

**IN THE MAGISTRATES' COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION**

Criminal Case No: 230 - 2015

STATE

-v-

MOHAMMED SHERAZ KHAN

For Prosecution : Inspector Lenaitasi S. [Police Prosecution]
Accused : Mr Samy A. [Legal Aid Commission]
Date of Trial : 16th April 2019
Date of Judgment : 24th April 2019

JUDGMENT

1. **MOHAMMED SHERAZ KHAN**, you and another pleaded guilty to the first count of assault occasioning actual bodily harm contrary to section 275 of the **Crimes Act 2009** and you and your co-accused were discharged on the 26th of October 2015 in relation to that count.
2. The second count remains. You are the only one charged in relation to that. You have pleaded not guilty. The count reads:

Second Count

Statement of Offence

COMMON ASSAULT: Contrary to section 274 of the *Crimes Act No. 44 of 2009*.

Particulars of Offence

MOHAMMED SHERAZ KHAN on the 20th day of September, 2015 at Yaladro Tavua in the Western Division, unlawfully assaulted **KESHNI DEVI SWAMI**.

PW1

3. Prosecution witness 1 [PW1] is Ms Keshni Devi Swami.
4. She is 40 years old.
5. On the 29th of September 2015 around 6.30 pm to 7 pm, she returned home with her family and saw rubbish burning in front of their home.
6. Her husband went to speak to Mr. Paras Ram Chetty who is the landlord of the area where the rubbish was being burnt.
7. PW1 does not know who burnt the rubbish but suspects that it was the defendant.
8. The defendant is a neighbour and stays 30 meters away.
9. PW1 has known the defendant for 16 years.
10. PW1's husband asked the defendant and the defendant's son and they denied burning the rubbish. A fight broke out.
11. PW1 said that her husband was punched and kicked. She went to save him.
12. When she approached, the defendant pushed PW1 onto some thorns and she was injured.
13. PW1 described that the defendant's hand landed on her shoulder and she fell.
14. In cross examination PW1 said that the fire was burnt in their compound but near a fence.
15. PW1 said that her husband, the landlord Mr Chetty and the defendant had a talk about the fire near PW1's fence. The defendant's son was there and some neighbours too. PW1 came there too.
16. PW1 admits that her husband drank some alcohol as they had returned from a party.
17. PW1 admits her husband swore but it was because he was being kicked.
18. PW1 said that she went in between her husband and the defendant to save her husband.
19. PW1 said only the landlord came to stop the fight, the others were just observing.

20. It was not an accident, PW1 said that the defendant pushed her and she fell.

PW2

21. Prosecution witness 2 [PW2] is Mr Paras Ram.

22. He is 54 years old.

23. He was at home on the 20th of September 2015.

24. Hemun or PW1's husband came to his home and asked him if he could explain to the defendant what to do when it came to burning.

25. Hemun is his cousin.

26. PW2 then went with Hemun to the defendant's place.

27. The defendant bought the land from PW2.

28. The defendant admitted to PW2 that he [the defendant] burnt the rubbish.

29. Then Hemun and the defendant started fighting.

30. It was dark.

31. PW1 came to save Hemun.

32. PW2 said that he did not see who fell or who pushed who.

33. He left when PW1 came in to save her husband.

34. In cross examination, PW2 said that when the noise got louder then people started coming. There was more than 6 people. The people were saying for the fight to stop.

35. The court found that there was a case to answer and after advising the defendant of his options, the defendant chose to give sworn evidence and will call another witness.

DW1

36. Defence witness 1 [DW 1] is Mr Mohammed Sheraz Khan, the defendant.
37. On the 20th of September 2015 he was at home with his family when the landlord came to see him about burnt rubbish.
38. It was the defendant's daughter in law who burnt the rubbish but the defendant apologized to the landlord and promised that they will not burn rubbish anymore.
39. Hemun came and was standing outside his fence, 4 meters away.
40. The defendant said that he apologized to Hemun.
41. Hemun was drunk. He yelled at the defendant telling him why he always wanted to burn the rubbish there.
42. Then the defendant's son came and the son and the defendant started fighting.
43. 5 to 6 neighbours came.
44. The defendant admits punching Hemun.
45. Hemun's wife or PW1 came when Hemun fell.
46. The defendant said that PW1 pushed him but luckily a neighbour was beside him which prevented the defendant from falling. That neighbour is Mohammed Shaahid Khan.
47. Hemun pushed his wife or PW1 away and started throwing stones.
48. PW1 tried to pull her husband away 3 to 4 times but Hemun pushed her away.
49. The defendant denied that he pushed PW1 and repeated the same when cross examined.

DW2

50. Defence Witness 2 [DW2] is Mr Mohammed Shaahid Khan.
51. He is 32 years old.

52. He saw the defendant's son fighting with Hem or Hemun.
53. Hemun was drunk and swearing at the top of his voice.
54. PW1 came and pushed the defendant. DW2 saved the defendant from falling.
55. There were others trying to stop the fight.
56. PW1 tried controlling Hemun but Hemun was pushing her.
57. Hemun threw some stones.
58. In cross-examination DW2 said that it was 7pm. It was dark but it was not that dark.
59. DW2 did not see DW1 punching Hemun.
60. DW2 only saw Hemun fighting with the defendant's son.
61. That was the end of the defence case.

ANALYSIS

Burden and Standard of Proof

62. The defendant is presumed innocent.
63. The burden is on the party that wish to rebut this presumption. In this case, the burden is on the prosecution.
64. The prosecution rebuts the presumption when they make the court sure or convinces the court beyond a reasonable doubt that the defendant committed the offence.
65. Even if I reject the evidence of the defendant and or his witness or I don't accept his denial, it doesn't necessarily mean that the prosecution has proven their case.

Elements of the Offence

66. The elements of the offence for common assault contrary to section 274 of the **Crimes Act 2009** are:
- a. The defendant
 - b. Unlawfully assaults, that is, doing an unlawful act which intentionally or possibly causes another person to apprehend immediate and unlawful personal violence [**Fagan v Metropolitan Police Commissioner** [1968] 3 All E.R 442].
 - c. That the unlawful assault was done to PW1 Ms Keshni Devi.

FINDINGS

67. The evidence overwhelmingly show that the parties know each and it is not disputed.
68. If I for example, accept the defence case that the defendant did not push PW1 or even if the defendant pushed PW1, it was justified, then the defendant must be acquitted.
69. It can be difficult in affrays or scuffles like this for anyone who was not present, to make sense of things.
70. There is overwhelming evidence and I accept that a fight between Hemun and the defendant's son and the defendant was on-going.
71. I accept that people were coming in to stop the fight.
72. I accept that pushing, pulling and even profanities would have been dished and said.
73. A person may genuinely be acting in self-defence punching or pushing another and then in the next second that defence will not apply as the person now becomes the aggressor or provokes or exacerbates the situation.
74. I accept that it was dark but it was not that dark.
75. I believe and accept the evidence of PW1 that the defendant pushed her, felling her.

76. This means that I do not believe the defendant on this point.
77. I however accept the evidence of the Defendant and his witness, that the defendant was pushed by PW1 and that DW2 saved the defendant.
78. It is unclear to me though whether the pushing of either party particularly the pushing by the defendant as he is the one charged and not PW1, was unjustified or unlawful.
79. Both PW1 and the defendant went in to stop the fight.
80. In a commotion like this and in this context, people falling or being pushed is bound to happen.
81. That does not necessarily make the act unlawful.
82. I am unsure that when the defendant pushed PW1, whether that amounted to an assault.
83. There are several reasonable theories in this case that has not been ruled out by the evidence of the prosecution in-order for me to find that the act of pushing PW1 was unjustified. As the parties said, they came in to stop the fight or to help their family member, PW1 for the husband and the defendant for his son.
84. My being unsure, that benefit must be given to the defendant.

Conclusion

85. Based on the aforementioned reasons, I'm not satisfied beyond a reasonable doubt that the defendant committed the offence. I have a reasonable doubt about element (b) or whether the defendant's act in pushing PW1 was unlawful.
86. The defendant is acquitted of the second count of common assault.
87. 28 days to appeal.



At Tavua this 23rd day of May 2019

Lisiate T.V. Fotofili

Resident Magistrate