

IN THE HIGH COURT OF FIJI

AT LAUTOKA

[CRIMINAL JURISDICTION]

CRIMINAL CASE NO: HAC 121 of 2022

STATE

V

SHAFIL ALI

Counsel : Ms. Sheenal Swastika with Mr. Muhammed Rafiq for the State
Accused in Person

Dates of Hearing : 2-3 April 2024

Closing Submissions : 3 April 2024

Date of Ruling : 4 April 2024

VOIR DIRE RULING

Introduction

[1] As per the Amended Information filed by the Director of Public Prosecutions (DPP), the above named Accused, Shafil Ali, was charged with the following offences:

COUNT 1

Statement of Offence

MURDER: Contrary to Section 237 of the Crimes Act 2009.

Particulars of Offence

SHAFIL ALI, on the 25th day of July 2022, at Lautoka, in the Western Division, murdered **SUMAN LATA**.

COUNT 2

Statement of Offence

ARSON: Contrary to Section 362 (a) of the Crimes Act 2009.

Particulars of Offence

SHAFIL ALI, on the 25th day of July 2022, at Lautoka, in the Western Division, wilfully and unlawfully set fire to the dwelling house of **SUMAN LATA**.

COUNT 3

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375 (1) (a) (i) and (iv) of the Crimes Act 2009.

Particulars of Offence

SHAFIL ALI, on the 25th day of July 2022, at Lautoka, in the Western Division, without lawful excuse threatened **KRITESH NAND** with a cane knife and with words intended to cause alarm to the said **KRITESH NAND**.

COUNT 4

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to Section 375 (1) (a) (i) and (iv) of the Crimes Act 2009.

Particulars of Offence

SHAFIL ALI, on the 25th day of July 2022, at Lautoka, in the Western Division, without lawful excuse threatened **ROHIT RETISH** with a cane knife and with words intended to cause alarm to the said **ROHIT RETISH**.

- [2] The Amended Information was filed in this case on 21 November 2022. The matter was set for plea on 30 November 2022, on which date the Accused pleaded not guilty to the charges against him.
- [3] Following the conclusion of all pre-trial issues, this matter was fixed for trial from 2 April 2024 to 12 April 2024.

- [4] It must be stated that the Accused was originally represented by the Office of the Legal Aid Commission. All pre-trial documents-the PTC Check List and the Agreed Facts- were finalized while the Office of the Legal Aid Commission was representing the Accused. Even the trial dates were fixed in their presence.
- [5] However, on 4 December 2023, the Accused informed that he wishes to withdraw the services of the Legal Aid Commission and undertake his own defence. This Court had no option but to permit the application made by the Accused.

The Accused's Ground of Challenge

- [6] Investigations into this case had been conducted by officers of the Lautoka Police Station. Pursuant to his arrest, the Accused had been brought to the Lautoka Police Station for further investigations.
- [7] On the 26 July 2022, the Accused was caution interviewed by Detective Constable (DC) 3895 Dhiresh Kumar, at the Video Interview Room of the Lautoka Police Station. Detective Sergeant (D/Sgt) 2932 Shamim, was the Witnessing Officer during the recording of the caution interview statement. The recording of the caution interview was continued on 27 July 2022, by DC 3895 Dhiresh Kumar, at the same location. D/Sgt 2932 Shamim continued to be the Witnessing Officer during the recording of the caution interview statement on the second day.
- [8] In this case, the State is placing much reliance on DNA evidence to establish the case for the prosecution. As such, the Accused had been asked during the recording of his caution interview statement whether he agrees to give his buccal sample for the purpose of carrying out DNA analysis.
- [9] The Accused submits that although he agreed to provide his buccal sample he denied having signed the document titled; Consent Form for Reference DNA Collection. The Accused asserts that the signature on the said document is not of his.
- [10] By stating that he did not sign the Consent Form for Reference DNA Collection, the Accused is alleging that he did not duly consent to the taking of his buccal sample and therefore challenging the admissibility of the said DNA evidence.

The Law

[11] Since this is an issue raised by the Accused, this Court had to determine the issue by way of a Voir Dire, in terms of Section 288 of the Criminal Procedure Act No 43 of 2009 (Criminal Procedure Act), as Amended, which provides as follows:

When necessary to determine any issue during the course of a trial in any court, a judge or magistrate may proceed to determine the issue by a voir dire. A voir dire must only be conducted after the accused person has pleaded to the Information.

[12] Section 57 of the Crimes Act No. 44 of 2009 (Crimes Act) provides that the prosecution bears a legal burden of proving every element of an offence. The Section reads as follows:

(1) The prosecution bears a legal burden of proving every element of an offence relevant to the guilt of the person charged.

(2) The prosecution also bears a legal burden of disproving any matter in relation to which the defendant has discharged an evidential burden of proof imposed on the defendant.

(3) In this Decree (Act)—

"legal burden", in relation to a matter, means the burden of proving the existence of the matter.

[13] Section 58 (1) of the Crimes Act stipulates that a legal burden of proof on the prosecution must be discharged beyond reasonable doubt.

[14] Therefore, the onus of proving that the Accused duly consented to the taking of his buccal sample for the purpose of carrying out DNA analysis, is on the prosecution and they must establish this beyond reasonable doubt.

[15] It is understood that Deoxyribonucleic Acid or commonly referred to as DNA, is the hereditary material in humans and almost all other organisms. Nearly every cell in a person's body has the same DNA. DNA is the genetic information inside the cells of the body that helps make people who they are.

[16] DNA is the molecule inside cells that contains the genetic information responsible for the development and function of an organism. DNA molecules allow this information to be passed from one generation to the next.

[17] A buccal swab, also known as buccal smear, is a way to collect DNA from the cells on the inside of a person's cheek. Buccal swabs are a relatively non-invasive way to collect DNA samples for testing. Buccal means cheek or mouth.

The Voir Dire Hearing

[18] During the Voir Dire hearing the prosecution led the evidence of the following 3 witnesses in order to prove beyond a reasonable doubt that the Accused had duly consented to provide his buccal sample for examination:

1. Detective Constable (DC) 3895 Dhiresh Kumar
2. Detective Sergeant (D/Sgt) 2932 Shamim
3. Detective Constable (DC) 5663 Anasa Kovea

[19] During the hearing, the DVD containing the video recorded caution interview statement of the Accused (Disk 2), was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 1; the Consent Form for Reference DNA Collection (Consent Form) was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 2; and the Buccal Sample Collection Form was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 3. In addition, the transcribed version of the caution interview statement of the Accused, recorded on 26 and 27 July 2022, was tendered by the prosecution as MFI 1.

[20] The Accused testified on his own behalf.

The Prosecution Case

[21] DC 3895 Dhiresh Kumar testified that he has been serving in the Fiji Police Force since 2005. He is currently based at the Criminal Investigation Department (CID) of the Lautoka Police Station. He has been serving at the Lautoka Police Station since the year 2020.

[22] The witness said that in the year 2022, he was based at the CID Unit at Lautoka Police Station. On 26 July 2022, he had been detailed to be the Caution Interviewing Officer in this case. He had been assigned to record the caution interview statement of Shafil Ali, the Accused in this case.

[23] The witness testified that the caution interview had been conducted at the Video Recording Interview Room of the Lautoka Police Station. The said room is specifically

designed to conduct such interviews. D/Sgt 2932 Shamim functioned as the Witnessing Officer and was present throughout the interview. The interview had been conducted over a period of two days – on 26 July 2022 and 27 July 2022. The transcribed version of the caution interview statement of the Accused, recorded on 26 July 2022 and 27 July 2022, was tendered by the prosecution as MFI 1.

[24] DC Dhiresk Kumar testified that the video recorded interview is recorded on a specific recording device. Once the recording is done it is then stored (or burnt) on diskettes (on DVDs). Three DVDs had been created for the duration of the Accused's caution interview. On the top part of each DVD he had noted the following information for the purpose of identification-Date of the caution interview, Name of Caution Interviewing Officer and signature, Name of Witnessing Officer and signature, Name of the Accused and signature, File Number and Number of the Disk.

[25] The witness said that prior to the recording of the caution interview, the Accused had been explained all his Constitutional Rights. He had also been explained the procedure of obtaining a buccal sample. The Accused had been informed that the buccal samples collected from him during investigations will be used for DNA comparisons or analysis. The witness testified that the Accused had agreed to provide his buccal samples for the purpose of DNA analysis.

[26] The relevant portion of the caution interview reads as follows [as per the transcribed version of the caution interview statement at pages 47 and 48]:

DC Dhiresk: Shafil Ali. During...I wish to inform you that during this investigation Police has uplifted samples from the scene. Which is the house of, which is the burned house of Suman Lata, the remains of Suman Lata, cane knife, car registration number JA 207, clothes seized from you. The sample will be sent for DNA comparison by our Scene of Crime Investigation Team. So, we wish to also take samples which is called buccal swab for DNA comparison. Do you understand this?

Shafil Ali: Buccal swab for (from) me?

DC Dhiresk: Yes.

Shafil Ali: Yeah.

DC Dhiresh: Do you understand this?

Shafil Ali: Yeah.

DC Dhiresh: I wish to inform you, that the samples uplifted from the scene, upon DNA comparison with the DNA taken from you, if the result is positive, this evidence will be used against you as evidence in Court. Do you understand this?

Shafil Ali: Yes.

DC Dhiresh: Do you wish to give your buccal swab for DNA comparison?

Shafil Ali: Yes.

[27] The relevant portion of the video recorded caution interview, depicting the above conversation, was played in Court to confirm that the Accused had agreed to provide his buccal sample for DNA analysis. The DVD containing the relevant part of the video recorded caution interview statement of the Accused (Disk 2), was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 1.

[28] It must be mentioned that when the video recorded caution interview was played in Court, it shows two views (two camera views) – one view captures the Accused and the other view captures the Caution Interviewing Officer, DC Dhiresh and the Witnessing Officer, D/Sgt Shamim.

[29] DC Dhiresh further testified that prior to the recording of the interview being suspended on the first day (26 July 2022), the Witnessing Officer had also spoken to the Accused with regard to seeking his consent for obtaining of his buccal sample.

[30] The relevant portion of the caution interview reads as follows [as per the transcribed version of the caution interview statement at page 50]:

DC Dhiresh: Thank you. Now I will give it to my Witnessing Officer if he has any questions for you.

D/Sgt Shamim: Thank you, Mr Shafil Ali. Now we have come as the Officer, the Interviewing Officer has already asked you about the buccal swab, after this I'll like your consent to give your swab.

Shafil Ali: Sure.

D/Sgt Shamim: The Forensic Team is outside there....

Shafil Ali: Yes.

D/Sgt Shamim: For you to sign a consent letter and then they will take the swab.

Shafil Ali: I will do sir.

D/Sgt Shamim: From that, now we will suspend the interview from here.

Shafil Ali: Okay.

[31] The above portion of the video recorded caution interview was also played in Court by the Prosecution.

[32] DC Dhiresh further testified that upon the suspension of the recording of the caution interview on the first day, DC 5663 Anasa Kovea came into the interviewing room for obtaining of the formal consent from the Accused prior to taking his buccal sample. The witness said he was present at the time the Accused had been given the Consent Form for his signing and at the time the Accused had signed the said Consent Form. At this time, D/Sgt Shamim had also been present.

[33] In cross examination, the witness confirmed that he had seen the Accused sign the Consent Form that was brought by DC 5663 Anasa Kovea, who is based in their Crime Scene Investigation Unit (CSI Unit). He is the Officer who was responsible for taking the Accused's buccal sample. This was done inside the same Video Recording Interview Room of the Lautoka Police Station. However, at the time the Consent Form was signed by the Accused, the recording of the caution interview statement had been suspended for the day. Therefore, the signing of the Consent Form by the Accused is not depicted or shown in the video recorded caution interview.

- [34] The next witness for the prosecution was D/Sgt Shamim. He testified that he is currently serving at the CID Branch of the Lautoka Police Station. He had joined the Fiji Police Force in the year 1998 and was absorbed into the Regular Force in the year 2001. This is his 25th year of service in the Fiji Police Force, out of which 4 years had been served in the Uniform Branch and the balance 21 years in the CID Branch. He had been promoted as D/Sgt in 2021.
- [35] The witness said that he has been serving at the Lautoka Police Station since May 2022. He testified that he was the Witnessing Officer during the recording of the caution interview statement of the Accused on 26 July 2022 and 27 July 2022. The caution interview statement had been recorded by DC Dhiresh. The witness corroborated the evidence of DC Dhiresh in all material particulars.
- [36] The witness further testified that after having obtained the Accused's consent for taking of his buccal sample and after the recording of the caution interview statement was suspended on the first day, they had invited DC Anasa from the CSI Unit. DC Anasa came into the caution interviewing room with the official forms that are used for obtaining buccal samples. One of the forms was the Consent Form whereby the Accused gives his formal consent for obtaining of his buccal samples. The witness said that he had seen the Accused signed on the said form that day. In addition to the witness, DC Dhiresh, DC Anasa and the Accused had been present at the time. After the Accused had signed the said Consent Form, DC Anasa had also signed the said Form at the same time.
- [37] In addition to the Consent Form, the Buccal Sample Collection Form had been signed by DC Anasa and countersigned by the witness.
- [38] In cross examination, it was suggested to the witness that the Accused had never signed the said Consent Form or any Form in front of the witness. The witness denied this suggestion and said that the Accused did sign the Consent Form in his presence.
- [39] The final witness for the prosecution was DC Anasa Kovea. He is currently attached to the Forensic Science Services at the Lautoka Police Station. He had joined the Fiji Police Force as a Special Constable on 18 August 2008. In 2010, he had joined the Forensic Science Services in Suva. He had moved to the Lautoka Police Station on 19 December 2017.

- [40] The witness testified that in the year 2022, he was in the CSI Unit at the Lautoka Police Station. The CSI Unit is one arm under the Forensic Science Services. He was the Crime Scene Examiner in this case. His duties entailed the overall examination of the crime scene which was in Tomuka, Lautoka and uplifting of the exhibits and processing of the crime scene.
- [41] The witness said that on 26 July 2022, he was informed by D/Sgt. Shamim to avail himself if the Accused is willing to give his buccal sample. Later on the said day he was informed by D/Sgt. Shamim that the Accused had agreed to give his buccal sample. Accordingly, he had proceeded to the room where the Accused's caution interview was been recorded. D/Sgt. Shamim and DC Dhires had been present along with the Accused, Shafil Ali.
- [42] The witness testified that he had explained to the Accused all the details/particulars written in the Consent Form. The Accused had understood what was explained to him. The Form had been filled by the witness and thereafter signed by the Accused in his presence. D/Sgt. Shamim and DC Dhires had also been present at the time the Accused had placed his signature on the said Consent Form. After the Accused had signed the said Consent Form, the witness said that he had also signed the said Form at the same time. The Consent Form for Reference DNA Collection (Consent Form) was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 2.
- [43] In addition to the Consent Form, the Buccal Sample Collection Form had also been filled by the witness and signed by him. The said Form had been countersigned by D/Sgt. Shamim. The Buccal Sample Collection Form was tendered by the prosecution as Prosecution Voir Dire Exhibit PE 3.
- [44] The witness testified that thereafter the buccal sample of the Accused had been taken by him with the use of a lollipop swab stick. The lollipop swab stick is part of the package or kit used for the taking of buccal swabs. This had been done inside the CSI room. The original copy of the Consent Form together with the buccal sample collected from the Accused had then been sent to the Biology Lab in Suva for DNA analysis.
- [45] That was the case for the prosecution.

The Defence Case

- [46] The Accused testified that he is 45 years of age and a Taxi Driver by occupation. He said that although he had verbally agreed to give his buccal sample during the recording of his caution interview statement, he did not sign the Consent Form. He stated that at the time DC Anasa came to the room where the caution interview was been recorded, he had no Form with him. DC Anasa had come to the room with the lollipop swab stick (the kit) ready to take his buccal swab. He had then taken the buccal swab from his mouth.
- [47] The witness said the concern he is raising is only with regard to his signature on the Form. *"I promise to God that that is not my signature and I want legal action taken against that person".*

Analysis

- [48] As stated earlier, the onus of proving that the Accused duly consented to the taking of his buccal sample for the purpose of carrying out DNA analysis, is on the prosecution and they must establish this beyond reasonable doubt. The Accused submits that although he agreed to provide his buccal sample during the recording of his caution interview statement, he denied having signed the Consent Form for Reference DNA Collection. The Accused asserts that the signature on the said document is not of his.
- [49] I have carefully examined all the evidence led during this inquiry. All three prosecution witnesses- D/Sgt. Shamim, DC Dhires and DC Anasa clearly stated that not only had the Accused agreed to provide his buccal sample, he had duly placed his signature on the Consent Form. The Accused had placed his signature on the Consent Form after he had been duly explained of all the details contained in the Form by DC Anasa.
- [50] The Accused denies that the signature on the Consent Form is his. However, Court has examined the signature placed by the Accused on the DVD containing the video recorded caution interview statement of the Accused (Disk 2), which has been tendered by the prosecution as Prosecution Voir Dire Exhibit PE 1. I have also examined the signature placed by the Accused on the Agreed Facts which has been filed in Court in this matter on the 27 of March 2023. I find that the signature of the Accused in the Consent Form is no different to the signature placed by him on the Disk (Prosecution Voir Dire Exhibit PE 1) and on the Agreed Facts.

[51] In the circumstances, I reject the Accused's position that the signature appearing on the Consent Form is not his. I am of the opinion that the Accused had duly placed his signature on the Consent Form on 26 July 2022.

[52] Taking into consideration the totality of the evidence led at the hearing, I am of the opinion that the prosecution has established beyond reasonable doubt that the Accused had duly placed his signature on the said Consent Form.

Conclusion

[53] In the circumstances, I hold that the signature appearing on the Consent Form has been duly placed by the Accused and that the Accused has duly consented to the taking of his buccal sample for the purpose of DNA analysis.



AT LAUTOKA

Dated this 4th Day of April 2024

A handwritten signature in black ink, appearing to read 'Riyaz Hamza'.

Riyaz Hamza

JUDGE

HIGH COURT OF FIJI

Solicitors for the State : **Office of the Director of Public Prosecutions, Lautoka.**
Solicitors for the Accused : **Accused Appears in Person.**