KELEMEDI LAGI and 4 Ors v STATE (HAA0004 of 2004S)

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

5, 12 March 2004

Criminal law — offences — arson — criminal intimidation — whether there was insufficient evidence to convict accused — whether sentence harsh for first offenders — Criminal Procedure Code s 120(1) — Penal Code (Cap 17) ss 317(a), 330(a).

Betero Salabiau had lived for 30 years in Kiuva Village in a corrugated iron house with his wife and children. On 19 January 1999, he and his family went to bed at 9 pm leaving one hurricane lamp on. At about 11 pm, he heard the sound of something hitting the wall of his house and found the windows and doors of his house smashed. He went out to check what happened and saw the seven Appellants outside, armed with sticks and Sekove Tamanikaira and Navitalai Naivalu were holding spear guns. He ran to the radio telephone station to ring the police station but it was closed. When he ran back home, he saw the Appellants smashing all his belongings inside his house. Kelememedi Lagi (A1) was holding a container of benzine and set fire to his house. One Akariva pushed his brush cutter into the burning house. He and his family then walked to another village to call the police.

Under cross-examination, Betero said that he was later told that the reason the Appellants burned his house was because one of his sons assaulted someone in the village for indecently assaulting the son's wife. Betero denied assaulting the villager and A1.

On 19 August 2003, the learned magistrate delivered judgment and found that A1 forcefully entered the house of Betero and willfully struck the benzine light hanging inside the house knowing it would explode and cause fire. A1 was convicted on count 1 of arson. In respect of count 2, he found all the other Appellants guilty of criminal intimidation and convicted them.

The main grounds of appeal were that there was insufficient evidence to convict the Appellants, and that the sentence was too harsh for first offenders.

Held — (1) Based on the facts and circumstances of the case there was enough evidence of at least a reckless lighting of the fire by A1, even on the defence version of the facts. The learned magistrate did not err when he made a finding of fact that was open to him on the evidence and in law. Moreover all the elements of the offence of criminal intimidation were proved by the testimony of Betero's wife of the threat to burn the house down. Also, the Appellants were sufficiently identified as being present in the scene. Thus, there was sufficient evidence to convict the Appellants on count 2.

(2) The evidence established that A1 appeared to have ensured that the house was empty when he lit the fire. However, the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the serious consequences of the arson on the victims who were forced to leave the village they called home, it called for a sentence within the 2 to 4-year range. With a starting point of 3 years' imprisonment, reduction for the previous good character and other mitigation, and increase for the aggravating factors the court considered a 3-year term. That arson is a most serious offence with a maximum sentence of life imprisonment. Similarly, as to the offence of criminal intimidation, the court imposed a sentence of 10 years' imprisonment because the "threat" was to burn the house. The Appellants acted as a group and threatened the occupants of the house who included men, women and children, the crime was committed in the middle of the night and involved the use of dangerous weapons. Thus, the offence called for a deterrent sentence and a 2-year term of imprisonment did not appear excessively long even for first offenders.

Appeal dismissed.

Cases referred to

Amina Koya v State [1998] FJSC 2; *Donato Vakabale v State* [2002] FJHC 151; *R v Giffins* (1982) RTR 363; *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899; *Willmott v Atack* [1977] QB 498; [1976] 3 All ER 794, cited.

E. Veretawatini for the Appellants

A. Prasad for the State

Shameem J. The Appellants have appealed against convictions and sentence. They were charged as follows:

FIRST COUNT

Statement of Offence

ARSON: Contrary to Section 317(a) of the Penal Code, Cap 17.

Particulars of Offence

KELEMEDI LAGI on the 19th day of January, 1999 at Kiuva, Bau in the Central Division, wilfully and unlawfully set fire to the dwelling house of BETERO SALABIAU.

SECOND COUNT

Statement of Offence

CRIMINAL INTIMIDATION: Contrary to section 330(a) of the Penal Code, Cap 17.

Particulars of Offence

KALIVATI TODUA, SEKOVE TAMANIKAIRA, AKARIVA KILA, MOSESE MUA, NAVITALAI NAIVALU and MOAPE VU, on the 19th day of January, 1999 at Kiuva, Bau in the Central Division, without lawful excuse, threatened BETERO SALABIAU and his family with the intention to cause alarm to the said BETERO SALABIAU and his family.

The original grounds of appeal were filed in person. The main grounds were that there was insufficient evidence to convict the accused, and that the sentence was too harsh for first offenders. They were later represented by counsel, who filed additional grounds of appeal. They are as follows:

(a) That the learned trial Magistrate erred in law and in fact in not evaluating the evidence of the Appellants, hence there has been a substantial miscarriage of justice;

(b) That the learned trial Magistrate erred in failing to come to the conclusion that the charge against the 2nd to 5th Appellants were defective in that they had only one count against them although the charge sheet read the charge of Criminal Intimidation as Count 2, hence there has been a substantial miscarriage of justice;

(c) That the learned trial Magistrate erred in law and in fact in not properly directing himself on the required standard of proof on each of the charges, hence there has been a substantial miscarriage of justice;

(d) That the learned trial Magistrate erred in law and in fact when he failed to decipher the evidence of Prosecution Witness (2) Salanieta Salabiau when she made mention that two ladies held her as she was very frightened on page 16 of the Court Record, when this was an entirely new piece of evidence and the two ladies mentioned by her could have been independent witnesses for the State, hence there has been a substantial miscarriage of justice;

(e) That the learned trial Magistrate erred in law and in fact when he went ahead and gave a ruling of No Case to Answer on the second count of Criminal Intimidation when there was in fact no application for the same in respect of the second count was made and hence the learned trial magistrate had pre-judged the guilt of the 2nd to 5th Appellants, hence there has been a substantial miscarriage of justice;

(f) That the learned trial Magistrate erred in law and in fact in not taking into account that the mens rea of the first count of Arson was not established, hence the verdict and the subsequent sentence is unsafe;

(g) That the learned trial Magistrate erred in law and in fact when he relied on the hearsay evidence of Prosecution Witness 1 that the Roko Tui Kiuva had said that the Appellants had confessed to him that they had burnt the house, without giving the benefit to the Appellants to cross-examine the said Roko Tui whose evidence is not corroborated, hence there has been a substantial miscarriage of justice;

(h) That the sentence passed by the learned trial Magistrate is harsh and excessive in all the circumstances.

The trial

Although the charges were filed in July 1999, the trial did not commence until 20 September 2000. The Respondents appear to have taken turns to be absent, defence counsel was not instructed until January 2000, there was an attempt at reconciliation, disclosure was delayed and two applications for adjournment by defence counsel.

The trial itself took place over a 3-year period until judgment was delivered on 19 August 2003. The learned magistrate commented in passing judgment that "the delay in disposing of this case was due entirely to the systematic absenteeism of the accused persons".

PW1 was Petero Salabiau of Delainavesi. In January 1999 he was living in Kiuva Village, where he had lived for 30 years. He lived in a corrugated iron house with his wife and children. On 19 January 1999, at 6 pm he was at home with his family. They went to bed at 9 pm leaving one hurricane lamp on. At about 11 pm, he heard the sound of something hitting the wall of his house. He found the windows and doors of his house were smashed. He went out to check what had happened. He saw all seven Respondents outside, armed with sticks. The third and fifth Respondents (R3 and R5) were holding spear guns. He ran to the radio telephone station to ring the police station. The radio telephone station was closed. He ran back home and saw the Respondents smashing all his belongings inside his house. The first Respondent (R1) was holding a container of benzine. They then set fire to his house. One Akariva pushed PW1's brush cutter into the burning house. He, his wife and son then walked to Nasilai Village two-and-a-half miles away to telephone the police. The police arrived at 7 am. He then left Kiuva Village and is now settled in Delainavesi.

Under cross-examination PW1 said that he was later told that the reason the Respondents had burnt his house was because one of his sons had assaulted someone in the village for indecently assaulting the son's wife. PW1 himself denied assaulting the villager (one Ulaiasi) and R1. He said he knew each Respondent very well and that he had seen R1 holding a 5-litre container of benzine, and burning the house. He said (also under cross-examination) that Roko Tui Kiuva had told him that the Respondents had confessed to him about the arson.

PW2 was PW1's wife, Salanieta Salabiau. She gave similar evidence to her husband. She said she heard "Akariva" (R3) calling out — "Get out, get out, the house will be burnt down". She ran outside and saw all the Respondents there, holding mangrove poles and the second and fourth Respondents (R2 and R4) were holding spear guns. She saw one Savenaca, R1 and R3 pouring benzine inside the house and she saw the flames going up. The Respondents were using diving torches and she could see each one from 6 yards away. Under

cross-examination she said that a statement she had given to the police on 20 January was not correct as she was still in a state of shock. It is not clear from the record, what the inconsistency was that was alleged, and how significant it was. However she said that R1 poured the benzine and Savanaca struck the match.

PW3 Cpl Viliame Caqusau visited the scene on 20 January 1999 and found the dwelling house and kitchen of PW1 completely burnt down. He found and seized a burnt down benzine lamp and also interviewed R2 and R3. PW4 Cpl Aminiasi interviewed R1. PW5 PC Sirilo interviewed Kalivati Todua (R2), the fifth Respondent (R5) and the sixth Respondent (R6). Their interviews were tendered. They are not included in the court record, nor are they on the court file. A letter written to the Divisional Crime Officer Eastern on 21 January 2004 states that all caution interviews are lost. The judgment suggests that all statements were exculpatory.

The defence made a submission that there was no case to answer, on count 1 although he conceded that there was a case to answer on count 2. The learned magistrate found that there was a case to answer on both counts and proceeded to put the Respondents to their defence.

R1 gave sworn evidence. He said he met PW1 on 19 January 1999 at about 11 pm when R1 was returning from a grog party. He said he did not go to his house and went home. On his way there he met PW1 again, returning from the radio telephone station. PW1 struck him with a diving torch on the head. R1 was injured on his head. He ran to his house and picked up a 4" x 2" timber and went to PW1's house. He went to hit PW1 but instead hit the benzine light. It fell to the floor and burnt into flames. R1 then went home. He was treated by the village nurse. He then said that R5 and R6 were with him at the time.

Under cross-examination he said that PW1 was his cousin brother and that they had lived at Kiuva Village for 20 years. He said that there was no enmity between them prior to this incident and that he did not know why PW1 had struck him.

He tendered his medical report (which also appears to have been lost after trial). DW2 was R6. He said that he had gone to PW1's house on 19 January 1999 "to help Kelemedi Lagi". He saw R1 strike at the benzine light. He said he was not in the group that damaged PW1's house.

The learned magistrate delivered judgment on 19 August 2003. He found that the police had proven beyond reasonable doubt that R1 had forcefully entered the house of Betero Salabiau and had wilfully struck the benzine light which was hanging inside the latter's house, knowingly, "that the result of his unruly behaviour, would cause a fire to explode inside Betero's house". He convicted R1 on count 1. In respect of count 2, he found all Respondents guilty of criminal intimidation and convicted them.

The grounds of appeal

Ground (a) is that there was no proper evaluation of the evidence. The learned magistrate appears to have accepted that at some time during the night of 19 January, PW1 had assaulted R1, causing him to burn down PW1's house. He said that this assault was supported by the medical evidence. The learned magistrate appears therefore to have decided that the truth lay somewhere between the version given in evidence by PW1 and PW2, and the evidence of R1. R1's evidence was that the arson was an accident and that he did not hit the light wilfully. There was therefore no dispute that R1 caused the fire and that he did

so unlawfully. The only matter in dispute was whether he had done so "wilfully". The word "wilfully" was defined by the House of Lords in *R v Sheppard* [1981] AC 394; [1980] 3 All ER 899 as either deliberately doing an act or doing an act not caring about the consequences. The majority opinion was that "wilfully" meant either intentionally or recklessly. In *R v Giffins* (1982) RTR 363 the same definition was adopted on a charge of the wilful obstruction of a railway, and also in *Willmott v Atack* [1977] QB 498; [1976] 3 All ER 794, where the defendant was charged with the wilful obstruction of a police officer. The learned magistrate in this case correctly considered the possibility of recklessness, when he found that when R1 hit the benzine light he did so "knowingly that the result of his unruly behaviour would cause a fire to explode inside Betero's house". He did not mention the fact that R6, in his sworn evidence also said he saw R1 strike at the light. R6 did not say that R1 had aimed at PW1 and hit the light instead. Indeed, the evidence suggests that PW1 was not in the house at all.

In the circumstances there was ample evidence of at least a reckless lighting of the fire, even on the defence version of the facts. The learned magistrate made a finding of fact which was open to him on the evidence and in law. I do not consider that he erred.

In respect of count 2, the evidence was (and the learned magistrate appears to have accepted it) that the Respondents (excluding R1) gathered outside the house of PW1, armed with sticks and spear guns at 11 pm. They banged on the walls of the house and one of them said "Get out! The house shall be burnt out". The evidence was that this was a joint enterprise and that all were armed.

Section 330(a) of the Penal Code reads:

> Any person who without lawful excuse—
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> (a) threatens another person or other persons whether individually or collectively, with any injury to his or their person or persons, reputation or property, or to the person, reputation or property of anyone in whom that person is or those persons are interested, with intent to cause alarm to that person or those persons, or to cause that person or those persons to do any act which that person is or those persons are not legally bound to do, or to omit to do any act which that person is or those persons are legally entitled to do, as the means of avoiding the execution of such threat;
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> is guilty of a misdemeanour.

If the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or with imprisonment for a term which may extend to 7 years or more, or impute unchastity to a woman, he is guilty of a felony, and is liable to imprisonment for 10 years.

There can be no doubt that all the elements of the offence were proved on PW2's evidence of the threat to burn the house down. Of course R1 and R6 said they were not part of the group but the learned magistrate was entitled to reject this evidence in relation to R6's involvement. Further although there was only one benzine light on at the time, the Respondents and the witnesses have known each other for many years and the identification took place over a significant period of time at close quarters. Further the identification of R1, R5 and R6 was corroborated as to presence at the scene by the evidence of R1 and R6.

There was sufficient evidence to convict each Respondent on count 2.

The second ground of appeal is that the charges were defective in that they should not have been on one charge sheet. The facts in respect of both counts were obviously closely linked.

Section 120(1) of the Criminal Procedure Code provides:

> Any offences, whether felonies or misdemeanours, may be charged together in the same charge or information if the offences charged are founded on the same facts or form, or are part of, a series of offences of the same or a similar character.

There was no prejudice to any of the Respondents in the joint trial, and to separate the charges when the source of the evidence was identical would not have been in the best interests of justice. This ground of appeal fails.

Similarly ground (c) must also fail. The learned magistrate specifically referred to the burden and standard of proof in convicting the Respondents.

Ground (d) is that the prosecution did not call the other villagers who had come to help PW2 at the time of the fire. It is entirely the prosecution's prerogative as to which and how many witnesses to call to prove the prosecution case. This discretion is of course subject to the general duty of the prosecutor to disclose all relevant evidence to the defence. The court's duty is to assess the evidence called and to decide whether or not the case is proved beyond reasonable doubt. In this case the prosecution had no duty to call any additional witnesses, particularly when they called two witnesses who appeared to have given their evidence in a straight forward and clear manner. There is no legal requirement for corroboration in a prosecution for arson or criminal intimidation, nor for identification in circumstances such as those of this case.

Ground (e) has no merit. Simply ruling on a no case to answer submission, or at the end of the prosecution case even when no submission is made, does not lead to an assumption of prejudgment. The test at the end of the prosecution case is an objective one and does not require an assessment of credibility.

I have dealt with ground (f) under ground (a). As for ground (g), there is nothing in the judgment to suggest that the learned magistrate placed any weight at all on the evidence that there had been confessions made to the Roko Tui Kiuva. Indeed, he correctly pointed out that the evidence was hearsay.

Sentence

In *Donato Vakabale v State* [2002] FJHC 151, I considered sentences for arson. In that case the appellant had been given 4 years' imprisonment partly because the appellant had threatened to kill anyone who helped the occupants of the house that had burnt, escape. I upheld that sentence.

In *Amina Koya v State* [1998] FJSC 2, the Court of Appeal and Supreme Court upheld a 2-year term of imprisonment for arson motivated by financial gain. There was no danger to any person because the building was unoccupied.

In this case the Respondent appears to have ensured that the house was empty when he lit the fire. However the fact that he accompanied a group of men who threatened the occupants, the fact that the arson was motivated by revenge and the serious consequences of the arson on the victims who were forced to leave the village they called home, called for a sentence within the 2–4 year range. With a starting point of 3 years' imprisonment, reduction for the previous good character and other mitigation, and increase for the aggravating factors I have outlined, I see nothing wrong in principle, with a 3-year term. Arson is a most serious offence with a maximum sentence of life imprisonment. A family's home and belongings were destroyed in the fire. The children of the family may never recover for the trauma of what they saw on the night of 19 January 1999.

Similarly, in respect of the offence of criminal intimidation, the maximum sentence is 10 years' imprisonment because the "threat" was to burn the house. The Respondents acted as a group to put fear into the occupants of the house. The

occupants included men, women and children. Committed in the middle of the night, and involving the use of dangerous weapons, the offence called for a deterrent sentence. Although I have been unable to establish a tariff for criminal intimidation in respect of threats to burn property, a 2-year term of imprisonment does not appear excessively long, even for first offenders. I decline to reduce the sentences.

Result

The appeal against convictions and sentence fail.

Appeal dismissed.