IN THE HIGH COURT OF FIJI

AT LAUTOKA

CRIMINAL JURISDICTION

APPELLATE JURISDICTION NO. HAA 22 OF 2016

BETWEEN: **JOSUA NATAKURU**

APPELLANT

AND: **STATE**

RESPONDENT

Counsels: **Appellant in Person**

Ms. R. Uce for Respondent

Date of Hearing: **14th October 2016**

Date of Judgment: **18th October 2016**

JUDGMENT

1. Mr Josua Natakuru (hereinafter referred as the Appellant) is charged with one count of Criminal Intimidation contrary to Section 375 (1) (a) (i) & (iv) of the Crimes Decree No. 44 of 2009.

2. The trial for this matter had initially commenced before Resident Magistrate Ms. Lakmini Girihagama where both parties had closed their respective cases.

3. On 09th June, 2015, the matter was called before the current Resident Magistrate, Mr Rangajeeva Wimalasena. The Appellant sought to have the witnesses re-summoned and the matter re-heard pursuant to Section 139 of the Criminal Procedure Decree No. 44 of 2009.

4. The application for a re-trial was granted and the trial commenced on 30th October, 2015. The Prosecution called two (2) witnesses and closed its case.

5. At the end of the Prosecution case, the Court held that there was a case to answer and the Defence was called upon to open its case. The Appellant exercised his right to remain silent and did not call any witnesses or offer any evidence.

6. On 23rd May, 2016, the learned Magistrate delivered the Judgment and convicted the Appellant as charged.

7. On 27th June, 2016, the Appellant filed this timely appeal against his conviction.

GROUNDS OF APPEAL

8. The Appellant submits the following grounds of appeal:-

a) That the learned Magistrate erred in law and in fact when he found that the complainant had given convincing, credible and clear evidence;

b) That the learned Magistrate made a contradictory finding regarding the evidence of prosecution witness Neil William Ward;

c) That the learned Magistrate erred in law and in fact when he stated that it is sufficient for the accused to create a doubt in the prosecution case;

d) That the learned Magistrate erred in law and in fact when he found that the Prosecution adduced enough evidence to prove the charge against the accused;

e) That the learned Magistrate erred in law and in fact when he found that the Prosecution had proved the charge against the accused beyond reasonable doubt;

f) That the learned Magistrate totally failed to properly analyze the DVD recording evidence.

Ground (a)

9. The learned Magistrate found the complainant's evidence to be convincing, credible and clear. He had analysed the complainant's evidence in light of other evidence including the DVD recording evidence led in the trial.

10. Appellant claims that the learned Magistrate failed to take into account the omissions and contradictions in the complainant's evidence in coming to the above mentioned conclusion. He submits that the learned Magistrate disregarded the fact that the complainant had not mentioned to police anything about the recording that he had allegedly made. He argues that it is a material omission that goes to the heart of the matter.

11. The complainant said under cross examination, that he tendered the recording (to police) on the desk as evidence. However, when he was shown the statement he admitted that he had not mentioned about the recording to police. In re-examination, the complainant said that, when he made the complaint, he informed the police of the recording and tendered a copy of the same. I do not think this omission does affect the credibility of the complainant's evidence. Although the complainant had not mentioned about the recording in his statement he had informed police about the recording and had tendered a copy of the DVD.

12. It is well settled that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be discredited or disregarded. Thus an undue importance

should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution's witnesses. ***Nadim v State*** [2015] FJCA 130; AAU 0080.2011 (2 October 2015) *Para 15.*

13. The Appellant claims that the complainant was evasive in his responses as whether or not he had informed police of the DVD. I carefully perused the record of the Magistrates Court. 1 find the answers given by the complainant neither evasive nor inconsistent.

14. The Appellant also argues that the complainant contradicted his own statement to police in regards to his neighbour (PW.2) hearing the threats he is alleged to have made. The Complainant did not mention anything about his neighbour witnessing/ hearing the alleged incident in his evidence-in-chief. However, under cross examination, the complainant said that his neighbour was at least 10 meters away when the incident happened. The proposition that complainant had stated to police that his neighbour (PW.2) heard the Appellant threatening him was not proved to be a contradiction. Complainant said *'I don't think I mentioned my neighbour in the statement'*. 1f the complainant had made a contradictory statement to police, the contradictory part of the police statement should have been shown to the complainant and he should have been given an opportunity to explain the discrepancy. The complainant was not referred to his previous statement to confirm this alleged contradiction.

15. It is my considered opinion that the omission and the alleged contradiction highlighted by the Appellant do not affect the credibility of the complainant's evidence. The learned Magistrate correctly found that the complainant had given convincing, credible and clear evidence. Therefore, this ground fails.

Ground (b)

16. The Appellant claims that the learned Magistrate made a contradictory finding regarding the evidence of Prosecution witness Neil William Ward (PW.2). He argues that PW 2 was contradicting his own evidence as regards the distance they were standing apart from each other.

17. PW.2 had stated he was standing 50 meters away from where the complainant and the accused were. Complainant under cross examination said PW.2 was at least 10 meters away when the incident occurred. I do not find these two versions to be materially contradictory to each other.

18. The complainant said under cross examination that he did not know if PW 2 heard the Appellant threatening him. The Appellant submits that the complainant had been evasive in answering this question. Since the complainant was not in a position to say if PW.2 heard the Appellant threating, the answer given by the complainant cannot be said to be evasive.

19. PW.2 said under cross examination that he was 50 meters away and heard only a 'muffle conversation'. He specifically stated under cross examination that he did not hear Appellant threatening the complainant. However, in his examination in chief, PW 2 had said *...I saw raised voices...I heard some loud voices...he was yelling.* There is a slight inconsistency in PW2's evidence. However, I do not find this inconsistency to be material so as to discredit PW2's entire evidence in the circumstances of this case.

20. The learned Magistrate found that PW2 had corroborated the fact that the Appellant was yelling at the complainant. Even though (PW.2) had not testified to the exact threatening words the Appellant had allegedly used, the learned Magistrate's finding that PW.2 supported the version of the complainant was not incorrect. Therefore, this ground fails.

Ground (c)

21. The learned Magistrate at para 11 of the judgment observed:

> *"In a criminal case the accused need not prove his innocence. It is sufficient for the accused to create a doubt in the prosecution case. It is the duty of the prosecution to prove the charge against the accused beyond reasonable doubt".*

22. The learned Magistrate has clearly stated that the burden to prove the case beyond reasonable doubt lies with the Prosecution. He had made a general remark and stated '*It is sufficient for the accused to create a doubt in the prosecution case*'. There is nothing to suggest that the learned Magistrate had applied a wrong principle to the facts of the case. Therefore, this ground fails.

Grounds (d) and (e)

23. The learned Magistrate found that the prosecution adduced enough evidence to prove the charge against the accused. Prosecution was relying on the evidence of the complainant, PW.2 and the DVD recording. The learned Magistrate had analyzed all the evidence adduced by the Prosecution and considered what weight should be attached to the evidence. After considering all relevant and admissible evidence adduced during the trial, the learned Magistrate was justified in coming to the conclusion he reached. The learned Magistrate correctly concluded that the Prosecution had proved the case beyond reasonable doubt.

Ground (f)

24. During the course of the trial the Appellant had raised an objection to the DVD recording being played and its admissibility into evidence. His objection at the magistracy was based on two grounds, namely, that the recording was done in bad faith and that a copy of the original recording was not admissible.

25. The learned Magistrate overruled the objection and allowed the DVD recording being played in Court. He was satisfied that the complainant was the author of the recording and that the original recording was also available in court thus proving authenticity.

26. The Complainant admitted that the recoding was done with the intention of using it against the Appellant. No one can complain that the contemporaneous recording was done by the complainant in bad faith when it was intended to be used in evidence. Even

the confessions recorded by police offices using recording devices for the purpose of using them in evidence are nowadays admitted into evidence.

27. It is now well settled that tape recordings are admissible to provide primary evidence of the conversation or sounds recorded on the tape. [***R. v. Maqsud Ali*** [1965] All. E.R. 464 ***Butera v DPP*** (1988) 62 ALJR 7].

In ***R. v. Maqsud Ali*** [1965] All. E.R. 464 it was observed:

> *"We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices, provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged"*

28. It appears that three preconditions must be satisfied to render a tape recording admissible in evidence. Firstly, the content of the tape must be shown to be relevant and otherwise admissible in evidence. Secondly, voices recorded must be properly identified, for example by testimony of witnesses. This requirement presumably applies to the identification of any recorded sound. Thirdly, the provenance of the tape must be proved.

29. In ***Butera v DPP*** (supra), it was indicated by the High Court of Australia that the scope of this requirement is such that it is necessary to prove, as a condition of admissibility, that the tape is authentic and accurate and has not been tampered with.

30. There are authorities which suggest that if the authenticity of the tape can be reasonably inferred and there is no evidence to suggest that it is fabricated then the recording should be admissible. It appears unreasonable to require a party seeking to tender a tape recording in evidence to adduce independent proof that it is accurate and has not been tampered with. It would seem more appropriate for the tribunal of fact, after hearing evidence as to authenticity adduced by all parties and listening to the tape, to consider the possibility of tampering on the question of the weight to be attached to the tape. Support for this view is provided by the Australian High Court judgment of Gowans J in ***R v Matthews & Ford*** [1972] VR 3.

31. In that case, his Honour found no support for the proposition that tape recordings should be inadmissible even if there was a real possibility of tampering or lack of authenticity. His Honour held (adopting the reasoning adopted in *R v. Maqsud Ali)* that such a possibility should be considered by the jury in determining weight.

32. Nevertheless, serious doubt as to the authenticity of a tape recording, or strong suspicion of tampering, may be sufficient grounds for the exercise of a judicial discretion to exclude tape recordings in criminal cases. The basis of this discretion is fairness to the accused, and Gaudron J in ***Butera*** *(supra)* held that it may arise where a tape recording is either inaudible or unintelligible. For the discretion to be exercised, it must be shown that the probative value of the evidence would be slight and that the prejudicial effects that the accused would suffer were the evidence admitted would be substantial. However, if a tape were of only slight probative value and there existed doubts as to its authenticity, it may be considered unduly prejudicial to the accused if admitted because a jury may give greater weight to recorded sounds in much the same way as might occur with a document.

33. The High Court of Australia in ***Butera v. DPP*** (supra) has stated quite unequivocally that the "best evidence" rule can have no application so as to preclude admissibility of evidence derived from tapes mechanically or electronically copied from an original tape.

34. This rule, in its original form, required that "the best evidence must be given which the nature of case permits." It operated to render admissible secondary evidence only where the absence of primary evidence was satisfactorily accounted for and excused. The operation of this rule has been restricted in modern times and authority exists now that the rule cannot apply to physical objects, but "is limited and confined to written documents in the strict sense of the term and has no relevance to tape or films."

35. As matters now stand it would be prudent before tendering a copy tape to provide some explanation as to the absence of the original. Dawson J in ***Butera*** (supra) stated that failure to produce the original tape or to satisfactorily explain its absence "may impugn the evidence given of the tape's content, and provoke, at least, adverse comment".

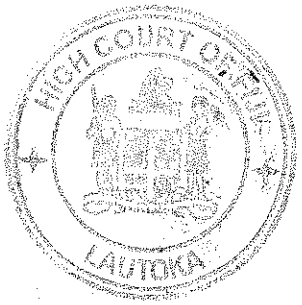
36. In the Appellant's case, the recording had been done by the complainant on his mobile phone. Not only the DVD which had been copied from the original but also the original recording itself was available to Court for inspection and also for hearing/ viewing the video recording. The recording was tendered through the author himself. So the learned Magistrate's decision on admissibility was in conformity with the accepted legal principles.

37. The video recording and the DVD had been played in Court. Voices recorded must have been properly identified by the learned Magistrate. Furthermore, the complainant in his evidence identified the voices of the Appellant and himself. The learned Magistrate had the opportunity to listen to the recording and also view the video for the purpose of comparing. The weight attached having considered all other evidence to the recording by the learned Magistrate cannot be questioned. Therefore, this ground of appeal fails.

Conclusion

38. For the reasons given in this judgment, conviction recorded by the learned Magistrate is affirmed. Appeal against conviction is dismissed.

39. 30 days to appeal to the Fiji Court of Appeal.



Aruna Aluthge
Judge

At Lautoka
18th October, 2016

Solicitors: **Appellant in person.**
Office of the Director of Public Prosecution for the Respondent