IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 17 of 2020

BETWEEN : **SHAMEEM MOHAMMED AND ANOTHER**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Mr. M. Anthony for the Appellant.
	:	Ms. S. Naibe for the Respondent.
Date of Hearing	:	21 September, 2020
Date of Judgment	:	28 September, 2020

JUDGMENT

BACKGROUND INFORMATION

1. The appellant with another was charged in the Magistrate's Court at Rakiraki with one count of criminal intimidation contrary to section 375 (1) (a) (iv) of the Crimes Act.

2. It was alleged that the appellant with another on 15th December, 2013 without lawful excuse threatened one Anand Kishore with a cane knife with intent to cause alarm to the said Anand Kishore.

3. At the outset, I would like to state that there were two accused persons charged in the Magistrate's Court, both had appealed against their conviction to the High Court. On 16th June, 2020 the first appellant Mohammed Aleem Afzal withdrew his appeal through his counsel.

4. The appellant had pleaded not guilty to the charge and the matter proceeded to hearing at the Magistrate's Court. The prosecution called two witnesses and at the close of the prosecution case the learned Magistrate found the appellant had a case to answer. When the defence opened its case the appellant gave evidence on oath.

5. On 6th May, 2019 the appellant was found guilty as charged and convicted for one count of criminal intimidation. On 21st February, 2020 the appellant was sentenced to 10 months imprisonment which was suspended for 2 years, he was also fined $360.00 to be paid within 28 days in default 18 days imprisonment, with a permanent non-molestation Domestic Violence Restraining Order to protect the complainant.

6. Being aggrieved by the conviction the appellant filed a timely appeal in person which was later amended by his counsel.

APPEAL AGAINST CONVICTION

7. The amended grounds of appeal are as follows:

GROUND ONE

The learned Magistrate erred in law and fact when he recorded a conviction when the evidence did not prove beyond reasonable doubt the charge of criminal intimidation.

GROUND TWO

The learned Magistrate erred in law and fact when he failed to consider important inconsistences in the evidence of the two prosecution witness.

8. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

GROUND ONE

The learned Magistrate erred in law and fact when he recorded a conviction when the evidence did not prove beyond reasonable doubt the charge of criminal intimidation.

9. The appellant's counsel argued that there was no reliable evidence in respect of the following elements of the offence of criminal intimidation namely:

a) The appellant had threatened the complainant;
b) With any injury; and
c) Intended to cause alarm to the complainant.

10. Counsel argued that the above elements of the offence could not have been satisfied considering the fact that the conversation took place from a distance of about 100 meters away. There was also no evidence on the existence of a cane knife because no knife was tendered in court and also there was no evidence that a knife was pointed at the complainant to cause alarm to him.

11. There is no dispute that the appellant and the complainant are known to each other and that the appellant and both the prosecution witnesses were

present at the scene where the incident had taken place. According, to the complainant he was about 40 meters away from the appellant.

12. The complainant told the court that the appellant had a cane knife with him and was swearing and shouting at him saying *"dogla"* meaning he had two fathers but according to the second prosecution witness the appellant had said "dogla" and "maichod" meaning mother fucker as well. The following excerpts from the evidence in chief of the complainant are noteworthy:

Page 15

"I know their names. One is Mohammed Shameem and the other is Mohammed Ali. They had a cane knife. Both of them were holding a cane knife. Both of them swore and said my fence is on their land. Swear "Dogla" may mean "son of two father". They were holding the knife (equivalent to their shoulder level). I didn't go near them when they were shouting and swearing, they will kill me."

13. In cross examination of the complainant, the following evidence is noted at page 16 of the copy record.

- *Defendant sitting on the horseback, they were holding a knife? Yes;*
- *Cannot confirm how they were holding the knife? I did say they were holding it like this (PW1 demo);*
- *They pointed the knife at me;*
- *Knife was held not pointed? They might have pointed it at me. They were holding it not pointing it...*

14. The complainant also told the court that he did not go near the appellant who was shouting and swearing with a cane knife in his hand and from this behaviour of the appellant, he told the court that they will kill him. The evidence of the complainant has to be taken in its entirety which was accepted by the learned Magistrate that the complainant was threatened by the appellant not only by the words spoken but by the aggression shown at the time which resulted in the complainant being alarmed.

15. The appellant was on a horse with the knife equivalent to his shoulder which suggested an intention on the part of the appellant to cause an alarm to the complainant. In the circumstances, there was no need for the knife to be pointed at the complainant. The conduct of the appellant at the time was sufficient to suggest an intention to cause alarm to the complainant.

16. Intention is not something that can be easily proved it has to be judged by the acts or words of a person or of the circumstances that surrounds what he or she does. The law says a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary cause of events. The intention of the appellant is to be considered by what the appellant did, before, at the time of, and after the act.

17. Intention of the appellant can be seen from the circumstances that prevailed at the time of what was said and observed by the complainant.

18. The distance where the appellant was standing does not matter because the prosecution witnesses could hear what the appellant was saying.

19. Furthermore, it is incorrect of the appellant's counsel to state that there was no evidence by the prosecution on the existence of the cane knife. The evidence of the prosecution witnesses is quite clear in this regard hence

there was no need for the knife to be exhibited. Although the complainant had not given a description of the knife held by the appellant to the police when his police statement was recorded does not mean that there was no knife held by the appellant. The knife was not only seen by the complainant but the other prosecution witness as well.

20. I have also perused the copy record, in my view the failure by the complainant to tell the police officer writing his police statement about the description of the knife was not a material discrepancy. The fact that the complainant had told the police the appellant was holding a knife in his hand was sufficient for the purposes of the complaint.

21. The learned Magistrate was mindful of the inconsistencies and omissions between the evidence given by the prosecution witnesses in court with their police statements. The learned Magistrate had mentioned this in his judgment from paragraphs 114 to 117. There was evidence beyond reasonable doubt in respect of all the elements of the offence the appellant was charged with.

22. Whilst evaluating the evidence the learned Magistrate accepted the evidence of both the prosecution witnesses over that of the accused.

23. In *Ajendra Kumar Singh vs. R (1980) 26 FLR 1* the Court of Appeal said at page 9:

"...It is also set out in [Director of Public Prosecutions- v- Ping Lin [1975] 3 All ER 175] as has frequently been said that an appellate Court should not disturb a judge's findings unless it is satisfied that a completely wrong assessment of the evidence has been made, or the correct principles have not been applied".

24. I have perused the copy record to satisfy myself whether the learned Magistrate had correctly assessed the evidence for the prosecution and the defence in deciding the credibility of the witnesses.

25. The learned Magistrate had observed the witnesses give evidence and in his judgment he had accepted the prosecution witnesses as credible and reliable. There is no compelling reason why this court should interfere with the fact finder's decision in this regard.

26. There is no error made by the learned Magistrate and this ground of appeal is dismissed due to lack of merits.

GROUND TWO

The learned Magistrate erred in law and fact when he failed to consider important inconsistences in the evidence of the two prosecution witnesses.

27. The appellant's counsel submits that the complainant and the other prosecution witness had contradicted each other. The complainant had mentioned in his evidence that the appellant had used the word *"dogla"* whereas the second prosecution witness had said the appellant used the word "dogla" and *"maichod"* and this witness did not say anything about the appellant saying to the complainant that *"they will see him"*.

28. Both phrases *"dogla"* and *"maichod"* are swear words in Hindi which was attributed to the appellant by the prosecution witnesses (although differently narrated by both the witnesses). The important point is that there was evidence of swearing by the appellant.

29. It is important to note that the second prosecution witness had also stated what the complainant had told the court except that PW2 did not say

anything about the appellant saying to the complainant that *"they will see him"*. Counsel for the appellant says this was a crucial inconsistency between the complainant and the other prosecution witness.

30. The complainant had maintained that the appellant had uttered the words *"they will see him"*. The fact that the second prosecution witness did not inform the court about this is immaterial. The altercation was between the appellant and the complainant so the best person to say what the appellant had said was the complainant even though the second prosecution witness was present. Furthermore, in cross examination of second prosecution witness the defence counsel did not put this proposition to this witness. In any event both the prosecution witnesses were found to be credible by the learned Magistrate.

31. Furthermore, the date of allegation is 2013 and the matter was tried in 2019 after 6 years. It would be quite unusual for a witness to narrate everything heard at the crime scene since passage of time and memory lapses play a crucial role when a person narrates evidence in court. From the judicial view point what matters is whether the basic version of the witnesses was shaken.

32. In *Bharwada Bhoginbhai Hirjibhai v State of Gujarat [1983] AIR 753, 1983 SCR (3) 280)* the Supreme Court of India held inter alia:

"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;"

33. The learned Magistrate was alert to the inconsistencies between the evidence of both the prosecution witnesses and upon his analysis of the evidence at paragraph 117 of the judgment, he correctly stated that the inconsistences were not significant or material enough to affect the credibility of these witnesses.

34. This ground of appeal is also dismissed due to lack of merits.

ORDERS

1. The appeal against conviction is dismissed due to lack of merits.

2. 30 days to appeal to the Court of Appeal.

Sunil Sharma
Judge

At Lautoka
28 September, 2020

Solicitors
Messrs AC Law, Lautoka for the Appellant.
Office of the Director of Public Prosecution for the Respondent.