

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 20 OF 2016

BETWEEN : PRAVIN KUMAR
APPELLANT

AND : THE STATE
RESPONDENT

Counsel : Mr. M. Anthony for the Appellant
Ms. S. Kiran for the Respondent

Date of Hearing : 7th of July 2016

Date of Judgment : 18th of July 2016

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the Sentence delivered by the learned Magistrate in the Magistrates' court at Lautoka on the 12th of May 2016, on the following grounds, *inter alia*;

- i) *The learned Magistrate erred in law and in fact when he failed to give sufficient time to the accused to read his disclosures and seek legal advice before the accused could take a plea,*

- ii) The learned Magistrate erred in fact and law when he failed to give the accused sufficient time to seek further legal advice and submit his mitigation grounds,*
 - iii) The learned Magistrate erred in law and fact when he refused an application to vacate the plea of the accused by his counsel on the 12th of May 2016,*
 - iv) The learned Magistrate erred in fact and law when he sentenced the accused on 12th of May 2016, just a week after the matter was first called on the 5th of May 2016, without giving the accused sufficient time to analyse and prepare his case,*
 - v) Alternatively, the overall sentence was harsh and excessive considering the circumstance of the case,*
2. Pursuant to the service of the Petition of Appeal, the Appellant and the Respondent appeared in court on the 30th of May 2016. Accordingly, both the parties were directed to file their respective written submissions. Subsequently, both the parties filed their respective written submissions as per the direction and the matter was set down for hearing on the 7th of July 2016. The learned counsel for the Appellant and the Respondent made their respective oral arguments and submissions during the course of the hearing. Having carefully considered the respective written and oral submissions of the parties and the record of the proceedings in the Magistrates' court, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant had been charged with one count of Criminal Intimidation, contrary to Section 375(1)(a)(i)(iv) of the Crimes Decree and one count of Breach

of Domestic Violence Restraining Order, contrary to Section 77 (1) (a) of the Domestic Violence Decree. The Appellant was produced before the Magistrates' court of Lautoka on the 5th of May 2016. The Appellant was unrepresented. According to the record of the proceedings of the Magistrates' court, the Appellant had waived off his right to counsel when he was offered with that right. He had pleaded guilty for both the counts. The learned magistrate had then concluded that the Appellant on his own free will had pleaded guilty. In doing that the learned Magistrate has convicted the Appellant for both the counts and adjourned the matter for sentence till the 12th of May 2016.

4. On the 12th of May 2016, the Appellant was represented by a counsel. The learned counsel for the Appellant had made an application to the court to differ the pronouncement of the sentence on the ground that the Appellant needs to make an application to withdraw his plea of guilt. However, the learned Magistrate had concluded that no proper application had been filed for the withdrawal of the plea by the Appellant. Hence, he had found no reason to differ the pronouncement of the sentence and had proceeded with it. Accordingly, the Appellant was sentenced for a period of 10 months' imprisonment for the first count and 2 months' of imprisonment for the second count with a fine of \$100. Aggrieved with the sentence, the Appellant filed this Petition of Appeal.

The Law and Analysis

5. Having carefully considered the grounds of appeal and submissions of the parties, I first draw my attention to the third ground of appeal, that is founded on the contention that the learned Magistrate erroneously refused the application of the Appellant to vacate his plea on the 12th of May 2016.

6. According to the record of the proceedings of the Magistrates' court, it appears that the learned Magistrate has not refused the application of the Appellant for the withdrawal of the plea on its merits. The learned Magistrate has actually refused to hear the said application and refused to differ the sentence on the ground that no proper application for withdrawal of plea had been filed and that the sentence was ready to pronounce. Hence, the bone of contention of the issue of this appeal is to determine whether the refusal of the learned Magistrate to hear the said application of the Appellant is in conformity with the law.
7. The concept of natural justice, that is embodied with two cardinal principles, the rule against bias (*nemo iudex in causa sua*) and the right to a fair hearing (*audi alteram partem*) has been deeply rooted in our legal systems. It has been applied, upheld and jealously adhered by civilised societies from time immemorial. The legal system of Fiji, that is mainly founded on the principles of common law tradition is not an exception.
8. The right to a fair hearing is a *sine qua non* for the procedural fairness, where the court must hear both the parties in order to determine the criminalities of any alleged action or omission.
9. The right to a fair hearing has been embodied into the legal domain in England as far back as of sixteenth and seventeenth centuries. Chief Justice Coke in **Bagg's Case (1615) 11 Co Rep 95b [77 ER 1271 at 1275]** found that;

“although they have lawful authority either by charter or prescription to remove any one from the freedom, and that they have just cause to remove him; yet it appears by the return, that they have proceeded against him without ... hearing him answer to what

was objected, or that he was not reasonably warned, such removal is void, and shall not bind the party"

10. Fortescue J in **R v Chancellor of the University of Cambridge (Dr Bentley's Case) (1723) 1 Str 557 at 567 [93ER 698 at 704]** one of the much acclaimed cases on natural justice, found that;

"The laws of God and man both give the party an opportunity to make his defence, if he has any. I remember to have heard it observed by a very learned man upon such an occasion, that even God himself did not pass sentence upon Adam, before he was called upon to make his defence"

11. Section 15 (1) of the Constitution has recognised the right to a fair trial, where it states that;

"Every person charged with an offence has the right to a fair trial before a court of law".

12. Having briefly considered the laws pertaining to the right to fair hearing, I now turn onto this instant case to discuss whether the refusal of the learned Magistrate to hear the application to vacate the plea breaches the right to a fair trial as envisaged under Section 15 (1) of the Constitution.

13. According to the record of the proceedings of the magistrates's court, it appears that the learned counsel for the Appellant has informed the learned Magistrate that the Appellant needs to make an application to withdraw his plea of guilt. Being informed by the application of the learned counsel for the Appellant, the learned Magistrate should have allowed him to proceed with his application in detail and in a proper manner. If needed, the learned Magistrate should have


directed the parties to adduce evidence in the form of affidavit or make submissions on this issue. Since the magistrates' court is being considered as a court of summary proceedings, I find that the requirement of filing an application in writing for this instant case does not necessitate. Therefore, the oral application made by the learned counsel for the Appellant in court ought to be considered as a proper application. Hence, I find that the findings of the learned Magistrate in refusing to hear the application to withdraw the plea of guilt is in contravention to the right to a fair hearing as stipulated under Section 15 (1) of the Constitution.

14. Justice Shameem in State v Tanidrala [2005] FJHC 205; HAM0042D.2005S (29 July 2005) has discussed the effect of subsequent orders made in contravention to natural justice, where her ladyship held that;

“Grounds (a) and (b) of the grounds of appeal, allege a serious breach of natural justice, in the granting of bail without hearing from the State. State counsel referred in particular, to the decisions of the High Court of Australia in Kioa and Others v. Minister for Immigration and Ethnic Affairs and Another [1985] HCA 81; 62 ALR 321 and Annetts and Another v. McCann and Others [1990] HCA 57; 97 ALR 177, to submit that where there was the denial of natural justice to a litigant, the resulting decision was a nullity.

15. Guided by the above judicial precedents, I find that the subsequent sentence imposed by the learned Magistrate is erroneous. Hence, I set aside the sentence delivered by the learned Magistrate on the 12th of May 2016 on the ground that it had been imposed in breach of the right to fair trial as stipulated under Section 15 (1) of the Constitution.

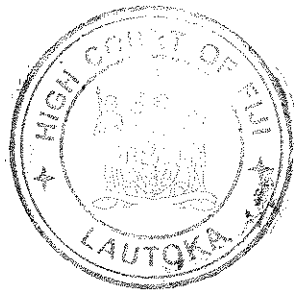
16. I do not wish to discuss or determine the merits of the application to vacate the plea of guilt and the subsequent conviction recorded by the learned Magistrate on the 5th of May 2016. It is prudent to leave it to the learned Magistrate to determine. Hence, I direct the learned Magistrate to hear the application of withdrawal of the plea made by the Appellant according to the law.
17. Accordingly, I set aside the sentence imposed by the learned Magistrate on the 12th of May 2016. Furthermore, I remit this matter back to the Magistrates' court to hear the application of the Appellant to withdraw his plea of guilt and to proceed further according to the law.
18. Thirty (30) days to appeal to the Fiji Court of Appeal.


R. D. R. Thushara Rajasinghe

Judge

At Lautoka

18th of July 2016



Solicitors : AC Law for the Applicant

Office of Director of Public Prosecution for the Respondent