

IN THE MAGISTRATES COURT OF FIJI
AT TAVUA
CRIMINAL JURISDICTION

Criminal Case No: 131 - 2015

STATE

-v-

SUNITA DEVI

Before : RM Fotofili L.
For Prosecution : IP Lenaitasi S. [Police Prosecution]
Accused : Ms Henao G. [Legal Aid Commission]
Trial Date : 10th December 2019
Date of Judgment : 11th February 2020

JUDGMENT

BACKGROUND

1. The defendant is charged with and has pleaded not guilty to the following:

Statement of Offence

BREACHING DOMESTIC VIOLENCE RESTRAINING ORDER: Contrary to section 77 (1)
of the Domestic Violence Act of 2009.

Particulars of Offence

SUNITA DEVI, on the 25th day of May, 2015 at Tavua in the Western Division having been served a notice of Domestic Violence Restraint Order No: 09/14 issued by Tava Magistrate Court by which he was bound without reasonable excuse contravenes the order by swearing [at] **PARVIN KUMAR** the protected person.

2. The parties have no reservation with the court taking judicial notice of a related matter which is Tavua DVRO 09 – 14.
3. It may be helpful to summarise that case.

4. The defendant Ms Devi is the Respondent in that DVRO case. The Applicant in that DVRO case is Mr. Parvin Kumar. Ms Devi is his sister in law or is married to the Mr Kumar's younger brother. The Applicant Mr Kumar alleged that Ms Devi continuously swears at him. They live in the same compound. When the DVRO case was first called before my brother Magistrate on the 20th of February 2014 [*ex parte*], the Court imposed an interim domestic violence restraining order [DVRO] with section 27 standard non-molestation on the Respondent Ms Devi. Ms Devi first appeared in that DVRO case on the 14th of April 2014. On the 27th of January 2015, after Ms Devi and Mr Kumar secured legal representation, Ms Devi consented to the interim DVRO being finalised with an additional condition that she is not to loiter around Mr. Kumar's compound. The standard non-molestation conditions, required the Respondent Ms Devi not to threaten, intimidate or harass the protected person Mr. Parvin Kumar.
5. Returning to this case, the defendant first appeared on the 1st of June 2015 and was granted bail.
6. An interim DVRO or another DVRO with section 27 standard non-molestation conditions was imposed on the defendant for the protection of the alleged victim Mr Parvin Kumar.
7. During the course of the proceedings, there was some information received that the defendant has a 'mental problem'.
8. Directions were made by my brother Magistrate for the defendant to voluntarily submit herself to hospital for a psychiatric assessment. Her husband who was also her surety, was to assist her.
9. There is no record in the file whether any psychiatric report was filed with the court or produced by the defence.
10. On the 15th of August 2017, the prosecution adduced their evidence by calling their main and only witness Mr Parvin Kumar. The evidence was adduced before my brother Magistrate.
11. A no case to answer ruling was not provided before my brother Magistrate left the judiciary.
12. I then ordered for a retrial before me.
13. The prosecution called only one witness who again was Mr Parvin Kumar.
14. After the prosecution closed their case, I found that there was a case to answer.

15. After having explained the options available to the defence, the defendant opted to give evidence and did not call any other witness.

16. I summarise the evidence of the parties below:

PW1

17. Prosecution witness 1 [PW1] is Mr Parvin Kumar.

18. He is 55 years old.

19. He was the Applicant in the DVRO matter in 2014 and he filed the DVRO against the defendant.

20. On the 25th of May 2015 at 3am, PW1 described that he was sleeping at home when he heard noise.

21. He heard swearing from the neighbour's.

22. The defendant is his neighbour.

23. The defendant resides in a different compound about 30 to 40 meters away.

24. The defendant is married to PW1's younger brother.

25. PW1 said that the defendant said his name and said 'Maichod' [motherfucker] and also said ' you want something, come here '.

26. PW1 reported the matter to police in the morning at 9am.

27. PW1 did not see the defendant directly when she was saying those things as PW1 was in his house.

28. There are bushes in between the houses too.

29. The defendant is certain that it is the defendant's voice he heard as it happens often. They have been neighbours for 10 to 12 years.

30. PW1 said that the defendant was like that for two nights.

31. PW1 says that her behaviour continues to date.

32. PW1 alleges that the defendant also bangs on the tin.

33. PW1 says that when the defendant acts that way, he does not feel good.
34. PW1 does not go to court or to the police every time it happens as PW1 feels ashamed.
35. In cross examination, PW1 said that the defendant creates problems. PW1 accepts that he wants the defendant removed. PW1 alleges that the defendant does not respect the family and since the defendant got married into the family, ' she has been doing that '.

DW1

36. Defence witness 1 [DW1] is the defendant herself Ms Sunita Devi.
37. She is 47 years old.
38. She accepts that she is the respondent in the DVRO case.
39. In 2015 she was residing with her husband.
40. PW1 is her brother in law.
41. They are not on talking terms.
42. It has been like that ever since she made her house at the area.
43. The defendant says that the family do not want her.
44. The defendant says that she was at home sleeping at the material time.
45. In cross examination, the defendant accepts that she agreed to the DVRO being finalised as she wanted the matter settled.
46. The defendant accepts that her house is a 'stone's throw away' from Parvin's house.
47. She denies swearing at Parvin saying Maichod. She denied saying for Parvin to come out of the house.
48. She denies that she was aware that a DVRO was in place at the time.

BURDEN and STANDARD OF PROOF

49. I remind myself that the defendant is presumed innocent until proven guilty.
50. The prosecution carries the burden of proving her guilt.
51. I also remind myself that I must be convinced beyond a reasonable doubt or I must be sure that the defendant committed the offence before I find her guilty.
52. The defendant has elected to give evidence. The evidence adduced by the defendant can be used for her and even against her. Her evidence could be neutral as well or inconsequential.
53. If for example, I accept the defendant's denial that she did not swear at PW1 or did not ask PW1 whether he wanted something and for him to come, then the defendant is entitled to an acquittal.
54. Even if I don't believe the defendant, it does not necessarily mean that she is guilty.
55. The prosecution still carries the burden of proving her guilt and they must meet the requisite standard of proof.

ELEMENTS

56. The elements of the offence, all of which, the prosecution have to prove beyond a reasonable doubt are:
 - i. **The defendant;**
 - ii. **Having had notice of a domestic violence restraining order by which she is bound;**
 - iii. **Contravenes the order or part of that order**
57. There are certain instances where it can be deemed that a person has had notice of a domestic violence restraining order. For instance, section 77 (4) (a) and (f) of the **Domestic Violence Act 2009** deems it so if the person was present before the Court when the order was made or was aware of the terms of the order.

58. If the prosecution's evidence satisfies the court beyond a reasonable doubt of the above elements, that is elements i., ii. and iii, then the defendant carries the legal burden of proving that she had reasonable excuse to contravene the order or part of the order. She only needs to satisfy the court that she had a reasonable excuse on the balance of probabilities [see section 60 and 61 of the Crimes Act 2009] .
59. This however does not prevent prosecution from adducing evidence touching on whether the defendant had a reasonable excuse.
60. If sufficient evidence is adduced by the prosecution to make this defence worth considering, then the defendant no longer carries the evidential burden [section 59 (5) of the Crimes Act 2009.
61. If the evidential burden has been discharged, the prosecution still carries the legal burden of disproving or negating that defence and they must disprove it beyond a reasonable doubt [section 57 (2) of the Crimes Act 2009] .

CIRCUMSTANTIAL EVIDENCE

62. It is inevitable in many cases that there would be circumstantial evidence.
63. I remind myself that circumstantial evidence can be powerful evidence but it must be considered with care in-order to avoid speculation. The circumstantial evidence must be consistent with the defendant having committed the act or the guilt of the defendant but that also the facts must negative any other reasonable conclusion that may exonerate the defendant. At the end of the day, the court must be satisfied beyond a reasonable doubt of the defendant's guilt [Varasiko Tuwai v.The State Criminal Appeal Number CAV 13 of 2015 (26th August 2016) at paragraph 51 to 53.

FINDINGS

64. It is well established and I find it proven beyond a reasonable doubt that the parties are acquainted with each other.
65. I did not find the defendant credible or believable as a witness. Her explanation in her evidence that she was not aware of the DVRO is against the totality of the evidence. I did not believe her that she was sleeping at the material time. I found her evidence self-serving and unconvincing.

66. There is overwhelming evidence and I am sure that the defendant had notice of the DVRO order. She was present during the DVRO proceedings and agreed to the DVRO being finalised on her in the presence of her counsel.
67. I found PW1 Mr Parvin Kumar a credible witness. I found him more forthright and convincing. He for example admits or accepts that he wants the defendant removed. It is only understandable considering the seemingly irreparable relationship they have and the complaints he has made against the Defendant. His admission only reinforces my view of his credibility.
68. I also find that he is not mistaken and there is strong circumstantial evidence of this. PW1 is familiar with the defendant and they reside close to each and know each other for more than a decade. It was the defendant's voice he heard. This was in the morning around 3am and I have no reason to believe that there were distractions at that time of day to make me doubt PW1's claim that it was the defendant's voice he heard. They are staying about 30 meters apart. I do not find his inability to see the defendant directly, as an impediment to his evidence. I accept that he clearly heard the defendant say his name and said Maichod or motherfucker and whether PW1 wanted something and for PW1 to come.
69. This was threatening, intimidating and a harassment of PW1 by the defendant.
70. I find there is no justification for her behaviour and there is no evidence before me to consider whether there might have been a justification.
71. The defendant's actions were a breach of the DVRO.

CONCLUSION

72. The charge is proven beyond a reasonable doubt.
73. I find the defendant guilty for breaching a domestic violence restraining order contrary to section 77 (1) of the **Domestic Violence Act 2009**.
74. I will take or receive mitigation and other relevant information before I pass sentence.



At Tavua this 11th day of February, 2020.

LISIATE T.V FOTOFILI
Resident Magistrate