

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

Criminal Case No. HAC 407 of 2022

BETWEEN : **STATE**

AND : **DEEPAK YOGESH CHAND**

Counsel : Mr T Naimila for State
Mr S Kumar & Ms S Prasad for Accused

Hearing : 16 & 17 December 2024

Closing addresses : 17 December 2024

Judgment : 4 February 2025

JUDGMENT

[1] The accused, Deepak Yogesh Chand, is charged with the following offence:

Statement of Offence

***ACTS WITH INTENT TO CAUSE GRIEVOUS HARM:** Contrary in section 255(a) of the Crimes Act 2009.*

Particulars of Offence

***DEEPAK YOGESH CHAND** on the 13th of August 2022 at Savutalele Settlement, Tacirua in the Central Division, with intent to cause grievous harm to **JOVESA TEMO** stabbed **JOVESA TEMO** in the chest with a knife.*

[2] The accused denies having committed the offence.

Acts with intent to cause grievous harm

[3] Section 255(a) of the Crimes Act 2009 reads:

A person commits an indictable offence if he or she, with intent...to do some grievous harm to any person...-

(a) unlawfully wounds or does any grievous harm to any person by any means;

[4] The following definitions under s 4 of the Crimes Act are relevant here:

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

Harm means any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time).

Harm to a person's mental health includes significant psychological harm, but does not include mere ordinary emotional reactions such as those of only distress, grief, fear or anger.

Wound means 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.¹

¹ My underlining.

[5] To establish the accused committed an offence under s 255(a), the prosecution must prove, beyond reasonable doubt, each of the following elements:

- i. the accused intended to cause grievous harm to Jovesa Temo; and
- ii. did so unlawfully wound Jovesa Temo.

Burden of proof and assessment of the evidence

[6] The accused is presumed to be innocent until he is proven to be guilty. As a matter of law, the onus or burden of proof rests 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.

[7] The burden is on the prosecution to prove the charges beyond reasonable doubt. Each element of the charge must be proved but not every fact of the story. If there is a reasonable doubt, so that the Court is not sure of the accused's guilt, or if there is any hesitation in my mind on any of the elements, the accused must be found not guilty of the charges and, accordingly, acquitted.

[8] The accused chose to give evidence, but he does not carry any burden to prove or disprove anything. The burden remains on the prosecution to prove his guilt beyond reasonable doubt.

Evidence²

[9] The parties filed the Admitted Facts on 29 July 2024. It is admitted that the accused is a taxi driver and was at Savutalele Settlement on 13 August 2022 in order to pick up Jovesa Temo and three others. The medical report for Jovesa Temo dated 13

² The transcript of the evidence at trial is incomplete. The recording for part of the evidence of PW1 (ie part of his cross examination and all his re-examination) and all the evidence of PW2 cannot be located. Also missing is the recording for part of the accused's examination in chief and all of his cross examination. I have relied on my own notes during trial for this evidence.

August 2022 was to be produced by consent on the basis that the contents were not in dispute. However, the prosecution sought to produce a copy of the medical report at trial (the prosecution could not locate the original report) and, as such, the defence objected to its admission in evidence. The result was that the medical report was not produced.

Prosecution case

[10] The prosecution called 4 witnesses, namely:

- PW1 - Jovesa Temo
- PW2 - Sakaia Samisoni
- PW3 - Mavoia Ilaijia Samisoni
- PW4 - Dr Amangela Chand

[11] PW1 is the complainant. He resides at Savutalele Settlement. His evidence in examination in chief was as follows:

- i. At about 3pm on 13 August 2022, his father (PW3) called a taxi so that he, his younger brother (PW2), and two cousins (Joeli Ledua and Sisalo Vakalawe) could travel to Suva to collect pigs food. When the taxi arrived, he, PW2 and Joeli sat in the back seat of the taxi whilst Sisalo sat in the front passenger seat. PW1 sat immediately behind the taxi driver (the accused), Joeli sat in the middle and PW2 sat on the other side. The taxi was about 100 metres from his house
- ii. As soon as PW2 got into the taxi he pressed the window button several times making the window go up and down. According to PW1 *'that's where the problem start'*. PW2's actions made the accused angry. The accused told PW2 off, asking who was going to pay for the window if PW2 broke the window, *'your father or you'*. This, in turn, made PW1 angry. PW1 states, *'I swear at him [the accused] and I said we don't want to board [the accused's] taxi and we getting off, so we got off. I opened the boot, I took out the bag'*

- iii. The accused also got out of the taxi and yelled out to PW1's father.
- iv. According to PW1, as they were all standing around the taxi, the accused went back to the driver's door and grabbed a small knife from inside the taxi. PW1 described the knife as being about 6 inches in length with an orange handle. PW1 states, *'he took out a small knife, a orange knife with the cover, he pulled out the cover, he was looking at us and us gang we screaming at him we don't want to board your taxi. he was still standing there and looking at us'*. According to PW1, his younger brother then tried to disarm the accused. PW1 states, PW2 *'came in front... he wanted to take out the knife. and then Deepak wants to stab him. And then I wanted to stop him, I wanted to stop Deepak. my small brother pushed him...when my small brother pushed Deepak he pushed him towards me. When I went towards Deepak I was doing this [PW1 described raising his hands and arms about chest high in a stopping motion] I wanted to stop him. And when he was pushed, and he turned around with the knife on his right hand and then he wanted to stab me on my ribs. From there I jumped back, and the knife hit my chest'*. PW1 immediately noticed blood on the inside of his shirt. PW1 stated, *'From there, one of my cousin brother [Sisalo] started to punch him [the accused]. after that we started to punch him'*.
- v. PW1 stated that three of the youths punched the accused, being PW1, PW2 and Sisalo. PW1 stated that he hit the accused which caused the accused to fall to the ground and *'the knife was pointing downwards and knife blade hit the cement and that's where the knife broke'*. In addition to punching the accused, the youths grabbed a *'halabala* branch and used it to smack the accused.
- vi. PW1's father, Mayoia Ilaitia Samisoni (PW3), arrived at the scene soon after. PW3 told the boys not to do anything and he wrapped his arms around the accused and placed him inside the taxi. PW1 was then taken to Twomey Hospital, Tamavua, in another taxi. PW1 informed the medical staff of the incident when he arrived. The police were called to the hospital. PW1 was then transported by ambulance to CWM Hospital and was admitted for 2 days.

He identified the accused in the dock as the person who had stabbed him on 13 August 2022.

- vii. At this stage, the prosecution sought to have PW1 identify a knife as being the knife that he was stabbed with on 13 August 2022. The prosecution did not, however, disclose the knife to the defence before trial and after being reminded by the Court of its duty to do so, the prosecution withdrew its application to produce the knife.

[12] In cross examination, PW1 stated:

- i. The mode of payment for the taxi fare was Mpaisa and was to be made by PW3. The agreed fare was \$20. PW1 did not understand that there would be any change returned to PW3 if the fare was less than \$20. The accused required payment be made before taking the passengers to Suva. PW1 was not aware whether his father had already arranged the Mpaisa transfer when he got into the taxi (or when he subsequently got out of the taxi).
- ii. PW1 accepted that while waiting in the taxi he got angry with the accused because the taxi meter had been turned on and the taxi was not moving. He was unable to explain why he was angry given that he understood that the amount of the fare was already agreed. PW1's bag, that was in the boot, contained clothes for PW1 and the other passengers to put on when they collected the pigs food.
- iii. PW1 stated that when the accused grabbed the knife and was staring at them, PW1 felt scared. He accepted that the accused was just standing by the taxi with the knife and not doing anything. They were about 3-5 metres from the accused by the side of the road.
- iv. He agreed that none of them ran away from the accused or called out to PW1's father. PW2 had instead approached the accused. PW1 repeated that when the accused tried to stab his brother, his brother pushed the accused away, PW1 said 'stop, stop' and then the accused turned around and stabbed up into his chest with the knife.

- v. PW2 hit the accused with the balabala branch when he was on the ground. The three (not including Joeli) punched the accused. It was put to PW1 that his evidence regarding the stabbing and the timing of the punches was inconsistent with his written police statement signed on 30 August 2022 which was shown to PW1. PW1 stated that his evidence in court was correct. PW1 did not accept that they took property from the accused such as the accused's phone, driver's license and \$80 cash.
- vi. He agreed that he was arrested by the police on 13 August 2022 and charged along with his brother and two cousins (PW1 was discharged from hospital about 15 August). They appeared at the Nasinu Magistrates Court. PW1 made the complaint regarding the stabbing on 30 August 2022 after he had already been arrested. PW1 stated that he had made the complaint to the police earlier but the police advised him that his case would be dealt with first.
- vii. It was put to PW1 that the accused did not have a knife and did not stab him. PW1 denied this.

[13] In re-examination, PW1 explained that he did not run away when the accused grabbed the knife because the accused was standing in front of their driveway. The charges against him and the other three youths are pending in the Nasinu Magistrates Court.

[14] Sakaia Samisoni, PW2, is 19 years old – and, thus, was 17 years when the incident occurred. His evidence in examination in chief was as follows:

- i. On 13 August 2022, he got into the taxi along with PW1, Sisa and Joeli. He was playing with the window button which angered the accused who told him off. They apologised to the accused but the accused was still angry and 'spoiling' them so they told the accused that they would get another taxi. They then got out of the taxi.
- ii. The accused yelled to PW2's father (PW3) that PW2 and the others did not want to take the accused's taxi. The accused then went to grab his knife from the taxi and stood in front of them with the knife. They were all standing at

the back of the taxi. PW2 moved to get behind the accused. The accused did not initially see PW2 but worked out what was happening. PW2 then grabbed the accused's hands and they tussled with each other, the knife being the focus of their grip. PW2 then pushed the accused towards PW1 who had come toward them to stop them. PW1 was then stabbed in the chest by the accused. PW2 was asked why he tried to disarm the accused, responding that the accused was taking too long to leave.

- iii. They were all shocked by the stabbing because they saw the blood on PW1's chest. PW2 wished to disarm the accused so he grabbed a balabala stick and hit the accused on his back. They then punched the accused. PW2 described the knife as being about 15 to 20 centimeters in length and having an orange handle. He stated that his father arrived on the scene and grabbed the accused, placing him inside the taxi.

[15] In cross-examination, PW2 stated:

- i. He accepted that PW1 swore at the accused in the car but only after the accused had not accepted PW1's apology.
- ii. He was aware when he was in the taxi that his father (PW3) had already arranged the Mpesa transfer for the taxi fare but could not recall how he knew.
- iii. Immediately before the stabbing, the accused was standing by the driver's door holding the knife at his hip but not saying anything. They told him to leave and it was about this time that PW2 decided to creep quietly behind the accused in order to take the knife from him. PW2 stated that he felt scared when the accused was holding the knife and it was only when PW1 saw him struggling with the accused that PW1 tried to stop them and at that stage was stabbed. Asked why he did not call his father before trying to disarm the accused, PW2 stated that the accused had already called his father.

[16] PW3, Mavoā Ilaītia Samisoni, is the father of PW1 and PW2. He is 55 years old, a pig farmer, and has four boys and two girls. His evidence in examination in chief was as follows:

- i. On 13 August 2022, PW3 organised a taxi for his two sons and two nephews to go to the market to collect food for his pigs. They normally collect the food at 2pm – they were running late on this day. The taxi parked at his driveway, on the main road, about 50 metres from his house.
- ii. The boys got into the taxi. He then heard the driver calling his name, *‘Mavoā, Mavoā see what your son has done’*. He looked at the taxi and saw PW1 pulling his bag out of the taxi. The others were standing by the taxi. PW3 told the boys to get back in the taxi as they were already late to collect the pig food.
- iii. At this point PW3 turned away and as he turned back he saw there was a tussle between the boys and the accused. There were punches being thrown. He only turned away for a matter of seconds. He then ran to the scene by which time the tussle had ended. PW3 stated that this also took seconds.
- iv. When he arrived at the scene, the accused was sitting down bloodied and injured. PW1 was standing. PW1 told PW3 that he that he had been stabbed by the accused. PW3 arranged for his son to be taken to hospital in a taxi. PW3 picked up the driver as well as a knife that was beside him. PW3 placed them both in the accused’s taxi. He described the knife as having an orange handle of 5 inches in length and a blade of a similar length. The knife was broken. He accompanied the accused to hospital in the taxi. He stated that he provided the broken knife and the car keys *‘to that taxi driver who took us to Nuffield to the Hospital’*.
- v. On the way to the hospital the accused kept *‘requesting us to resolve the problem. To forgive and reconcile, three times he told me that’*.

[17] In cross-examination, PW3 stated:

- i. He had transferred the \$20 fare to the accused by Mpaisa. The usual fare was about \$12 and he was expecting the driver to provide about \$8 change to his son.
- ii. Before the incident the boys were laughing and happy. When he saw the tussle he ran as fast as he could because *'there's problem with my boys I'm the father'*. By the time he arrived at the scene the tussle and punching had ended. He agreed that the accused was in a worse condition than PW1.
- iii. PW3 was asked why he travelled with the accused and not his son to the hospital. PW3 stated:

Yes, I really want to know why did this happen why did he have to take the knife and knife my child... we fathers its very hard bringing up our children especially boys and we have to know what happen, why did this happen. It was good that he missed the bone it would have gone inside and for you seeing your son to be knifed like that I don't believe it's a good scene, its very bad. Understand please its very bad for you to see your son.
- iv. He was not angry when he arrived at the scene. He saw bloodshed and was concerned for both his son and the accused.
- v. He confirmed the description of the knife he found by the accused. He also confirmed that he gave the knife to the driver of the taxi that drove them to the hospital.

[18] The final witness for the prosecution was Dr. Amangela Chand, PW4. She is a medical practitioner with about five years general practice. On 13 August 2022, she was the emergency doctor at Nuffield Health Centre. She treated both the accused and PW1. With respect to PW1, Dr Chand provided the following description of his condition following her medical examination:

...young male came in complaining about injury on the anterior chest wall. The history that was given to me by him was that he was stabbed. His vitals were all on the normal side. So, blood pressure, oxygen, pulse, temperature: normal.

Communicating, so awake alert, oriented, aware of his surroundings. History given, stabbed by Mr Deepak. Injury on the anterior chest wall below the xiphoid. So the xiphoid is right at the end of the sternum. Around two centimeters in length. So, horizontal injury, two centimeters, around 0.3 to 0.5 millimeters in width, with the deepest width being right to the centre of the wound.

- [19] Dr Chand referred PW1 to the surgical staff to be assessed for any internal injuries. She labelled PW1's injury as a stab wound caused by a sharp forceful penetration to the chest wall. In terms of the extent of the risk of such an injury to PW1, Dr Chand stated:

Any injury to the anterior chest is a basis for referral to the speciality because we know the heart, the lungs, the oesophagus, the aorta, the trachea all lie here. So with the penetrating wound, we would want to see if any blood vessels were leaked, if the lungs are okay, etc etc. So, we have to sort of find out if any of the vital organs that are in the anterior chest wall was affected.

So, it depends. So whatever the object penetrated, so anything in the anterior chest wall, it would have caused, say if it went into the lung it would have caused air to leak out of the lungs and that's called a pneumothorax. Or if it would have hit a blood vessel, it would have caused internal bleeding and then blood would have gone inside the lungs, that's called a hemothorax. Or if the aorta was nicked, then it would cause a major internal bleeding, causing the entire anterior chest wall, internally we call it the mediastinum, to be filled up with blood. Or if the heart was nicked, then that's a hemorrhagic shock.²

- [20] In cross-examination, Dr Chand confirmed that any sharp object could have caused the injury to PW1's chest. She stated that she also examined the accused and had, in fact, treated the accused before PW1. She stated:

² My emphasis.

So, he [the accused] was critically ill. He was the first person to be brought to the emergency department. He was not awake. He was not alert. His GCS was around 13. So GCS, Glasgow Coma Scale, it's a score. So it's needed to assess neurological function, and he was only responding to stimuli, which means he was only responding to pain. He had a laceration on his left head. He had periorbital swelling, which means swelling around the eye. I recall his left eye being completely closed. He had multiple abrasions and bruises all throughout his body. He had a massive bruising on his left chest. However, he was breathing spontaneously, like he was breathing, but there was some difficulty with the movement of his chest wall. So when we breathe in and out he was having difficulty breathing. On auscultation, that if I used a stethoscope, there was reduced air entry. That means we could not appreciate breath sounds on the lower half of his lung on the left side. And he was sort of, we assessed him as a traumatic brain injury and possible hemothorax, and he was on trauma call. So we had to stabilize him, and refer him to the CWM emergency department.⁴

[21] The prosecution then closed its case.

Defence case

[22] I informed the accused that I was satisfied there was evidence of each of the elements of the offence for which he had been charged, sufficient for a case to answer. I then informed the accused of his three options: being, to provide sworn evidence, to remain silent, and to call witnesses. The accused opted to provide sworn evidence as well as call a witness.

[23] The accused's evidence in examination in chief was as follows:

- i. He is a taxi driver. On 13 August 2022, he was at the taxi base when a call was received to go to the Savutalele settlement to pick up passengers. When he

⁴ My emphasis.

arrived, four youths loaded some material in the boot, three got into the back seat and one got in the front passenger seat.

- ii. The taxi fare was to be paid by Mpaiza by PW3 who was not coming with the youths. The accused provided the details for payment and then the front passenger yelled these details to PW3. They all sat in the stationary taxi whilst waiting for confirmation of the payment transfer.
- iii. One of the youths in the back seat started playing with the window button. The accused told him to stop. The youths were impatient for the accused to leave but the accused refused until the payment transfer had been confirmed. After about 5 to 10 minutes of waiting, the passengers were getting frustrated. The person in the front passenger seat grabbed the accused's phone to check whether the transfer had been made. The accused stated, *'And I tried to get the phone back, I couldn't, so they dragged me out of the taxi and assaulted me'*. According to the accused, as he was trying to retrieve his phone, the person who was sitting in the back seat playing with the window button (PW2), then punched the accused to the side of his face. The person immediately behind the driver's seat then got out of the taxi, opened the driver's door, grabbed the accused, and dragged the accused out of the taxi.
- iv. The accused was then punched by the four youths. A stone was thrown against the accused's head which he managed to mostly avoid (it *'touched my forehead'*) and a balabala stick was struck against his back. The accused did not know anything about a stabbing or a knife. He tried to fight back but was outnumbered and could not land any punches. The accused tried to run away but could not. He suffered injuries to his face, a tooth was damaged and he had injuries to his low back.
- v. Whilst he was being assaulted, he called out *'Mavoa [PW3] just to see what I'm going through'*. PW3 arrived on the scene soon after. PW3 took the key from the ignition of the taxi as the engine was still running. PW3 then asked for \$20 from the accused which the accused had in his pocket. PW3 took the money.

vi. The accused's cousin then arrived on the scene and helped the accused into the passenger seat. His cousin took him to the hospital. When he was taken to the hospital, he initially said that it was just him and his cousin in the taxi but upon further reflection thought that somebody else was in the taxi but could not recall who that person was.

- [24] In cross-examination, he stated that he only called for PW3 after he had been dragged out of the car and was being assaulted. He denied that he was standing by the car when he called out. It was PW3 who stopped the assault but then demanded the \$20 cash. He was adamant that he had no knife. He suggested that the injury to PW1 could have been caused by the balabala stick which was being used by the youths to assault the accused. He identified the person who drove him to hospital as his cousin, Avinesh Chand. He did not accept that he asked for forgiveness from the youth's father in the taxi whilst being transported to hospital.
- [25] In answer to questions from the Court, the accused stated that he is still suffering ongoing problems from the beating, being pain to his low back, headaches and forgetfulness. He stated that he has not forgotten any of the details of the beating. He stated that he had been driving a taxi for two and a half years when the incident on 13 August 2022 occurred.
- [26] The second witness for the defence was Avinesh Chand, DW2. He, too, is a taxi driver. He was at the taxi base on 13 August 2022 when he was informed by one of the other taxi drivers that another driver had been involved in a fight. He recognized the taxi number as belonging to the accused and, therefore, went with two other taxi drivers to the scene.
- [27] When he arrived, DW2 saw the accused was in a bad condition with a lot of injuries. He saw an itaukei youth who was also injured. He helped the accused from the driver's seat into the passenger seat and drove him to hospital. Somebody handed the car key to him but he could not recall who. He stated that the father of the itaukei youth was sitting in the back of the car when they were driving to hospital. DW2 knew the father as the father lives close to the taxi base. DW2 stated that he did not receive any knife from PW3. He did speak with PW3 – PW3 was saying that they should try to resolve

the matter between themselves. DW2 did not accept this as the accused was badly injured. DW2 did not accept that PW3 spoke with the accused in the taxi. DW2 stated that the accused was in a serious condition.

- [28] In cross-examination, DW2 stated that he knew the itaukei youth was injured because he had blood on his white shirt. He denied that PW3 spoke to the accused to try to reconcile or that the accused apologized, or that a knife was given to him.

Decision

- [29] The prosecution and the defence have provided two different versions of the material events on 13 August 2022. Where there is common ground is that on the afternoon of 13 August 2022 the accused picked up 4 passengers from Savutalele Settlement. Two of the passengers were brothers, PW1 and PW2. Their father, PW3, organized the taxi and paid the fare by way of an Mpaisa transfer, but was not travelling in the taxi. Whilst they were all in the taxi waiting to leave, PW2 began playing with the window button which caused the accused to tell off PW2. The descriptions of the material events differ from this point.
- [30] The prosecution case is that PW1 took offence to the accused telling off his younger brother and got out of the taxi with the other three passengers, refusing to take the taxi. The accused also got out of the taxi and called out to PW3 telling him that the passengers were not taking his taxi – in apparent hope that PW3 would tell the youths to get back into the taxi. Whilst the youths and the accused were standing by the side of the road the accused returned to his taxi to grab a knife from inside the taxi. PW2 then attempted to disarm the accused – resulting in a tussle between the two. PW2 pushed the accused toward PW1. The accused then deliberately stabbed PW1 in the chest. The youths disarmed the accused and proceeded to punch him and hit him with a balabala stick. The prosecution relies principally on the evidence of PW1 and PW2.
- [31] The defence case is that after PW2 was told off for playing with the window button, the passengers became agitated that the accused refused to leave until the accused had received confirmation of the Mpaisa payment. One of the passengers grabbed the accused's phone and as the accused tried to retrieve the phone, PW2 punched the

accused to the head and PW1 dragged the accused from the taxi. The accused was then beaten by the youths. He denies having possession of or using any knife. The defence relies on the accused's evidence.

[32] If I accept the truth of the accused's evidence then he is not guilty of the charge. On his evidence he had no knife and did not stab the complainant (PW1). Even if I reject the accused's evidence, the prosecution must still prove beyond reasonable doubt that the accused did stab PW1 with a knife and in doing so intended to cause grievous harm to PW1.

[33] The Court must assess the truthfulness and reliability of the witnesses, in particular the three key witnesses, being PW1, PW2 and the accused. I keep in mind the following factors when determining the credibility and reliability of a witness such as: promptness, spontaneity, probability, improbability, consistency, inconsistency, contradictions, omissions, interestedness, disinterestedness, bias, and the demeanour and deportment in court - see *Matasavui v State* [2016] FJCA 118; AAU0036.2013 (30 September 2016), *State v Solomone Qurai* (HC Criminal - HAC 14 of 2022. In *Liberato and Others v The Queen* [1985] HCA 66; 159 CLR 507 at 515 the court discussed the approach to be taken where there are conflicting versions of evidence given by the prosecution and the defence witnesses. Brennan J stated:

When a case turns on a conflict between the evidence of a Prosecution witness and the evidence of a defence witness, it is commonplace for a judge to invite a jury to consider the question: who is to be believed? But it is essential to ensure, by suitable direction, that the answer to that question (which the jury would doubtless ask themselves in any event) if adverse to the defence, is not taken as concluding the issue whether the Prosecution has proved beyond reasonable doubt the issue which it bears the onus of proving. The jury must be told that, even if they prefer the evidence for the prosecution, they should not convict unless they are satisfied beyond reasonable doubt of the truth of that evidence. The jury must be told that, even if they do not positively believe the evidence for the defence, they cannot find an issue against the accused contrary to that evidence if that evidence gives rise to a reasonable doubt as to that

*issue. His Honour did not make clear to the jury, and the omission was hardly remedied by acknowledging that the question whom to believe is “a gross simplification”.*⁵

[34] In *State of UP v M K Anthony* (1985) 1 SCC 505, the Court stated:

*While appreciating the evidence of a witness, the approach must be to ascertain whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, then the court should scrutinize the evidence more particularly to find out whether deficiencies, drawbacks, and other infirmities pointed out in the evidence is against the general tenor of the evidence. Minor discrepancies on trivial matters not touching the core of the case should not be given undue importance. Even truthful witnesses may differ in some details unrelated to main incident because power of observation, retention and reproduction differ with individuals. Cross-examination is an unequal duel between a rustic and a refined lawyer.*⁶

[35] In *Bharwada Bhoginbhai Hirjibhai v State of Gujarat* (1983) 3 SCC 217, the Court stated:

A witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a videotape is replayed on the mental screen ... The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another It is unrealistic to expect a witness to be a human tape recorder In regard to exact time of an incident, or the time duration of an occurrence, usually people make their estimates by guesswork on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time sense

⁵ My emphasis.

⁶ My emphasis.

of individuals, which varies from person to person.... Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on...⁷

[36] I have carefully considered the evidence of the witnesses at trial. This includes their demeanour, their reactions to questions, any internal inconsistencies as well as inconsistencies with the other witnesses. I have also read the written transcript of the evidence provided at trial as well as my own notes. I find the evidence of PW1 to be reasonable, plausible and believable. He provided his evidence in a straightforward manner. He made concessions in cross examination, for example he acknowledged that the accused telling off his brother was only a very small matter. He seemed genuinely confused about the payment arrangements; i.e. whether his father had paid and whether there would be any refund.

[37] Certainly there were inconsistencies and contradictions as between PW1 and PW2. For example, PW1 stated that he disarmed the accused when he punched him but PW2 stated that he disarmed the accused when he hit him with a balabala stick. PW1 stated that he understood that the agreed fare for the taxi was \$20 yet stated that he got angry when the accused turned the taxi meter on and refused to leave to Suva – I agree this makes little sense. The Court is permitted to take into account these inconsistencies in order to consider whether the witnesses are believable and credible. It is obvious that the passage of time can affect one's accuracy of memory. It cannot be expected that every detail will be the same from one account to the next or between witnesses. If there is an inconsistency, it is necessary to decide, firstly, whether the inconsistency is significant and, secondly, whether the inconsistency 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. If there is an acceptable explanation, then this Court may conclude that the underlying reliability of the witness' evidence is unaffected. If the inconsistency is fundamental, then it is for this Court to decide to what extent it influences the reliability of the witness' evidence. As the Court of Appeal observed in

⁷ My emphasis.

Mohammed Nadim and another vs. State [2015] FJCA 130; AAU0080.2011 (2 October 2015) at [16];

[16] The Indian Supreme Court in an enlightening judgment arising from a conviction for rape held in Bharwada Bhoginbhai Hirijbhai v State of Gujarat (supra):

Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all-important "probabilities-factor" echoes in favour of the version narrated by the witnesses. The reasons are: (1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen; ... (3) The powers of observation differ from person to person. What one may notice, another may not. It is unrealistic to expect a witness to be a human tape recorder;

- [38] I am satisfied that the inconsistencies in PW1's evidence does not undermine the core parts of his evidence. As stated, it appeared to me that PW1 was confused about the payment arrangement for the taxi fare. In terms of the differences between PW1 and PW2, as to how the accused was disarmed, in the melee of a physical fight involving 4 or 5 persons, I would be surprised (and concerned), if the accounts of each person were precisely the same.
- [39] Nevertheless, PW1's description of the material events was largely in line with PW2's description (I do not lose sight of the fact that they are brothers and, therefore, there is no arms-length relationship between the two). While I found PW2 to have demonstrated a lack of maturity in the witness box (at one stage I warned PW2 to take the proceedings more seriously), I accept the veracity and reliability of his description of the key events. I should add that the description given by PW1 to Dr Chand on the same day, only a short time after the events, is consistent with the evidence of PW1 and PW2. The history supplied to Dr Chand by PW1 was that the injury to his chest was a result of being stabbed by the accused.

[40] PW3 did not observe the key events. Much of his evidence does not assist the Court with its findings on the critical factual disputes.

[41] I turn to the evidence of the accused. Having listened to his account and observed his demeanour I am unable to accept the veracity of his evidence – at least on the critical factual issues in dispute. His explanation for the violent assault on him is that he refused to leave until the fare payment was confirmed and/or he tried to retrieve his phone when one of the passengers grabbed it. This explanation lacks any ring of truth. I do not accept that innocuous events inside the taxi caused the violence that led to his serious injuries. I find that the account from PW1 and PW2 is more believable, that those events inside the taxi caused PW1 to decide to take another taxi – this in itself being an overreaction to what were minor issues. Indeed, I am satisfied that the violence was, in fact, triggered by the accused stabbing PW1. Another concern that I had with the accused's evidence is the level of detail provided by him of the events that day. While I accept that given the impact on him there will be aspects and moments he may never forget I would expect that much of the detail of the incident would not be easy for him to recollect given the trauma, chaos and injuries sustained. And on the matter of his injuries, there is likely the additional component of the impact of the head injury on the accused's ability to recall the events. The injuries caused him to lose consciousness at some point, most likely on route to hospital. He was diagnosed by Dr Chand as having a traumatic brain injury. The accused informed the Court that he was still suffering the effects of his injuries including cognitive symptoms such as forgetfulness. While the accused denied that this problem extended to his recollection of the events on 13 August 2022 it would be surprising if they did not.

[42] DW2's evidence does not greatly assist the Court. Like PW3, DW2 was not present at the material time. He arrived at the scene even later than PW3. The importance of his evidence is to respond to PW3's evidence (that the accused asked for forgiveness from PW3 in the car and that PW3 gave the broken knife, said to have been used by the accused to stab PW1, to DW2). I accept DW2's evidence that the accused did not ask for forgiveness as he was in no state to communicate whilst being transported to hospital – this is consistent with Dr Chand's findings when she examined the accused at hospital. Also, there is no valid reason offered why PW3 would have given the knife to DW2.

[43] In terms of the knife, it was not produced in evidence during the trial. The prosecution wished to produce a knife but did not properly disclose the same to the defence (if the knife had been produced, the prosecution would have been required to establish the chain of custody). Nevertheless, I accept on the viva voce evidence of PW1 and PW2 that the accused was in possession of a small knife with an orange handle and that this knife was used by the accused to stab PW1.

Findings of the Court

[44] Taking all the evidence into account, including my findings on the veracity and reliability of the witnesses, in my view the events on 13 August 2022 unfolded as follows:⁸

- i. PW3 arranged for a taxi to transport his two sons and two nephews to the Suva market to collect pigs food.
- ii. The accused arrived in his taxi and the four youths got inside, three in the back seat and one in the front passenger seat. PW2 began playing with the window button which angered the accused. The accused told off PW2 which in turn angered the older brother, PW1. PW1 reacted telling the accused that they would not be travelling in his taxi. All four passengers then got out of the taxi, as did the accused. The accused called out to PW3 hoping that he would tell the youths to get back into the taxi.
- iii. PW1 collected his bag from the boot of the taxi. At or about this time, the accused went back to the driver's door and grabbed a small knife from inside the taxi. What possessed the accused to do so is unclear (only the accused will know why but his evidence to the Court is that he denies being in possession of the knife). The accused then stood in front of the youths holding the knife in his hand. The four youths told the accused to

⁸ I have confined my findings to the facts necessary to deal with the charge before this Court and I have refrained from making any findings in respect to the assaults by the youths on the accused that is presently before the Magistrates Court.

leave. The accused did not do so. PW1 and PW2 stated that they were scared when the accused held the knife in front of them. I do not accept this. The knife was small and they, along with their two cousins, outnumbered the accused. Further, by their own evidence the accused was not making any move to threaten or attack the youths with the knife.

- iv. At that stage the youths could simply have walked away. They did not. Instead, PW2 escalated matters by trying to discreetly move behind the accused to disarm him. This action was spectacularly unsuccessful. PW2 and the accused ended up in a physical tussle. PW1 moved toward them to try and diffuse the situation. At that moment, PW2 pushed the accused toward PW1. The accused turned toward PW1, stabbing at him piercing PW1's chest with the blade of the knife causing blood to seep from the cut spilling onto PW1's shirt.
- v. When the youths saw PW1 being stabbed, and saw blood on PW1's shirt, the shock triggered the all-out assault by the youths on the accused.

[45] Dealing then with the elements of the offence for which the accused has been charged.

[46] The first is that the prosecution must prove that the accused intended to cause grievous harm to PW1. I am satisfied that this element is proven beyond reasonable doubt. I am satisfied on the basis of the evidence of PW1 and PW2 that the accused deliberately stabbed PW1 in the chest with a knife with the intention of causing PW1 grievous harm. The stabbing was not accidental. The accused would have been aware of the danger that stabbing a knife into PW1 presented. In that moment, the accused intended to cause serious harm to PW1. As Dr Chand explained in her evidence, an incision into a person's chest can cause serious and life-threatening injuries to that person – it could puncture the lungs, heart or other important blood vessel. It was fortunate that the accused did not do so on this occasion but he will have been well aware of the danger and risk that came with stabbing PW1 in the chest.

[47] I also find that the accused unlawfully wounded PW1. A wound is defined as including an incisional puncture of the skin which, as Dr Chand confirms, occurred here. Even without the doctor's evidence, I am prepared to make this finding based on the eyewitness evidence that there was blood on PW1's shirt after the accused had stabbed PW1.

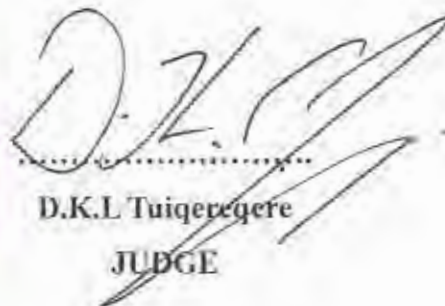
Conclusion

[48] I have no doubt that PW2 was the architect of the trouble that occurred on 13 August 2022. It was his playing with the window button that led to the youths leaving the taxi and it was his attempt to disarm the accused that needlessly aggravated matters. Nevertheless, there was no justification for the accused grabbing the knife from the taxi. The presence of the knife was plainly dangerous, unnecessarily elevating tensions.

[49] I am sure on the evidence presented at trial that the accused intended to cause grievous harm to PW1 when he deliberately stabbed PW1 in the chest and that in doing so the accused unlawfully wounded PW1.

[50] In view of the above, I find the accused guilty of acting with intent to cause grievous harm to PW1 and unlawfully wounding him contrary to s 255(a) of the Crimes Act. He is, accordingly, convicted.




D.K.L Tuiqeregere
JUDGE

Solicitors:

Office of Director of Public Prosecutions for the State
Shahrukh Ali Lawyers for the Accused