IN THE HIGH COURT OF FIJI

AT LABASA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 14 OF 2019

Criminal Case No. 511 of 2014

BETWEEN : NAZIM HUSSEIN

Appellant

AND : STATE

Respondent

Counsel : Mr. H.Robinson for the Appellant

Ms. A. Vavadakua for the Respondent

Date of Hearing : 12 July 2019

Date of Judgment : 12 July 2019

JUDGMENT

1. The Appellant appeals both the conviction and sentence within specified time.

2. The charge reads as follows:

Statement of Offence

BREACHING DOMESTIC VIOLANCE RESTRAINING ORDER: Contrary to Section 77 of the Domestic Violence Decree of 2009

Particulars of Offence

NAZIM HUSSAIN ON THE 23RD DAY OF October, 2014, at Labasa in the Central Division, breached the Domestic Violence Restraining Order No. 07/14 by committing an act prohibited by the Domestic Violence Restraining Order

3. The trial was concluded on 12th June, 2017, before the Resident Magistrate Mr. C.M. Tuberi and the Appellant was convicted by his judgment dated 4th April, 2019.

4. On the 31st May, 2019, the Appellant was sentenced to a term of 9 months imprisonment. The sentence was passed by another Resident Magistrate, Ms. S.K. Puamau.

5. The Appellant was unrepresented at the trial. The Prosecution called the complainant and the police interviewing officer PC Lepani. PC Lepani read the Record of Caution Interview into evidence and the case for Prosecution was closed thereafter. The Appellant elected to give evidence and sought permission to call his daughter as a witness. His application was disallowed.

6. On the 12 June, 2019, the Appellant filed a petition of appeal with following grounds of appeal:

   [1] That the Learned Magistrate erred in law and in fact in convicting the petitioner when fact there was no supporting evidence that he violated the said restraining order;

   [2] That the verdict and findings of the Learned Magistrate is unreasonable and cannot be supported having regard to the evidence as a whole;

[3] That the learned Magistrate erred in law and in fact in accepting the evidence of the complainant particularly in view of the following:-

(a) that there was no corroborating evidence of the complainant by any other independent witness.

[4] That the said sentence of 9 months imprisonment was harsh and excessive in the circumstances.

[5] That the appellant reserves the right so alter or file further grounds upon receipt of the Court Record.

7. By the Interim Domestic Violence Restraining Order (IDVRO) issued, the Appellant was refrained from doing the following:

1. Physically assault or sexually abuse the protected person,
2. Threaten to physically assault or sexually abuse the protected person.
3. Damage or threaten to damage any property of the protected person.
4. Threaten or intimidate or harass the protected person;
5. behave in an abusive, provocative or offensive manner towards the protectedperson; and
6. Encourage any person to engage in behaviour against a protected person where there behaviour if engaged in by the Respondent would be prohibited by the order.

8. According to complainant's evidence which was believed by the Learned Trial Magistrate, the complainant is married to the Appellant with three daughters and one son. The alleged incident occurred on 23rd October, 2014, when her son and one of her daughters were home. The Appellant had come home after work. He picked up the four burner stove and threw it down. He threw the food she cooked on the floor. He swore at her with filthy words such as, '*kutiy'*, meaning bitch, *'Bajaru',* meaning prostitute, *'Maichod*' meaning motherfucker. She started crying and cleaning up the mess in the floor. All these things happened when the IDVRO issued against the Appellant was in force. She tendered the

IDVRO in her evidence. Under cross examination, she said that she bought the stove from money she earned from sewing. WPC Lepani read the caution interview into evidence. In the caution interview, the Appellant had denied throwing the stove on the floor and using filth to swear at her. He had admitted receiving the IDVRO.

9. The Appellant elected to give evidence under oath. He denied throwing the stove on the floor. He asked complainant why food was not cooked. She replied that the gas stove was not working. Then the complainant asked the daughter to cook some food. His son was angry at her mother for not cooking and he picked the gas stove and threw it. He said that he was trapped for what his son did. He said that she used to level such false allegations in the past and that this is not the first time he was charged.

10. After giving evidence, the Appellant sought permission to call her daughter as a witness. The Prosecution objected on the basis that the witness was sitting inside the court room. The Learned Trail Magistrate upheld the objection. Then the Appellant sought permission to call his son who was at work and sought an adjournment. The Prosecution objected. The court upheld the objection.

11. There is no hard and fast rule that the evidence of a witness must necessarily be corroborated for it be believed. The credibility does not depend on the quantity or number of witnesses called but on the quality of evidence. If the trier of fact believes that the witness told the truth that is the end of the matter. However, when the case turns on one word against the other it is prudent to look for some supporting evidence. The trier of fact must give cogent reasons as to why he or she preferred one version against the other.

12. The Appellant had admitted receiving the IDVRO and that it was in force when the alleged incident occurred. The only issue before the Learned Trial Magistrate was whether he could believe the version of the complainant that the Appellant had thrown the complainant's stove onto the floor and he swore at her in filth in breach of the IDVRO. The evidence given in the trial shows that both parties gave their respective version of events but those versions remain uncorroborated.

13. The only reason given by the Learned Trial Magistrate as to why he disbelieved the evidence of the accused is found at paragraph 13 of the judgment. He referred to answer to question 36 of the caution interview, which was admitted without a *void dire*, where the Appellant had admitted that he was angry at his wife when he returned home from Bua because food had not been cooked. The Learned Trial Magistrate drew the inference that because the Appellant was angry he would have dashed the stove on the floor. The Appellant was never confronted with this answer either by the prosecutor or the magistrate nor an opportunity given to the Appellant to explain his position.

14. The main complaint of the Appellant is that he was not allowed to present his case fairly by calling his daughter/ son to support his evidence.

15. Both the complainant and the Appellant in their respective evidence concede that their son and daughter were present at the time of the alleged incident. They are no doubt important witnesses to testify as to what actually transpired between the father and the mother.

16. The application to call Appellant's daughter was disallowed because she was seated in the courtroom during her farther's testimony. The Appellant was unrepresented at the trial and he chose to defend himself. There is no evidence on the record to show that the Appellant was informed, after the conclusion of the Prosecution's case, of his right to call the witnesses. However, he decided to give evidence and call a witness. He would not know that the presence of his witness in court is obnoxious to the court proceedings. There is no indication from the Record that a warning had been given to the Appellant to ensure that his witness should not be present in court. Under these circumstances, the proper course of action the court should have taken was to allow the Appellant to call his witness and then determine what weight it should attach to her evidence in light of her being present in court during her father's testimony. By completely shutting out her evidence, the Appellant was prejudiced in his defence and his right to a fair trial guaranteed in Section 15(1) of the Constitution.

17. Out of desperation, the unrepresented Appellant had then asked for an adjournment so that his son, who was at work at that time, could be called. That application was also disallowed.

18. Under Section 14 (2) (*l*) of the Constitution, every person charged with an offence has the right to call witnesses and present evidence, and to challenge evidence presented against him. Under Section 233 (1) of the Criminal Procedure Act (CPA) the accused person shall be allowed to examine any witness not previously bound over to give evidence at the trial if the witness is in attendance.

19. According to Section 233(3) of the CPA, no accused person shall be entitled to any adjournment to secure the attendance of any witness unless it is shown that he or she could not by reasonable diligence have taken earlier steps to obtain the presence of the witness. The Appellant in the present case was faced with an unforeseeable situation when his witness was not allowed to give evidence. Therefore an adjournment should have been granted.

20. The Learned Trial Magistrate failed in his duty to protect the rights of the unrepresented Appellant by not allowing him to corroborate his evidence so that a reasonable doubt could have been created in the version of events of the Prosecution's case. This failure in my view, makes the conviction unsafe. For these reasons, I would allow the appeal against conviction.

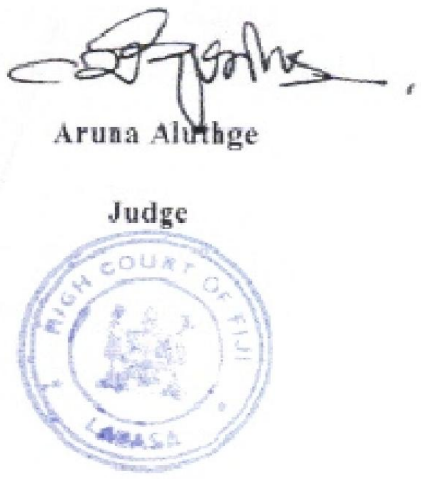
21. After coming to the said finding, I am not required to address the grounds raised in appeal against sentence. However, it is pertinent to note with dismay the prejudice caused to the Appellant in the trial process when he was ordered to go to prison nearly five years after the alleged incident. The alleged incident occurred on 23rd October 2014. The Appellant's trial was not a complex one. It was begun and concluded on 12th June 2017 and the judgment delivered after several adjournments on 4th April 2019. The sentence was passed on 31st May 2019 nearly 2 years after the judgment. This is a clear violation of Section 14 (2) (g) of the Constitution which guarantees to an accused the right to have the trial begun and concluded without unreasonable delay.

22. The record shows that the fact that the Appellant and the complainant had been separated was brought to the notice of the sentencing magistrate. This fact has not been considered in the sentencing process when the DVRO was made. There is no concrete evidence however on this point. Therefore I do not interfere with the DVRO issued by the Learned Trial Magistrate. The Appellant is free to apply for cancellation of the order after satisfying the court.

23. For the reasons given, I do not order a re-trial.

24. Following Orders are made.

1. The Conviction recorded by the Learned Trial Magistrate is quashed.
2. The Sentence is set aside.
3. No re-trial is ordered.
4. The Appellant is acquitted.



At Labasa

12 July 2019

Solicitors: **Sadiq Lawyers for Appellant**

Office of the Director of Public Prosecution for Respondent