

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 48 OF 2019

BETWEEN: IZAAZ KHAN

APPELLANT

A N D: THE STATE

RESPONDENT

Counsel: Mr. R. Singh for Appellant
 Mr. R. Kumar for Respondent

Date of Hearing: 14th September 2020

Date of Judgment: 16th October 2020

J U D G M E N T

1. The Appellant had been charged in the Magistrate's Court in Nausori with one count of Criminal Intimidation, contrary to Section 375 (1) (a) (iv) of the Crimes Act. The particulars of the offence are that:

Statement of Offence (a)

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

Particulars of Offence (b)

IZAAZ KHAN, on the 24th day of August, 2017 at Baulevu, Nausori in the Central Division without lawful excuse threatened **KELEMEDI NATARAKU** with a cane knife with intend to cause alarm to the said **KELEMEDI NATARAKU**.

2. The trial had conducted on the 25th of September 2019. The learned Magistrate in his judgment dated 12th of November 2019, had found the Appellant guilty of the offence of Criminal Intimidation, contrary to Section 375 (1) (a) (iv) of the Crimes Act and convicted to the same. The learned Magistrate then sentenced the Appellant to 30 months imprisonment with a non-parole period of 22 months. Aggrieved with the said conviction and sentence, the Appellant filed this appeal on the following grounds, *inter alia*:

Grounds of Appeal

- (a) *That the Learned Magistrate erred in Law and in fact in failing to consider whether your Petitioner was misled or deceived by the variance between the charge and the evidence and further failed to adjourn the hearing so as to enable your petitioner to better prepare for the continuation of the trial and such failure has caused a substantial Miscarriage of Justice.*
- (b) *That the Learned Magistrate failed to consider whether the variance between the charge and evidence led in support hereof had deprived your unrepresented Petitioner of a fair trial.*
- (c) *Substantial miscarriage has been caused to the Appellant by the State's tendering of perjured evidence knowing the same to have been perjured.*
- (d) *Further substantial prejudice has been caused to the Appellant by the State's withholding of material disclosure namely, the complainant's caution*

interview statement, Appellant's plain statement, witness statements in Criminal Case No. 639 of 2017 in the Nausori Magistrate's Court.

- (e) That the Learned Magistrate erred in Law and in fact in failing to consider the variance in dates of alleged offence by all three witnesses and whether such variance rendered the complainant's testimony improbable and not capable of being credit worthy.*
- (f) The weight of the evidence does not support the said conviction.*

Appeal Against Sentence

- (g) The Sentence is manifestly harsh and excessive.*
- (h) The Sentence is disparate in that it goes against Judicial comity namely that prior to the Appellant's sentencing the Complainant in the within appeal and a accused in Criminal Case No. 593 of 2017 was on the 31st day of October 2019 in Court No. 1 at Nausori Magistrate's Court sentenced to a binding over for a period of three years in relation to a charging of threatening to kill the children of the Appellant.*

3. The hearing was conducted by way of written submissions with the consent of the parties. Having carefully considered the record of the proceedings, the judgment, and the sentence, I invited the parties to file further submissions addressing the issue of whether the accused was given a fair trial in the Magistrate's Court. The learned counsel for the Appellant and the Respondent filed further written submissions accordingly. I first take my attention to the fairness of the hearing in the Magistrate's Court.
4. Section 15 (1) of Fiji's Constitution states that every person charged with an offence has the right to a fair trial before a court of law. One of the important components in a fair trial

concept is to inform the accused nature of and the reasons for the Charge. (*vide Section 14 (2) (b) of the Constitution*).

5. The Charge in the Magistrate's Court provides the accused nature of and the reasons for the Charge. Sections 58 and 61 of the Criminal Procedure Act stipulate the main ingredients of the Charge. It states that:

"Every Charge or information shall contain;

- (i) A statement of the specific offence or offences with which the accused person is charged; and,*
- (ii) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged."*

6. Section 61 Criminal Procedure Act states that:

- (i) A count of a charge or information shall commence with a statement of the offence charged, and this shall be called the statement of offence.*
- (ii) Each statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence.*
- (iii) The Charge shall contain a reference to the section of the law creating the offence.*
- (iv) After the statement of the offence, particulars of the offence shall be set out in ordinary language, and the use of technical terms shall not be necessary.*

7. The statement of offence and the particulars of offence are the two main components of the Charge. The statement of offence describes the offence, and the particulars of the offence explain the nature of the Charge.

8. The Fiji Court of Appeal in **Shekar & Shankar v State (Criminal Appeal No AAU0056 of 2004)** discussed the purpose of a charge, where it held that:

"The purpose of the Charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as it reasonably practicable, it is not necessary slavishly to follow the section in the Act."

9. In **State v Singh (Criminal Appeal No AAU0097 of 2005S)** the Fiji Court of Appeal expounded the purpose of the particulars of offence, where it observed that:

"The purpose of the particulars of offence is to indicate to the person accused of the offence the nature of the case the state intends to present. It does not need to set out the whole evidence and it is sufficient if it indicates how the case will be presented. What is important is the evidence the Prosecution adduces."

10. The Appellant had been charged with one count of Criminal Intimidation, contrary to Section 375 (1) (a) (iv) of the Crimes Act. The nature of the allegation was that the Appellant had allegedly threatened the Complainant with a cane knife with intent to cause alarm to the said Complainant.

11. Section 375 (1) (a) (iv) of the Crimes Act states that:

(1) *"A person commits a summary offence if he or she, without lawful excuse*

a) threatens another person or other persons (whether individually or collectively) with any injury to"

iv) to cause alarm to that person or those persons;

12. The basis of the Prosecution's allegation was that the Appellant had threatened the Complainant with a cane knife with the intention to cause alarm to the Complainant. However, the Prosecution led the evidence of the Complainant to establish that the Appellant had, in fact, threatened the Complainant to cause death or grievous harm. (*vide page 12 of the Record of the Proceedings in the Magistrates' Court*).
13. If a person threatened another to cause death or grievous harm, that constitutes another offence of Criminal Intimidation, contrary to Section 375 (2) (a), which is an indictable offence (triable summarily) and carries a maximum penalty of ten years imprisonment. The offence of Criminal Intimidation, contrary to Section 375 (1) (a) (iv), is a summary offence and carries a maximum penalty of five years imprisonment.
14. Accordingly, it appears that the Prosecution had conducted the trial based on the indictable offence under Section 375 (2) (a) Crimes Act instead of the summary offence under Section 375 (1) (a) (iv) Crimes Act as charged. However, the learned Magistrate had then found the Appellant guilty of the summary offence under Section 375 (1) (a) (iv) Crimes Act. The learned Magistrate had then sentenced the Appellant based on the maximum punishment as stipulated for the indictable offence under Section 375 (2) (a) Crimes Act. (*vide Paragraph 3 of the Sentence*).
15. The Fiji Court of Appeal in **Yang Xieng Jiong v State [2019] FJCA 17; AAU0077.2015 (7 March 2019)** has discussed the inappropriateness of conducting the trial on an entirely different basis than of the basis stated in the information. Nawana JA found that:

"The Appellant was entitled to know the basis upon which the case against him had been presented by the state; and, that basis had not been anything else other than on the basis of the individual criminal liability as presented by the information by the DPP. This cannot be changed by making an opening statement on a totally contrary line and bring in a completely different case, which would certainly have entailed the involvement of different legal principles. This, in my view, is not permissible as it is against

the fundamental rules of criminal procedure. The issue is made clear in view of the mandatory provisions of Section 58 of the Criminal Procedure Act, which states:

Every Charge or information shall contain-

- a) A statement of the specific offence or offences with which the accused person is charged; and,*
- b) Such particulars as are necessary for giving reasonable information as to the nature of the offence charged.*

The purpose of the Charge is to ensure that the accused person knows the offence with which he or she is charged (Per Goundar J. in Kamlesh Lata Arun v State [2009] HAA 52-55/08L 23 October 2009.

This court, in the case of Lal v State; AAU 154.2014; [2018] FJCA 147 (04 October 2018) adopted the ruling of the Supreme Court of Canada in H. M the Queen v N. H. Rooke and R. C. De Vries; [1990] 1990 CanLII 1131 (SCC) and Morozuk v The Queen; 1986 CanLII 72 (SCC), [1986] 1 S.C.R. 31, which held that it was a fundamental principle of criminal law that the offence, as particularized in the Charge, must be proved; and, permitting the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial.

In the circumstances, I conclude that the prosecuting State Counsel is not empowered to conduct the case totally on a different basis by making an opening statement, which is manifestly different to the information presented to court and served on an accused person by the DPP without an

amendment to the information, if such amendment is warranted. I am unable to agree with the submission of the learned counsel for the State that the prosecuting counsel's opening statement has had the effect of giving sufficient notice of the basis of Charge to the Appellant."

16. In view of the reasons discussed above, it is clear the Appellant was not given a fair trial, causing prejudices to the Appellant. Therefore, it is my considered view that the conviction and subsequent sentences are not safe and wrong in law. Because of the above conclusion, I do not wish to discuss the other grounds of appeal.
17. The Appellant had already served nearly ten months in prison. Hence, I do not wish to order a retrial.
18. The orders of the court are that:
 - a) The appeal is allowed,
 - b) The conviction dated 12th of November 2019 is quashed, and the sentence is set aside.
19. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
16th October 2020

Solicitors
Messrs. Fazilat Shah Legal for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.