IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

A T L A U T O K A

Appellate Jurisdiction

Criminal Appeal No. 54 of 1980

BETWEEN:

I B R A H I M K H A N
s/o Amir Khan — Appellant

A N D: R E G I N A — Respondent

Mr. Sahu Khan — Counsel for the Appellant
Mr. D. Williams — Counsel for the Respondent

J U D G M E N T

The appellant was charged with the offence of criminal intimidation contrary to Section 366(a) of the Penal Code in that on 29th February, 1980 he without lawful excuse threatened Hassan Mohammed with a knife with intent to cause alarm. After hearing evidence, including evidence by and on behalf of the appellant the magistrate found him guilty and sentenced him to nine months imprisonment suspended for two years and to a fine of $150. He now appeals against his conviction and sentence.

The first ground of appeal is that the magistrate misdirected himself on the questions of "lawful excuse, colour of rights, and mens rea".

It was found by the magistrate that the appellant had a genuine belief that a lorry in the possession of the complainant belonged to him,

the appellant, and the incident involved his attempt to recover possession of it. Under Section 13 of the Penal Code criminal responsibility for the use of force in the defence of property is to be determined in accordance with English Common Law. In most cases where force is used, the force is used in defending the person or his property. But there is authority in Blades v Higgs (1861) 10CB(N.S.) 713 for the proposition that assault may be justified in recovering possession of one's property from another provided that no more force than is necessary is used to do it. The relevance of this is that in the offence with which the appellant is charged one of the essential elements is that it is committed "without lawful excuse", (not "lawful authority"). The magistrate seemed to agree the appellant might have had lawful reasonable grounds for making the threat, and I can only assume that by "lawful/reasonable grounds" he meant lawful excuse. But he then went on and found that the threat was not a proper means of enforcing his demand about which is a little strange. The question is, had the prosecution proved that the appellant had no lawful excuse, and there seems to have been some doubt about that.

The second ground of appeal is that the charge as drafted is defective. One of the elements of the offence is "threat of injury", but the charge as drafted does not allege "threat of injury" it merely alleges that the appellant threatened the complainant with a knife. Another element of the offence is the intention to cause alarm in the complainant. Now the main intention of the appellant, it seems to have been accepted, was to recover possession of the vehicle. In doing so he may have caused alarm in the complainant, but was that his intention? Assuming

that he had a knife as the complainant alleged; was the knife carried as a means of deterring opposition should the complainant and his friends decide to fight, or did he use it as a direct threat against the complainant? There was no evidence of spoken threats or injury by the appellant. Apparently when the complainant and his brother saw the appellant coming they jumped into the vehicle and drove off. The appellant jumped onto the running board and shouted to them to stop. According to them both he banged the side of the vehicle with the knife, waved it at them and shouted to them to stop. Striking the side of the vehicle with the knife is not what the appellant was charged with. If he was clinging to the side of the vehicle as it bumped along a bad road - as this seemed to be - he would not be able to do much and his main concern seemed to be that they should stop. The complainant and his brother may have been alarmed and may have feared that they would be struck with the knife but was it in fact the appellant's intention to strike them and injure them, or did he indeed threaten to strike and injure them with intent to cause alarm? Because it is this that the prosecution had to prove and it was necessary for the magistrate to approach the matter very carefully, direct himself on what exactly the prosecution had to prove, and make his findings according on the evidence before him. It was not sufficient that the appellant may have had a knife in his hand and waved it in the air, or even what P.W.1 and P.W.2 thought he was going to do. And the question whether or not the appellant had a knife in his hand was very much in dispute. P.W.1 and P.W.2 said he had a knife, the appellant denied it.

No knife was ever produced, its existence or non-existence dependent entirely on the evidence of witnesses. P.W.1 and P.W.2 and the appellant were naturally very interested parties. But there was in addition the evidence of P.W.3, a prosecution witness and one described by the magistrate as a "solid witness". He says he never saw a knife and it is difficult to see how he could not have seen a knife if the appellant did indeed have one in his hand and waved it at the complainant. And yet the magistrate said "Weighing the evidence I accept that the accused had the knife at the cab window. There is no doubt that the accused threatened P.W.1 and alarmed him". But how did he weigh P.W.3's evidence, because it cannot just be ignored on an issue as vital as this. He seems to have believed P.W.1 and P.W.2 and therefore disbelieved anything to the contrary. And yet what were his reasons for believing P.W.1 and P.W.2? After dealing with P.W.1 the magistrate said "P.W.2(P.W.1's brother) testifies similarly although there are some discrepancies. P.W.1 and P.W.2 both have considerable reason to invent an allegation against the accused but their demeanour in Court was of honesty". The discrepancies were not specified although the magistrate did later say that they were only of a kind to be expected on hearing from two separate observers. As to the reference to demeanour I can best repeat what the Fiji Court of Appeal said in Nirmal v R, 15FLR 194 that "the assessment of the credibility of witnesses by their demeanour alone is wrong if it can be avoided; all the evidence should be weighed before deciding what to accept and what to reject." The magistrate seems to have decided the issue of the knife entirely on the demeanour of P.W.1 and P.W.2, overlooking discrepancies in their evidence, their obvious bias, and more importantly completely ignoring the evidence of P.W.3, the "solid witness", and the only one who seemed to be quite disinterested.

There are other aspects of the judgment which counsel for the appellant attacked. For instance the magistrate said he was convinced that the appellant was instrumental in enticing P.W.1 and the truck to the remote spot and there ambushing him. And he later referred to the certainty that there was a carefully laid plot and the appellant intended to alarm P.W.1. This was conjecture since there was no firm evidence of such an intention to entice P.W.1 to a remote spot and ambush him, no evidence of a carefully laid plot, and whether or not an intention to alarm P.W.1 could be inferred, this

must be connected to a threat of injury for the purposes of the charge.

In all the circumstances I conclude that the conviction cannot safely be left and I therefore set aside the conviction and sentence and acquit the appellant. The fine, if paid, must be returned.

LAUTOKA,
11th September, 1980

(sgd.) G.O.L. Dyke
JUDGE