

IN THE MAGISTRATE'S COURT**AT SUVA, FIJI****CRIMINAL CASE NO: 271 of 2009****BETWEEN: THE STATE****PROSECUTION****AND: MOHAMMED NIMRAROJ IMRAN****ACCUSED****BEFORE: Resident Magistrate Mr. Thushara Rajasinghe,****COUNSEL: Ms. Low for the Prosecution,****Mr. Naidu R for the Accused in person,****Date of the Judgment: 21st of June 2013.**

JUDGMENT

1. The accused is charged with one count of "Dangerous Driving" contrary to section 98(1) and 114 of the Land Transport Act, one count of "Driving motor vehicle without being the holder of a valid driving license" contrary to section 56 (3) (a) (6) and 114 of the Land Transport Act and one count of "Criminal Intimidation" contrary to section 330 (a) of the Penal Code Act. The particulars of these offences are that ;

“ Mohammed Nimmaroj Imran” on the 11th day of January 2008 at Suva in the Central Division drove a motor vehicle on Victoria Parade, in a manner which was dangerous to the public having regards to all the circumstances of the case’

“Mohammed Nimmaroj Imran” on the 11th day of January 2008 at Suva in the Central Division drove a motor vehicle registration number CE 274 on Victoria Parade without being the holder of a valid driving license in respect of the said motor vehicle with the driving license expired on 1st of April 1999”.

“Mohammed Nimmaroj Imran” on the 11th day of January 2008 at Suva in the Central Division without lawful excuse and with intend to cause alarm, threatened to assault police constable Number 2662 Shiu Naicker with a cane knife”.

2. The accused person pleaded not guilty for this offence, wherefore, the case was set down for hearing. During the hearing the Prosecution called 4 witnesses. At the conclusion of the prosecution case the accused gave evidence on oaths and called three more witnesses for the defence. At the conclusion of the hearing both parties were invited to file their respective final submission for which only the defence filed accordingly. I must thank the learned counsel for the defence for his extensive and detailed submission with supporting case laws which assisted me enormously in this judgment.
3. The prosecution alleges that the accused on the 11th of January 2008, at about 2.15 a.m at Suva drove the vehicle registration Number CE 274 in a manner dangerous to the public. The prosecution claims that the accused drove his vehicle in a high speed and without proper care turned into the main road with the same speed. He then did not obey the order of Cpl Shiu who tried to stop the vehicle and drove along the Edinburgh drive towards Samabula. He then drove along few cross roads and entered into a feeder

road which is a gravel road. He stopped his vehicle which is a black colour van at the end of said drive way and tried to run a away.

4. The prosecution witnesses stated that when the accused drove away his van in a very dangerous manner without stopping for the order of Cpl Shiu, the four police officers who were the part of beat foot patrol team that was on duty at that time in the city managed to get a taxi and chased the van driven by the accused. They managed to drive parallel to the van which was driven by the accused when he was driving alone the Edinburgh drive. First, second and third prosecution witnesses claimed that they saw the accused was driving the van while they were driving parallel to the van of the accused. The police officers shouted and demanded the accused to stop the van with no success. The accused drove along few roads around Samabula and finally entered into a gravel feeder road and stopped at the end of the drive way. He then tried to run away. At that point Cpl Shiu managed to get hold the accused as they continuously followed the van. The accused denied that he drove the van and also the ownership of it.
5. The prosecution claims that the police officers then tried to tow the van to the Central Police Station as the accused denied the ownership. The accused person then entered into the compound of his house and came back with a cane knife. He then threaten the police officers and the driver of the towing truck and warned them no to tow his van. However the police officers managed to tow the van away though the accused behave violently. The police officers then tried to arrest the accused. The accused refused to come out from his compound and abused the police officers. He was still carrying the cane knife and then started to throw empty beer bottles at the police officers. At that time another police team from Samabula Police Station reached to the scene. The accused then came out without any violent and got into the police vehicle of the Samabula Police station and went with them to the police station.
6. The accused person vehemently denies the allegations of the prosecution and stated that he went to a night club with few of his friends and came out around 2 am on that

morning. He denied that he drove the van and claimed that one of his friends who accompanied him to the night club who did not consume alcohol drove the van to his home on that morning. The accused fallen into sleep soon after he got into the van and slept on the front passenger seat of the van. He put the front passenger seat back word and slept on it. He claimed that he did not aware of any incidents of dangerous driving and disobeying the police orders. He woke up when the van had entered into the gravel drive way and found the van was moving in a high speed. He inquired the driver why he was driving so fast, and the driver replied that a car was chasing them. The driver stopped the van at the end of the drive way, got off from the van and ran away. The police officers who chased the van came behind them and one of the officers chased down the driver who ran away from the scene.

7. The accused denied that he drove the vehicle and requested the police officers to run after the driver and catch him. The accused then went into his compound but the police officers were still claiming him to come out. The police then towed his van away and shouted him out and abuse him with filthy words and remarks. When the accused came out and asked the police officer to stop shouting at him and go and catch the driver, he was hit by a stone on his head that injured his head. In order to get medical treatment for his bleeding head and get assistance, he called Samabula Police Station and requested them to come and help him. The accused claims that he then got into the vehicle of the Samabula police station when they reached to the place and went with him. He was then assaulted by the same police officers who chased him at the Central Police Station. The sister and the wife of the accused person gave evidence to collaborate the accused person's defence and more interestingly, the third defence witness claimed that he drove the van on that morning. He stated that the reason why he did not stop the van alone the Edinburgh drive, that he did not recognized then as police officers and though some Fijian youths were trying to hazel them.

8. Having considered the prosecution case and the defence of the accused person, I now draw my attention to discuss the main elements of the three offences for that the accused is charged with.

9. Section 98 (1) of the Land Transport Act states that;

“Any person who drives a motor vehicle on a public street recklessly, or at a speed or in a manner which is dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the public street and the amount of traffic which is actually at the time or which might reasonably be expected to be on the public street, commits an offence and, subject to subsections (2) and (3), is liable upon conviction to the prescribed penalty”.

10. In view of the section 98 (1) of the Land Transport Act, the main elements of the offence of Dangerous Driving that the prosecution is required to prove beyond the reasonable doubts are;

- i. That accused person,
- ii. Drove a motor vehicle on a public street,
- iii. Recklessly, or at a speed or in a manner which is dangerous to the public,

11. In respect of the second count of Driving motor vehicle without being the holder of a valid driving license, section 56 (30 (a) (6) of the Land Transport Act states that;

“No person shall (a) drive a motor vehicle on a public street unless the person is the holder of a driver's license of the appropriate class issued under this Part”.

12. Moving to the third count of Criminal Intimidation, section 330 (a) of the Penal Code states that;

“Any person who without lawful excuse-

(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”.

13. Justice Temo has held in *State v Nagalu* (2010) FJHC 122.2008s (20 April 2010) that “ for the accuse to be found guilty of “criminal Intimidation”, the prosecution must prove beyond reasonable doubt the following elements,

- i. The accused person,
- ii. Without lawful excuse,
- iii. Threaten another person
- iv. With an injury,
- v. With intent to cause alarm to that person.

14. Bearing in mind the main elements of these three offences, I now turn to deliberate the evidence presented with the applicable laws in respect of these offences respectively. I first turn to the first two counts of dangerous driving and driving motor vehicle without being the holder of a valid driving license.

15. Having careful perusal of the evidence presented by the prosecution and the defence, I find the nexus of the dispute of these two counts is the identification of the accused person as the driver of the van registration number CE 274. The accused person vehemently denied that he drove the van on that morning while the four prosecution witnesses who were traveling in a taxi in pursuit of the fleeing van claim that they positively identified the accused person as the driver of the fleeing van.

16. The main issues to be considered in relation to the identification of the accused person have discussed in *R v Turnbull (1977) Q.B.224*, where it was held that ***“the judge should direct the jury to examine closely the circumstances in which the identification by each witness came to be made.***

- i. How long did the witness have the accused under observation?***
- ii. At what distance?***
- iii. In what light?***
- iv. Was the observation impeded in any way as for example by passing traffic or a press of people?***
- v. Had the witness ever seen the accused before?***
- vi. How often?***
- vii. If only occasionally, had he any special reason for remembering the accused?***
- viii. How long elapsed between the original observation and the subsequent identification to the police?***
- ix. Was there any material discrepancy between the description of the accused given to the police by the witness when first seen by them and his actual appearance?***

17. The first prosecution witness Cpl Sui stated that he saw the accused clearly when the taxi came parallel to the van along the Edinburgh drive. He said he was seated at the front passenger seat beside the driver. However the second prosecution witness also claimed that he was seated at the front passenger seat beside the driver and reaffirmed it during his cross examination. The third prosecution witness stated that he was sitting middle of the back passenger seat. Apart from the first prosecution witness, other three witnesses have not seen the accused person before. The first prosecution witness has seen the accused on several times in the town as a taxi driver. All four prosecution witnesses claim that they saw the accused while he was driving along the road. All of these witnesses were travelling in a moving taxi. Would it possible for them to clearly

see the accused person who was driving a van which is higher than a normal taxi in which all four witnesses were traveling. I could agree with the prosecution witnesses with their claim of lighting along the street from street lights, but would it be enough for a person to clearly identify a man who is driving in a van from another moving vehicle which is quite low to the van. There is no evidence that the inside light of the van was on.

18. Apart from these doubts arising from the evidence of identification, there is a contrasting claim from the first prosecution witness and the second prosecution witness in respect of the place where they were seated in the taxi.
19. In view of this contrasting claim of the first and second prosecution witnesses, I could not rely on their evidence of identification of the accused at the Edinburgh drive and neither at the time the van came to stop at the end of gravel feeder road. The third and fourth prosecution witnesses who were seated middle and right hand corner behind the driver on the back seat would not definitely be in a position to clearly see the driver while he was driving along the road and also at the time the van came to stop.
20. In contrast to the prosecution claim, the accused person contended that he did not drive the van and the second defence witness claimed in his evidence under oaths that he was the one who drove the van on that morning. In view of the contradictory nature of the prosecution evidence of identification and the doubts arising from it; I am inclined to hold that the prosecution witnesses failed to properly and positively identify the driver of the van. Hence I accept the explanation given by the accused person. Accordingly I am satisfied that the prosecution has not proved that the accused person drove the vehicle in a manner dangerous to the public having regard to all the circumstances of the case beyond reasonable doubt.
21. Apparently, the prosecution did not provide any evidence for the second count. In view of this reason with my finding above that the prosecution has failed to prove that the

accused drove the vehicle on that morning, I hold that prosecution has not prove that the accused person is guilty for the second offence beyond reasonable doubts.

22. I now turn to the third count where the accused is charged that he without lawful excuse and with intend to cause alarm threatened to assault Police Constable 2662 Shiu Naicker.

23. In *Lo Tong v The Queen* (1977) HKLR 193) a judgment of the High Court of Hong Kong which is cited by the learned counsel of the defence in his closing submission has discuss the element of the offence of criminal intimidation and the burden of proof on those elements. It was held in said *Lo Tong v The Queen* (supra) that

“ What the prosecution must show upon a charge under section 24 of the Crimes Ordinance (a provision which is modeled closely upon section 503 of the Indian appeal code) is that the person making the threat intends to cause alarm to the person to whom the threat is made or that the threat itself is of such a kind that a person of ordinary firmness would be affected by it. In deciding these matters, as it seems to me the context of the circumstances out of which the threat has arisen are of paramount important to be considered. The test involves both objective and subjective consideration inasmuch as (to quote the commentary upon the Indian section which appears in the 2nd Edition of the “Law of Crime” by Ratannal and Dhirajlal)

“ the question whether a threat amount to a criminal intimidation or not, does not depend on the nerves of the individual threatened, if it is such a threat as many overcome the ordinary free will of a firm man, or whatever the nature of the threat, if it is made with the intention mentioned in section, it is an offence”

In all cases of such utterance the questions of the intention with which the threat is made and of the effect which it had produce upon the person to whom it was made or would be likely to produce on a “firm man” are the relevant questions and they will fall to determined by reference to the particular circumstances affecting both the persons

involved at the particular time when the words were spoken. To my mind therefore it was of the greatest importance that the court should have considered whether the words were “ wild and whirling words’ uttered in exasperation by a man driven beyond the point of endurance by opposition offered to him in his legitimate rights as owner of premises, and signifying nothing more than an instinctive outburst of spleen, or whether they were uttered with a genuine intention of causing fear or were, in the circumstances of their utterance, likely to produce that effect”.

24. In line with this extensive description of the offence of criminal intimidation and section 330 (a) of the Penal Code Act, I find the offence of criminal intimidation consists with three limbs. The first limb is that threaten another person with any injury. The second limb is with intent to cause alarm to that person and third limb is an alternative to the second limb that is to cause that person to do any act which that person is not legally bound to do or omit to do such act as the means of avoiding the execution of such threat.
25. MacDuff CJ held in *Chinaiya v Reginam* (1962) 8 FLR 204 that *“In the Shorter Oxford English Dictionary there are two meanings of the word “alarm” that may be opposite. The meanings given are “ a warning of danger of any kind” and “ a state of excitement caused by danger apprehended” Webster’s Dictionary gives one meaning “ sudden surprise with fear or terror, excited by apprehension of danger”. That dictionary in expressing the shades of meaning in and the differences between the words “alarm, fright, terror and consternation” uses this definition alarm is the hurried agitation of feeling which springs from a sense of immediate and extreme exposure (to danger). I would adopt this as being the meaning to be attached to the word “alarm” in section 359 (a) of the Penal Code”.*

26. Bearing in mind the three limbs constitutes the offence of criminal intimidation and the judicial definitions aforementioned; I now proceed to analyze the evidence presented in respect of the third count as follows.
27. The evidence present by the prosecution does not specifically state that the accused person threatened Cpl Shiu directly with a cane knife. Cpl Shiu in his evidence stated that that accused came out with a cane knife and threatened us that it would not good for us if we towed his van. He did not specifically state that the accused directly threatened him with any injury. The second prosecution witness stated that the accused came out with a cane knife and said "you tow my vehicle, you will see the fun". He further stated that the accused struck several times on his vehicle and the towing truck with his cane knife. The third prosecution witness stated that accused uttered that "if you towed the vehicle then you will see what I will do to you people". He stated that when the vehicle was towed away, he went inside his compound and locked his gate. Fourth prosecution witness testified in his evidence that the accused said that if we towed the vehicle, it would not good for us" and he then came close to them when the vehicle was towed, and said I do not want any damages to my vehicle.
28. In view of these evidence of the prosecution, I do not find that none of the witnesses specifically heard including Cpl Shiu himself, that the accused person has directly threaten Cpl Shiu with any injuries. It is the onus of the prosecution to prove that the accused person threatened Cpl Shiu with any injury. According to the evidence the accused has merely stated that "you will see what I will do if you towed the vehicle". Indeed those words could resemble a threat, but that is not sufficient to constitute the first limb of the offence. That threat must accompany with "any injury to a person or a property or reputation in which such person has interest in".
29. Considering the evidence in respect of the threatened with any injury, I could infer that the accused came out with a cane knife and shouted at the officers presented that he will do something, if they towed the vehicle.

30. The second limb is that with intend to cause alarm or to cause that person to do or omit to do any act which he is or is not legally bound to do or not. This is a specific intention that the prosecution must prove. It is not enough for them to prove that the accused had intention to threatened the person with any injury but the prosecution must prove in addition that when the accused made that threat with any injury, he did such with an intention to cause alarm to that person or to cause that person to do or omit to do any act.
31. The evidence of the fourth prosecution witness where he stated that the accused came close when his vehicle was towed and said that he does not want to damage his vehicle. This creates a doubt that whether the accused actually intended to cause an alarm or cause Cpl Shiu to omit to do the act of towing. The police officers came behind him when he got down from the van and questioned him for dangerous driving. He denied that he drove the van but then police tried to tow his van. The accused admitted in his evidence that he was very drunk at that time. As MacMullin J held in *Lo Tong Kai v The Queen* (Supra) the court is required to consider that the word use were wild and whirling world uttered in exasperation by a man driven beyond the point of endurance by opposition offered to him in his legitimate rights as owner of premises and signifying nothing more than an instinctive outburst of spleen, or whether they were uttered with a genuine intention of causing fear or were, in the circumstances of their utterance likely to produce that effect.
32. According to the accused person, the police kept on insisting that he drove the van when he denied it. The accused was drunk. An argument has erupted between the police officers and the accused which was confirmed from the evidence of the accused person's wife as she heard that people were talking at top of their voices. The police officers managed to tow the vehicle without any resistance from the accused person. Cpl Eroni the fourth prosecution witness stated that the accused came close when the van was towed and said that he does not want damage his van. Considering these

reasons, I find that there is a reasonable doubt exists that whether the accused uttered such words as claimed by the prosecution witnesses with such a specific intention of causing an alarm or causing to the person he threatened to stop the towing of his van.

33. The prosecution did not produce the said cane knife as an exhibit and none of the witnesses has tried to take the said cane knife which they alleged that the accused was armed with into their custody. Cpl Shiu stated that he wanted to tow the van because he felt that taking the van into police custody would help his investigation into the offence of dangerous driving. Ironically Cpl Shiu did not find the same importance of taking the said cane knife into his custody as a vital evidence of the prosecution. Prosecution failed to give any valid reason for not taking the knife into their custody and produce it as evidence.
34. Apart from this, if there was such a commotion caused by the accused person, why the accused himself called Samabula Police Station and requested for assistance. Cpl Shiu said that he also asked for back up but did not denied that the accused has also requested assistance from Samabula Police station. Third Prosecution witness specifically admitted that they did not call Samabula police station for assistance and it was the accused person who asked them for assistance. The accused person surrendered to the police officers from Samabula Police Station without causing any issue once they reached. When these evidence taken into consideration together with the evidence of the defence, a reasonable doubt arises that whether the accused person actually armed with a cane knife and threatened the police officers.
35. Having considered the reasons set out in above paragraphs, I find that the prosecution has not successfully proved all the elements of this third count of Criminal Intimidation beyond reasonable doubt.
36. Reaching to my conclusion, I hold that the prosecution has not proved that the accused person is guilty for these three counts of dangerous driving, driving motor vehicle

without being the holder of a valid driving license and criminal intimidation respectively beyond reasonable doubt. I accordingly dismiss these three counts and acquit the accused from same.

37. 28 days to appeal.

On this 21st day of June 2013.

R.D.R.Thushara Rajasinghe

Resident Magistrate, Suva.