

IN THE HIGH COURT OF FIJI
AT SUVA
[REVIEW JURISDICTION]

Review Case No. HAR 001 of 2019

BETWEEN : STATE

AND : SHEENAL LAL

Counsel : Ms S Tivao for the State
Mr A Dutt for the Accused

Dates of Hearing : 10 May 2019

Date of Judgment : 31 May 2019

JUDGMENT

Background

- [1] The Accused was a civil servant teaching at Penang Sangam Primary School in Rakiraki when she was accused of assaulting a 6-year old female student on 10 May 2018. On 16 May 2018, the Accused appeared in the Magistrates' Court charged with assault causing actual bodily harm. Her plea was deferred to 30 May 2018 after she was advised of her right to legal representation.
- [2] On 30 May 2018, the Accused appeared in court without counsel and pleaded guilty to the charge. The learned magistrate discharged her without recording a conviction. She was discharged under section 15 (1) (f) of the Sentencing and Penalties Act 2009. The power to discharge without conviction was exercised under wrong provision of law. Section 15 (1) (f) gives the court power to fine an offender with or without

conviction. The Accused was not ordered to pay a fine. The correct provision is section 15 (1) (j) that allows for an order dismissing the charge without recording a conviction.

- [3] Following her guilty plea, the Accused was terminated from her employment as a teacher. On 10 January 2019, the Accused wrote to the then Chief Justice complaining she was influenced by the learned magistrate to plead guilty to the charge in return for a non-conviction. She maintains her innocence and claims that her guilty plea was not made freely and voluntarily, and therefore, she was wrongfully terminated from her employment.

Review Jurisdiction

- [4] The High Court called for the record of the proceedings in the Magistrates' Court so that it could be examined pursuant to section 260 of the Criminal Procedure Act 2009. The relevant part of section 260 states:

(1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to

- (a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and
- (b) the regularity of any proceedings of any Magistrates Court.

- [5] After receiving the record of the proceedings, this Court decided to review the propriety of the Accused's guilty plea and the regularity of the proceedings in the Magistrates' Court. The Director of Public Prosecutions and the Accused were served with the papers and a notice of hearing. At the review hearing, the Accused was represented by a private counsel of her choice. Both parties have made helpful submissions.

The proceedings in the Magistrates' Court

[6] I set out the proceedings in the Magistrates' Court:

16/05/18

Prosecution: Sgt. Nitesh

Accused: Present

Charge read and explained and understood in _____ language all four (sic) counts.

Court: As of their rights – (a) legal Counsel

(b) Legal Aid

(c) Represent Self.

Plea: defer

Prosecution: No objection.

30/05/18 plea.

30/05/18

Prosecution: WPC Poonam

Accused:

Court Clerk: Iva, Khushoo

- Charge Read Explained and Understood.

Plea:

- Guilty

Findings:

- Accused 25, single, teacher for past 4 years. FNU graduate, Colasi,
- Sorry apologize, remorseful, learning. Promise to reoffend, seek non-conviction to further career.

Sentence

- The Accused is a young teacher she is remorseful, apologise and promise not to reoffend she deserves a second chance as a first offender.

S and PD Sec. 15(1) (f) non-conviction

Was the Accused denied of her right to legal representation?

- [7] The Accused claims that she was denied of her right to legal representation in the Magistrates' Court. An accused has a right to legal representation. That right is given by the Constitution and falls under the Bill of Rights. Section 14 (2) (d) of the Constitution sets out the ambit of that right as follows:

to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right.

- [8] Although the right to legal representation is not an absolute right, the right recognizes the injustice that may arise from the power imbalance between an unrepresented accused and the State who is represented by a qualified lawyer in the adversarial system of justice. Legal representation creates an even field for litigation and ensures fairness to both sides. The right to legal representation is therefore a procedural safeguard designed to ensure a fair hearing for an accused person. This interpretation of the right to legal representation is universal.
- [9] In *R v Brydges* (1990) 1 SCR 190, the Canadian Supreme Court has said at page 202 that the purpose of the right to counsel is to foster the principles of adjudicative fairness arising from the concern for fair treatment of an accused person.
- [10] In *Singh v State* [2000] FJLawRp 59; [2000] 2 FLR 127 (26 October 2000), the High Court considered the question whether the courts were obliged to inform an accused of his or her right to legal representation under the 1997 Constitution. The Court held that since the purpose of the right to counsel is to ensure a fair trial, the custodian of the enforcement of that right is the court. The Court also held that for the accused to make an informed choice, the court must inform the accused of the rights at the most meaningful time before the plea.

[11] Further, since the right to legal representation is a procedural safeguard for a fair hearing, any waiver of that right must be informed and unambiguous. In *Korponay v Attorney-General of Canada* (1982) 1 SCR 41 the Canadian Supreme Court said that any waiver of such a right "... is dependent upon it being clear and unequivocal that the person is waiving the procedural safeguard and is doing so with full knowledge of the rights the procedure was enacted to protect and of the effect the waiver will have on those rights" (per Lamer CJ p.202). In *Johnson v Zerbst*, 304 U.S the United States Supreme Court held that the determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused.

[12] In *Chand v State* [2008] FJHC 9; HAC138.05 (18 January 2008), this Court said at [29]:

A lawyer provides valuable assistance to an accused in achieving the necessary levels of knowledge and understanding of the constitutional rights and the legal process. The court must assure that any waiver of the right to legal representation is knowingly and affirmatively made. The waiver must appear on court record and not to be assumed from a silent record. For a waiver to be effective, the prosecution must show that the accused was competent to make such a waiver and the accused was completely aware of the right being waived.

[13] When the Accused appeared in court on 16 May 2018 she was informed of her right to legal representation. The Accused claims that when she appeared in court on her next appearance date she informed the learned magistrate that she was represented by legal aid but her counsel was attending a workshop on that day. She claims that she did not waive her right to legal representation and the taking of her plea without her counsel was irregular. There is some support for this contention of the Accused. The court record is silent as to whether the Accused waived her right to legal representation before her plea was taken. A waiver cannot be assumed from the silent court record. For a binding waiver to exist, it must be informed and expressly made.

Since the record is silent, I conclude that the Accused neither waived nor was aware of any waiver of her rights.

Whether the Accused was prejudiced due to the lack of legal representation?

[14] The question now is whether the Accused was prejudiced due to the lack of legal representation.

[15] The courts have a duty to exercise care when accepting a guilty plea from an unrepresented accused. In *Michael Iro v Reginam* FLR 12, 104, the Court of Appeal said at page 106:

In our view there is a duty cast on a trial judge in cases where the accused person is unrepresented to exercise the greatest vigilance with the object of ensuring that before a plea of guilty is accepted the accused person should fully comprehend exactly what that plea of guilty involves.

[16] Not only must the plea be unambiguous but also made with full understanding of all that it implies (*R. v. Vent* (1935) 25 Cr App R 55; *R. v. Griffiths* (1932) 23 Cr App R 153). If there is ambiguity, the plea must be treated as a plea of 'not guilty' and the case should proceed in the ordinary way (*Rex v. Golathan* [1915] 84 LJKB 758 at p.759).

[17] In the present case, after the plea was recorded, the learned magistrate proceeded to mitigation (mistakenly recorded as 'Findings') without making any enquiry as to whether the Accused was pleading guilty freely and voluntarily, without pressure, promise or inducement. Although there is in the court record a separate page of summary of facts prepared by the investigating officer in support of the charge, the record does not state that the facts were tendered or admitted by the Accused. The Accused may well have pleaded guilty to the charge, but she may not have fully comprehended what that plea of guilty involved if she did not admit the facts in support of the charges.

[18] The learned magistrate made a procedural error by not acting diligently to ensure that the Accused's plea of guilty was unambiguous and was made with full understanding of all it implies. The Accused was prejudiced by the lack of legal representation and the proceedings were unfair. There is a doubt whether her guilty plea is a true reflection of guilt.

Result

1. For these reasons, the proceedings are revised and the plea of guilty and order for non-conviction are set aside.
2. The case is remitted to the Magistrates' Court for a re-hearing before another magistrate. The Accused is ordered to appear in the Magistrates' Court at Rakiraki for mention and bail determination on 14 June 2019, 9.30 am.



A handwritten signature in blue ink, appearing to be "D. Goundar", written over a dotted line.

Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Messrs Dayal Lawyers for the Accused