

IN THE HIGH COURT OF FIJI

AT SUVA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 69 of 2016

STATE

V

SHAHISTA SHEWANI DEVI

Counsel : Mr. S. Shah with Mr. Z. Zunaid for the State
Mr. A. K. Singh for the Accused

Dates of Hearing : 19-20 September 2017

Date of Ruling : 21 September 2017

RULING

NO CASE TO ANSWER

1. The Accused in this case was charged with the following Information:

FIRST COUNT

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375 (1), (a)(i) and (iv) of the Crimes Decree, 2009.

Particulars of Offence

SHAHISTA SHEWANI DEVI on the 2nd of February, 2016 at Nasinu in the Central Division, without lawful excuse, threatened **MANDUR LATA** with a knife with intent to cause alarm to the said **MANDUR LATA**.

SECOND COUNT

Statement of Offence

ATTEMPTED MURDER: Contrary to Section 44 (1) and Section 237 of the Crimes Decree, 2009.

Particulars of Offence

SHAHISTA SHEWANI DEVI on the 2nd of February, 2016 at Nasinu in the Central Division, attempted to murder **DIVYAN DAKSH PRASAD**.

2. The above mentioned Madhur Lata (listed as Mandur Lata in the information) is said to be the mother-in-law of the Accused, while Divyan Daksh Prasad, is her eldest son (who was 4 years at the time of the incident). Manish Priyant Prasad, is the husband of the accused and the father of Divyan and also Madhur Lata's son.
3. During the trial of this case, the prosecution led the evidence of Madhur Lata, Manish Priyant Prasad, Divyan Daksh Prasad, Police Sergeant 2110 Pradip Lal, WDC 3483 Ana Likulagi and Detective Corporal (D/Cpl) 3541 Isikeli Rokodreu. The investigations in this case were conducted by the Crimes Branch of the Nakasi Police Station.
4. The Prosecution also tendered in evidence as exhibits **P1(a), P1(b), P1(c) and P2**, which were the pieces of cloth (parts of a bed sheet recovered from the scene of the crime) and as **P3**, a rough sketch plan of the scene.
5. At the close of the Prosecution case, the Counsel for the Accused made an application in terms of Section 231 (1) of the Criminal Procedure Act No. 43 of 2009 ("Criminal Procedure Act"), that there is no evidence that the Accused committed the offences charged and as such the Court should record a verdict of not guilty against her.

6. This preliminary matter was taken up for hearing before me on 19-20 September 2017. Both Counsel for the Accused and Counsel for the State were heard. The parties also filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

7. Section 231 (1) of the Criminal Procedure Act provides as follows:

When the evidence of the witnesses for the prosecution has been concluded, and after hearing (if necessary) any arguments which the prosecution or the defence may desire to submit, the court shall record a finding of not guilty if it considers that there is no evidence that the accused person (or any one of several accused) committed the offence.

8. In the case of **State v. Waisale Tuivuya** [2003] FJHC 186 (4 November 2003); it was held:

“The test to be applied under Section 293 of the Criminal Procedure Code is whether there is evidence in respect of each ingredient of the offence. If there is some relevant and admissible evidence, direct or circumstantial, touching on all the elements of the offence, then there is a prima facie case (*Sisa Kalisoqo –v- State* Crim. App. No. 52 of 1984, *State –v- Mosese Tuisawau* Crim. App. No. 14 of 1990).

.....

Accordingly, the question to be addressed at this stage of the proceedings is whether there is some relevant and admissible evidence in respect of each element that must be proved before the Accused could be convicted of the offences alleged against him in the information.”

9. It is clear that since Section 231(1) of the Criminal Procedure Act has retained the provisions similar to that of Section 293(1) of the now repealed Criminal Procedure Code (Chapter 21) in respect of no case to answer, the test remains the same. If there exists

some relevant and admissible evidence, direct or circumstantial, touching on all the ingredients of the offences charged, then there is a prima facie case.

10. As indicated earlier the Accused in this case has been charged with two counts.
11. The first count is of Criminal Intimidation contrary to Section 375 (1), (a)(i) and (iv) of the Crimes Act No. 44 of 2009 (Crimes Act).
12. The provisions of Section 375(1)(a) of the Crimes Act is reproduced below:

(1) A person commits a summary offence if he or she, without lawful excuse —

(a) threatens another person or other persons (whether individually or collectively) with any injury to —

(i) their person or persons; or

(ii) their reputation or property; or

(iii) to the person, reputation or property of anyone in whom that person is or those persons are interested —

with intent —

(iv) to cause alarm to that person or those persons; or

(v) to cause that person or those persons to do any act which that person is or those persons are not legally bound to do; or

(vi) to omit to do any act which that person is or those persons are legally entitled to do—

As the means of avoiding the execution of such threat. [Emphasis is mine].

13. Therefore, in order to prove the ingredients of Count 1, the Prosecution has to establish:
 1. That the Accused;
 2. On the specified day (in this case the 2 February 2016);
 3. At Nasinu, in the Central Division;
 4. Threatened Madhur Lata with an injury to her person, with a knife;
 5. With intent to cause alarm to the said Madhur Lata.

14. Madhur Lata testified to the events which took place on the day of incident as follows:

- (i) *She testified that on 2 February 2016, which was a Tuesday, she had woken up in the morning. Her grandson Divyan and granddaughter Rysha had wanted breakfast. But breakfast was not ready at the time. It was around 8.00 in the morning.*
- (ii) *She had then given her grandchildren tea, biscuits and butter. The accused had then woken up. Since the children were eating butter, she had asked as to who took out the butter. The witness had said that she had given the children butter to eat with biscuits. After that an argument had started as to why she had touched/taken the butter.*
- (iii) *The witness testified that the argument was between the accused and her son as to why she had touched/taken the butter.*
- (iv) *Thereafter, her son Manish had left for work. The accused had gone to her bedroom with her children.*
- (v) *Later she had heard the accused talking on her phone with Manish. The accused had been swearing at the witness over the phone. The accused had told Manish I will do what I told you the last time.... I will kill the children and kill myself.*
- (vi) *The accused had then gone back to her room and started to wake up her daughter. The accused had then started tearing a bed sheet. The witness had then gone to the room and asked the accused what she was doing. The accused had asked her to go away.*
- (vii) *Thereafter, the accused held her children's hand and went outside (to the terrace). She said "let's go I am gonna hang you". The witness testified that she was trying to stop the accused from going outside, while the children were crying.*
- (viii) *The accused went outside (to the terrace), stood on a chair and tied the bed sheet on the rafter. She was holding onto Divyan's hand and was pulling him towards her. Divyan was holding onto her at the time while the accused was pulling him by his hand. The witness said that she was trying to stop the accused. The accused had told her to go away and had pushed her. The witness had fallen and got up again. She had then held onto the accused and told her not to do this. The accused had told her if you don't go away I will cut you (chapak dega).*

(ix) *The witness testified that she had got afraid and run away to her landlord's house to seek help.*

15. Divyan Daksh Prasad, testified that:

(i) *He was sleeping when his mum woke him up (on 2 February 2016). She had then put a chair and was trying to hang them. He further testified that after he woke up, he was crying and his mother was tearing cloths.*

(iii) *The witness further stated as follows: "she was trying to hang us. My grandmother saved me. Then she pushed my grandmother and said I am going to use a knife and cut you. Grandma went outside".*

16. However, from the testimony led in this Court of Madhur Lata it is clear that she has made no mention that the Accused threatened her with a knife or even was in possession of a knife at the relevant time. Her testimony is that the Accused had said that I will cut you if you don't go away. However, she has not referred to any weapon been used at the time.

17. Even though Divyan testified that the accused had stated "*I am going to use a knife and cut you*" (in reference to his grand-mother), absolutely no mention is made that a knife was in fact used by the accused at the time of the incident.

18. Section 182 of the Criminal Procedure Act refers to circumstances where there is a variance between charge and evidence and amendment of charge. These provisions are in relation to proceedings in the Magistrate's Court. However, since there is no comparable provision in relation to proceedings in the High Court, it is my view that these provisions could be made applicable to High Court proceedings as well.

19. Section 182 of the Criminal Procedure Act is reproduced below in its entirety:

(1) *Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective (either in substance or in form), the court may make such order for the alteration of the charge, either by —*

(a) *amendment of the charge; or*

(b) *by the substitution or addition of a new charge —*

as the court thinks necessary to meet the circumstances of the case

(2) *Where a charge is altered under sub-section (1) —*

(a) *the court shall call upon the accused person to plead to the altered charge; and*

(b) *the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross-examined by the accused or his lawyer and, in such last-mentioned event, the prosecution shall have the right to re-examine any witness on matters arising out of the further cross-examination.*

(3) ***Variance between the charge and the evidence produced in support of it with respect to —***

(a) ***the date or time at which the alleged offence was committed; or***

(b) ***the description, value or ownership of any property or thing the subject of the charge —***

is not material and the charge need not be amended for such variation —

(4) *Where the variation is with respect to the date or time at which the alleged offence was committed the court shall determine that the proceedings have in fact been instituted within the time (if any) limited by law for their institution, and shall make any appropriate order to enforce the applicable time limits.*

(5) ***Where an alteration of a charge is made under sub-section (1) or there is a variance between the charge and the evidence as described in sub-section (3), the court shall, if it is of the opinion that the accused has been misled or deceived, adjourn the trial for such period as may be reasonably necessary. [Emphasis is mine].***20Section 182(3) provides for the instances where the variance between the charge and the evidence produced in

support of it is not material. However, in the present case the prosecution has stated in the information that the threat of injury to Mandur Lata's person was caused by a knife. In the opinion of this Court this is a material fact that the Prosecution was bound to prove. However, there is no evidence led by the Prosecution to establish this fact.

20. It is the opinion of this Court that this is a fatal error in the Prosecution case that cannot be remedied at this stage.
21. I referred to section 162 of the Criminal Procedure Act to verify whether, in the given circumstances, a conviction for a lesser or an alternate offence could be sustained by the Prosecution. However, the Prosecution conceded that from the facts of this case no conviction for a lesser or an alternate offence could be made.
22. In the circumstances, I hold that the Accused has no case to answer in respect of Count 1. Accordingly, I record a verdict of not guilty against her in respect of Count 1 and the Accused is acquitted of Count 1.
23. Now I turn to Count 2, which is Attempted Murder contrary to Section 44 (1) and Section 237 of the Crimes Act.
24. Section 237 of the Crimes Act provides the definition of Murder as follows:
"A person commits an indictable offence if —
 - (a) the person engages in conduct; and*
 - (b) the conduct causes the death of another person; and*
 - (c) the first-mentioned person intends to cause, or is reckless as to causing, the death of the other person by the conduct."*
25. Section 44 of the Crimes Act deals with Attempts, which is in effect an extension of criminal responsibility. Sections 44(1) and 44(2) are particularly relevant. The two sub Sections read as follows:

“(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) for the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence, and the question whether conduct is more than merely preparatory to the commission of the offence is one of fact.”

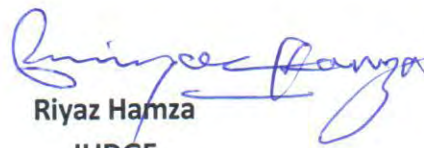
26. Therefore, in order to prove the First Count of Attempted Murder, the prosecution must establish that;
- (i) The Accused;
 - (ii) On the specified day (in this case the 2 February 2016);
 - (iii) At Nasinu, in the Central Division;
 - (iv) Engaged in a conduct; and
 - (v) The said conduct was an attempt to cause the death of Divyan Daksh Prasad; and
 - (vi) The Accused intended to cause the death of Divyan Daksh Prasad; or the Accused was reckless as to causing the death Divyan Daksh Prasad by the conduct.
27. The fourth element above 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 that the conduct of the Accused was deliberate and not accidental. 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 conduct is more than merely preparatory to the commission of the offence is one of fact.
28. The evidence of Madhur Lata and Divyan Daksh Prasad has been led by the Prosecution to establish the Count of Attempted Murder against the Accused. From the said evidence (reference to which has been made earlier in this Ruling) led, I am satisfied that there exists some relevant and admissible evidence, touching on all the

ingredients of this offence. Thus a prima facie case has been made out by the Prosecution in respect of Count 2.

29. In the circumstances, I hold that there is a case to answer by the Accused in respect of Count 2.

30. **FINAL ORDERS:**

1. The Accused has no case to answer in respect of Count 1. Accordingly, I record a verdict of not guilty against her in respect of Count 1 and the Accused is acquitted of Count 1.
2. There is a case to answer by the Accused in respect of Count 2 and accordingly I call for her defence in respect of Count 2.



Riyaz Hamza

JUDGE

HIGH COURT OF FIJI



Solicitor for the State
Solicitor for the Accused

: **Office of the Director of Public Prosecutions, Suva.**
: **Messrs A.K. Singh Law, Nausori.**