does grievous harm to another person."

60. Maliciously means an actual intention to do the kind of harm that was done, or recklessness as to whether such harm should occur. It is enough that the accused foresaw that some physical harm to Sarda might result from his action.

61. I am sure that the accused intentionally drove away and, in doing so, he intended to cause Sarda some physical harm, albeit not really serious bodily harm (were I sure that he intended to cause her really serious harm, the only verdict properly open to me would be guilty of the section 255 Crimes Act Offence).

62. Mr. Sen has endeavoured to persuade me that Sarda was the author of her own misfortune, and that the injuries resulted from an accident for which his client bears no responsibility whatsoever. I reject that characterisation of the offence. Sarda may well have made a rash decision in attempting to alight from the vehicle before it had fully stopped, but there is no doubt in my mind that it was the accused's intentional driving away in the knowledge that Sarda had not fully exited his vehicle that caused her really serious bodily harm.

63. I find the accused guilty of unlawfully and maliciously causing grievous harm to Sarda, contrary to section 258 of the Crimes Act and I convict him accordingly.

Count Three

64. On the face of it, Asmin's account of having voluntarily thrown herself out of a moving vehicle seems unlikely.

65. Sarda's evidence provides the context for the circumstances in which both she and Asmin came to be seriously injured by falling from the vehicle driven by the accused.

66. Asmin testified that she opened the front passenger door because she was scared. It must, of course, have been Asmin who opened her door. It is likely that she did so because she was scared. After all, she had just experienced her mother falling from the moving vehicle.

67. Having carefully considered all the evidence, particularly Asmin's testimony that the accused was trying to prevent her falling from his moving vehicle, I cannot be sure that the accused did an act causing grievous harm to Asmin.

68. I find the accused not guilty of count three and acquit him accordingly. Since I cannot be sure that the accused did a deliberate act causing grievous harm to Asmin, an alternative verdict of guilty to an offence contrary to section 258 Crimes Act 2009 is not open to me.

69. 30 days to appeal to the Court of Appeal.




Hon. Mr. Justice Burney

At Labasa

19 May 2025

Solicitors

**Office of the Director of Public Prosecutions for the State
Sen Lawyers for the Accused**