

IN THE HIGH COURT OF FIJI
AT SUVA
[CRIMINAL JURISDICTION]

CRIMINAL CASE NO. HAC 247 of 2018

BETWEEN : **STATE**

AND : **1. DHARMENDRA KUMAR**
2. ACHAL VISHALA RAJ

Counsel : *Ms. B. Kantharia for the State*
Mr. K. Prasad for the 1st Accused
Mr. A. Nand for the 2nd Accused

Hearing on : *25th of March 2019 – 03rd of April 2019*
Summing up on : *04th of April 2019*
Judgment : *09th of April 2019*

JUDGEMENT

- [1] The 1st accused, Mr. Dharmendra Kumar and 2nd accused Ms. Achal Vishala Raj are charged with two counts, of Act With intent to Cause Grievous Harm and Common Assault, respectively contrary to Sections 255(a) and 274 of the Crimes Decree No. 44 of 2009.
- [2] Each accused pleaded not guilty to the respective charge and the ensuing trial lasted for 6 days. The complainant Ruci Rokowati, a neighbor Mr. Paulo Kafoa, a police officer PC3406 Tinolevu and Dr. Pauline Clip, gave evidence for the prosecution while the 1st accused gave evidence in denial of the charge.
- [3] At the conclusion of the evidence and after the directions given in the summing up, the assessors unanimously found both the accused not guilty to the counts of Act with Intent to Cause Grievous Harm and Common Assault respectively.
- [4] I direct myself in accordance with the law and the evidence inclusive of which I have discussed in my summing up to the assessors.

The Evidence

- [5] The 1st witness for the prosecution or the PW1 is Ms. Ruci Rokowati. Her evidence is that;
- i) The 1st accused, Dharmendra was her de-facto partner, with whom she has been living for about 2 and half years.
 - ii) The 2nd accused is a daughter of Dharmendra, who lived with them at lot 6, Nakauvadra Road, Delainavesi.
 - iii) The witness was living at the 1st accused's house together with her 3 year old son, 1st accused Dharmendra and his daughters (Achal the 2nd accused, and another) and also his son Donald Vishal.
 - iv) On the 13th day of June, 2018, she has returned home from shopping with the 1st accused, Dharmendra (A1) and her son. When they returned, there has been A1's son Vishal and daughter Achal (A2) at home. A1 has asked his children 'why, there was no cooking done?' Then Vishal has retorted that it was her (Ruci's) duty. Thereafter Vishal has sworn at her and she and Vishal has had an argument.
 - v) Then she has gone to the back of the house to remove her shoes and has heard her son crying, and came back to the sitting room and asked Vishal, 'what happened' because her son was crying and Vishal has started shouting at her saying that 'who are you? You do not own anything here.' Then the PW1 has got angry and picked up a charger and threw it at Vishal. At that moment the A1 has punched her on the back of her head. While the witness was defending herself A2 has hit her with the hair clipper. The hair clipper has hit her on her left leg.
 - vi) Thereafter, she has tried to run outside and since the all the doors were closed she has gone for the back door. While trying to open the back door grill she has heard lifting of heavy metal and when looked at, has seen the A1 hitting her with the cane knife. She was hit on the right side of her head towards the back. Then she has managed to push him away and open the grill and get out of the house. The witness identified the cane knife which was marked and produced as PE1 as the knife used by the A1.
 - vii) Having gone out she has heard her son crying and has come back for him and taken him also out and has run to the road to call for help as she was bleeding. Her neighbor has come to help her and having comforted her, has taken inside his house, has put a wet cloth to the injury to stop the bleeding, and called the police.
 - viii) The police has come about an hour later and taken her to the nearest health center, which is the Lami health center. She was taken into the emergency unit and having shaved a part of her hair they have stitched the wound. From there she was taken to the police station to record her statement.

- ix) Having recorded her statement, since she bled still she was taken to the CWM hospital and admitted at the emergency unit. She has fainted there and was put to an observation room. She was operated on the following morning at about 10.00 am. Altogether she has been in the hospital for 5 days and was asked to attend the clinic on every Thursday for a time.

[06] Answering the cross examination on A1's behalf, PW1 says that;

- i) The A1's house which they were living in had two bedrooms and the living area and the kitchen were to the front of the house and the bedrooms were at the center adjacent to each other and the washing area was towards the back of the house. The house had three entry exit points to the outside and two were in the living kitchen area, one to the front and another to the side, and the other was at the back from the washing area.
- ii) The witness admitted that she has been charged in Suva Magistrate's Court on a cross report regarding the same incident and the charge sheet containing three counts of common assault against the witness was marked and produced as DE-A1-1.
- iii) The witness further admitted the Caution Interview in respect of the above charges and marked and produced a copy of the said caution interview record as DE-A1-2. In referring to questions 33, 34 and 36 of the said caution interview the witness admitted them to be true and correct. She conceded that she was the 1st to throw things at Vishal. She further conceded that a ceramic doll which she threw at Vishal hit him and A2 told her that she shouldn't have hit Vishal. Then she, the witness responded to it by saying that 'who is she (A2) to talk to her like that'. Thereafter, there has been a scuffle between the PW1 and A2 with pulling of hair and punching. Then A1 has taken her to his bedroom and closed the connecting door, however arguments have continued between the PW1 and A2.
- iv) She further admitted that she pushed the door connecting A1's bedroom and A2's bedroom and it came out and fell on the A2's face. Thereafter, the fight between the PW1 and A2 has recommenced and continued into the A1's bedroom. In the middle of the fight things on the bedside cupboard has fallen on to the floor and PW1 has grabbed the hair trimmer and pinning A2 to the bed has sat on her. Further, PW1 concedes to have tried to strangle A1 by her neck using the hair trimmer wire. Then A2 has cried for help.
- v) At that moment A1 has come and grabbed her by the shoulders and pulled the PW1 off from A2. When it was suggested that she slipped on and knocked her head on the door frame, which was a sharp edge, and got her-self injured, the witness denied. She admitted that the door edge was 90 degrees.
- vi) When it was suggested that all this time, until she stepped out of the house, A1 was trying to calm her down saying "buna – Calm down", the witness

admitted it. Further, when suggested that A1 simply saved A2 from the PW1, the witness admitted it.

- [07] In answering the cross examination on A2's behalf, the witness said;
- i) A2 came out of her room only when she heard the commotion between the PW1 and Vishal and having come out A2 tried to calm down her brother Vishal, to not to fight with the PW1.
 - ii) When queried whether the A2 went back to her bedroom after Vishal leaving the house, though the witness answered in the negative initially, when confronted with question 36 and her answer in DE-A1-2, the witness admitted so.
 - iii) When queried by the Court of the number of doors in A1's bedroom the PW1 said one. Further, though the witness claimed that A1, A2 and Vishal ganged up against her, she contradicts herself later by conceding that while she was fighting with A2, Vishal was not at home and A1 did not do anything.
 - iv) The witness further concedes that while she threw things at A2 what A2 did was only defending.
- [08] In re-examination, the witness stated that;
- i) She saw A1 hitting her with the cane knife, when she was trying to open the grill door, at the back of the house in the washing area.
 - ii) The witness explaining a question by the Court earlier, stated that as soon as she looked at A1, that very moment she saw the knife hitting her.
- [09] The PW2 was Mr. Paulo Kafoa. His evidence was that;
- i) Presently he is living in Ba and has been living there for two years.
 - ii) Prior to coming there, he has been living in lot 6, Nakauvadra, Delainavesi, for about 6 months, from March 2018 to August 2018. A1 was his landlord and he was living as a tenant in a room adjacent to the A1's house. His room was separated from A1's house by a single wall.
 - iii) On the 13th of June, 2018 while at his room, he has heard A1 having an argument with his wife, the PW1. The tone of the argument has gone up and he has heard the PW1 calling for help. Then he has left his room and gone to back side of the A1's house. There he has seen them (A1 and PW1) exchanging words. Thereafter, he has seen A1 swing a knife at PW1, and her coming out of the house bleeding. Then he has seen her running back into the house and coming out with her son.
 - iv) Thereafter, the witness has taken her to a neighbor's house and PW1 has fainted there. Within 20-35 minutes police has come and taken her to the Lami Hospital.

[10] The next witness, PW3 was the police officer, PC3406 Tinolevu. His evidence was that;

- i) He has been in the police service for 14 years and was on duty on the 13th of June 2018, attached to Lami police station.
- ii) In the evening while driving a patrol car, he has received a call to attend to a report at Delainavesi. When he reached Delainavesi, he has met the victim at a neighbor's house. He, together with two other police officers has taken the PW1 to the Lami Health Center as it was the closest and she has been bleeding.
- iii) Once the hospital staff attended to the PW1, he has taken her to the Lami police Station to record a statement from her. Having handed over the PW1 to the officer in charge of the Lami Police station he has continued on his patrol. Then he has received another call from the station, informing that the PW1 has further bleeding and needs to be admitted to the CWM hospital. The witness having come back to the station and having picked up the PW1, has proceeded towards the CWM hospital. While on the way the PW1 has informed him that she wanted to pick some clothes from her house and accordingly he has taken her to her house at Delainavesi.
- iv) While at her house the PW1 has told him that a knife was used and having showed him the knife, he has picked it from a place near the bathroom. The witness concedes of not following the proper procedure in collecting the case exhibits though he is aware of such procedure. His explanation for it was that he is only a police driver and not an investigating officer.
- v) When he was queried by the Court 'whether he happened to observe any stains of blood on the floor of the house' the witness stated that he did not observe such and when queried 'if there were stains of blood, should he have observed them?' the witness answered in the negative.

[11] PW4 was Dr. Pauline Clip. She has examined the PW1 on the 14th of June 2018 at 01.30 hrs. at the CWM hospital. She states that;

- i) She is a MBBS qualified doctor and having obtained her qualifications in 2010, has about 9 years of experience. She works in CWM hospital since 2015 and is presently attached to the Neuro Surgical Unit at the CWM hospital.
- ii) The witness having identified a medical examination form filled in respect of PW1, as a document prepared by her, marked and produced the same as PE2.
- iii) The witness states that her findings are consistent with the history given by the patient. However, when queried whether a similar injury could occur by PW1, hitting her Head on the 90 degree door frame edge, the witness affirmed such.

[12] With the leading of the above evidence prosecution closed their case and the Court being satisfied that the prosecution has adduced sufficient evidence covering all the

elements of the offences, decided to call for a defense, acting under the virtue of section 231(2), of the Criminal Procedure Decree, explaining and granting the due rights of the accused.

- [13] The 1st accused having understood his rights, elected to give evidence on his behalf. His evidence is that;
- i) He was having a de-facto relationship with PW1 and she and her 3 year old son lived with him and his two daughters and the son.
 - ii) on the 13th of June 2018, having gone out, he returned home together with his partner, Ruci (the PW1) and her son, Ledua at around 7.15pm. When they came home, his son Vishal and daughter Achal was at home. As soon as they came in Ruci has gone into the bedroom and A1 having kept the groceries has gone to the kitchen to see whether rice is cooked or not. Having seen the rice cooker empty he has gone to A2's room. She was on her bed and when asked why she didn't cook the rice, has replied that she is tired and he should tell the buna (his wife) to cook the rice.
 - iii) Then A2 has gone back to the kitchen and asked his son who was there frying a sausage, to put the rice in the rice cooker. His son has called buna to come and cook the rice. Buna was changing her clothes and has replied that she cannot do it and an argument has taken place between Vishal and the PW1.
 - iv) PW1 having come to the living room picked up a charger and has thrown it to Vishal. Again she has picked up a ceramic doll and thrown it at Vishal. It has hit the Vishal's head and broken into pieces. By that Vishal has got angry; however, A1 has managed to send him out of the house.
 - v) Thereafter when A1 tried to take Ruci to the bedroom, while going through the A2's bedroom, A2 has told Ruci that she should not have hit Vishal like that. Then there commenced an argument between A2 and the PW1, which culminated in punching and pulling of hairs between the two. A1 has come between them and has managed to separate the two and take Ruci to her bedroom.
 - vi) Once Ruci is inside the bedroom, A1 has closed the door, however the argument between his daughter and the buna has continued. After a while Ruci has brushed A1 aside and kicked the connecting door. The door has come out and fallen on the A2 who was on her bed. Then Ruci has gone into the A2's room and started fighting again with the A2. While fighting A2 has picked up an extension cord and Ruci has picked up the hair trimmer. A2 has thrown the extension cord wire at Ruci while Ruci has held the hair trimmer by the plug and thrown the machine at the A2.
 - vii) The witness, (A1) had seen the hair trimmer hitting the A2 and bouncing back hitting PW1 on her leg. While fighting the things they fought with has got entangled with themselves has both has ended up in PW1's bedroom. There

PW1 has pushed A2 on to her bed and when fell down in to the bed sat on A2 and has tried to strangle the A2 with the hair trimmer wire.

- viii) Then A2 has cried for help and A1 has come and pulled PW1 off A2 with force, holding her from the shoulders. There have been many things scattered on the floor of the bedroom due to the earlier scuffle and PW1, having slipped off something, fell down hitting her head on the edge of the door frame. The witness describes the door frame made of wood to be of 90 degree angle and sharp.
- ix) As for the witness, thereafter he has helped the PW1 to stand up and asked the A2 to go out. He has had a discussion with the PW1 for about 15 minutes and she has alleged him of taking his daughter's side. He has seen PW1 bleeding and has offered to take her to the hospital, which the PW1 has refused. Then the PW1 has got few of her things packed into a small black bag and having her son also got dressed went out of the house.
- x) In cross examination, when the A1 was confronted with the evidence of PW1 and asked whether he punched the PW1 on her head when she threw things at Vishal, A1 states that if he did so, PW1 would have fought with him.
- xi) In reference to the evidence of the PW2, the A1 states that PW2 has complained against him to the rent board, while he was in prison and also was in arrears of rent for 3 months. His assertion is that PW2 had never been there watching the alleged incident. Ultimately, the witness, A1 vehemently denies assaulting the PW1 with a knife.
- xii) In responding to the cross examination by the State, the witness admits that the way his son, Vishal spoke to Ruci was wrong and that angered her and prompted an argument between Vishal and Ruci.

[14] The 1st accused decided to not to call any other witnesses on his behalf and close his case with the leading of the above evidence.

[15] The 2nd accused decided to remain silent and neither to give evidence herself nor to adduce any other evidence on her behalf. That is her constitutional and she bears no burden to prove her innocence. The prosecution must prove her guilt beyond a reasonable doubt.

[16] That was a summary of the evidence given in this case. I have outlined above, some of the important and relevant evidence given at this trial. However, I am much familiar with all the evidence lead in this case as I have listened, and taken down the entire evidence and have observed the demeanor of the witnesses as well.

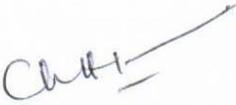
Analysis

- [17] First I will commence with the evidence of the PW2. When we analyze the evidence of this witness, should be mindful of the many inconsistencies with the evidence of the PW1. Firstly, even as for the PW1's evidence there has never been an argument between A1 and PW1. Secondly, PW1 never stated that she cried for help at any time, while she was inside the house. Thirdly, when the witness came out of the room he has said to have seen A1 and PW1 having an exchange of words. This does not substantiate the PW1's version of events. Fourthly, the witness says that PW1 fainted at the neighbor's place. As for the PW1's version she has fainted only at the CWM hospital. Furthermore, as for the witness he has escorted the PW1 to the neighbor's place as soon as she came out with the child. However, as for the PW1, she has come out of the house with the child and ran to the road before crying for help. Though I am aware that evidence of two separate witnesses need not exactly be the same, the glaring inconsistencies are far too unjustifiable. If we assume that the version of events narrated by PW1 is correct, we have to reject the PW2's version and vice versa. In result, we cannot consider the PW2's evidence as corroborative of the PW1's evidence.

Further, in cross examination, the witness states that in between him and the A1, there was the closed grill door, and half opened wooden door, and PW1, yet he managed to see from a distance of about 6 meters, A1 picking up the cane Knife from the wash basin, which was about 2 meters away from the door and swing it at the PW1. This, when taken together with the inconsistencies mentioned above, I am of the view that PW2's evidence should not be relied upon.

- [18] When looked at the version of events described by the PW1 in her examination in chief, it drastically changed during the cross examination. Therefore, when we look into the main allegation against the A1, to wit; the assault with the cane knife, it obviously creates a reasonable doubt in the mind, of the prosecution version as well as on the veracity of the said allegation. Further, PW1 asserted that A1 tried to calm her down throughout the incident. If the A1 happened to punch her on the head at the very commencement of the incident as alleged, the most natural consequence of it would have been a fight between the PW1 and the A1. On the other hand, if A1 indeed assault the PW1 initially, would he still try to calm her down thereafter? Obviously, it would not be possible. If A1 was in need to assault the PW1, he wouldn't have waited until she tried to get out of the house. Instead of pulling the PW1 away from the A2, which is admitted by the PW1 as well, he would have assaulted her then, when he was in a greater provocation towards the PW1. Therefore, I am of the view it would be difficult to rely on the evidence of the PW1.

- [19] When it comes to the evidence of PW3, the police officer, it is highly unsatisfactory for a trained officer to act in violation of the regulations and it should be condemned. It would have been an ideal opportunity in discovery of truth if proper procedures were adopted and PE1 was examined for human blood. It is beyond my comprehension, why the prosecution decided to call the police driver instead of the investigating officer. As for the evidence of PW4, the doctor, she was not in a position to testify in detail as the wound was already sutured by the time the witness observed the injured. In any event when looked at the PE2 it is apparent that it was not completed with the due care.
- [20] The court having explained all the relevant legal principles and the applicable law to the assessors, they unanimously held the accused to be not guilty of the alleged offences. Each one of the assessors has obviously rejected the version of events presented by the prosecution. It was a question of believing either the prosecution or the defense.
- [21] From my point of view, the assessor's opinion was not perverse. It was open for them to reach such a conclusion on the available evidence. Therefore, I concur with the opinion of the assessors.
- [22] I, having seen and heard the testimonies of the witnesses, am satisfied that evidence of the prosecution presented through the witnesses 1 to 4, is insufficient to establish the elements of alleged offences beyond a reasonable doubt.
- [23] Therefore, I acquit the accused, Dharmendra Kumar and Achal Vishala Raj of the alleged offences.
- [24] This is the Judgement of the Court.


Chamath S. Morais
JUDGE



At Suva
This 09th Day of April 2019

Solicitors: *Office of the Director of Public Prosecutions for the State
Legal Aid Commission for the Accused*