

IN THE HIGH COURT OF FIJI
AT SUVA
MISCELLANEOUS JURISDICTION

MISCELLANEOUS CASE NO.: HAA 031 OF 2012

BETWEEN : IOKIMI NAVAKAROKO

Appellant

AND : THE STATE

Respondent

COUNSEL : Ms P Salele for the Appellant
Ms M Fong for Respondent

Date of Hearing : 29/11/2013

Date of Judgment : 06/12/2013

JUDGMENT

[1] Iokimi Navakaroko (hereinafter “the appellant”) was charged for three counts of Indecent Assault on Female contrary to section 154(1) of the Penal Code. Cap. 17, one count of Rape Contrary to Section 149 of Penal Code Cap.17 and one count of Assault Occasioning Actual Bodily Harm Contrary to Section 245 of the Penal Code Cap 17. The Charges were filed at the Suva Magistrates Court on 3rd day of November 2009.

[2] On the trial date of the 4th of April 2011, some 9 months after trial date had been fixed, the Appellant appeared in person and opted to change his plea to Guilty on all counts. Later in the same day summary of facts in respect of Criminal Case No: 1409/2009 was read out to the Appellant. He pleaded guilty to the charge and admitted the summary of facts.

- [3] On the 1st of December 2011, the Appellant mention of the fact that he wished to vacate his guilty plea, stating he had not been aware of the consequences of pleading guilty to the 5 counts.
- [4] After calling submission from both sides, the Court on 22/03/2012 delivered written ruling dismissing the Appellant's application to vacate plea, finding that he had changed his plea with full knowledge of the consequences of pleading guilty to the charges and that the plea was unequivocal.
- [5] On 12th October 2012, he was sentenced to a prison term of 10 years and one month imprisonment on all counts.
- [6] Being aggrieved by the Ruling (on guilty plea), Conviction and Sentence the Appellant filed his Petition of Appeal on 06/11/2012 on the following grounds:
1. The Learned Magistrate erred in law and in fact and in law in Ruling against the Appellant's application to vacate his Guilty Plea as follows:
 - a. The Appellant had been forced to change his guilty plea to Guilty because he was legally unrepresented and had left intimidated and apprehensive of the trial. It was on the morning of the trial date 04/04/2011 that he was forced to change his plea to guilty and prior to that the Appellant had maintained a not guilty plea even though his legal representation had been denied.
 - b. That the Appellant was forced to change his plea on the trial date (04/04/2011) because he was intimidated and apprehensive of the fact that he lacked knowledge of the law and how to conduct his defence.
 - c. That at the time of changing his guilty plea the Appellant had not understood the consequences of a guilty plea to lack of legal advice. The Learned Magistrate erred in law and facts and in fact in failing to give allowance of sentence over the Appellant's guilty plea.
 - d. That the Learned Magistrate failed in his duty to explain to the Appellant the consequence of a guilty plea before accepting the plea and convicting him.

2. That the Learned Magistrate erred in fact and law in failing to consider that the Appellant was not served with full disclosures. The Learned Magistrate's ruling had erroneously stated that the Appellant has been served with full phase disclosures on the 27th of November 2009 when in fact he had not received full disclosures until he was sentenced.
3. That the Learned Magistrate erred in fact and in law in accepting and admitting the summary of facts in his ruling, when there were discrepancies and differences in the dates noted in the summary of facts and the actual charge.
4. That the Learned Magistrate erred in fact and in law in failing to give the Appellant the opportunity to elect or to choose on whether he preferred to have his case heard in the Magistrate's court or High Court. The charges were electable offences and this opportunity to choose was not given to the Appellant.
5. That due to the nature of the case, the Learned Magistrate erred in fact and in law in convicting the Appellant at the Magistrates Court and failing to refer the matter to the jurisdiction of the High Court.
6. That the Learned Magistrate erred in fact and in law in accepting the medical report to have contained evidence of sexual assault when in fact no such finding was recorded. The actual fact was that the complainant was medically examined in 2009 and the grounds of Assault Occasioning Actual Bodily harm, when the events relative to sexual assault were in 2007.
7. That the sentence received by the Appellant was harsh and excessive.

[7] The Appellant in his written submissions moved this court to withdraw his appeal grounds 5 and 7.

[8] The powers of the High Court after hearing of an appeal is clearly set out in section 256(2) of the Criminal Procedure Decree 2009 which states:

(2) The High Court may-

- (a) Confirm, reverse or vary the decision of the Magistrates Court;
- or

- (b) remit the matter with the opinion of the High Court to the Magistrates Court; or
- (c) order a new trial; or
- (d) order trial by a court of competent jurisdiction; or
- (e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or
- (f) the High Court may, notwithstanding that it is opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

Appeal Ground 1

[9] The Learned Magistrate erred in law and in fact and in law in Ruling against the Appellant's application to vacate his Guilty Plea as follows:

- a. The Appellant had been forced to change his guilty plea to Guilty because he was legally unrepresented and had left intimidated and apprehensive of the trial. It was on the morning of the trial date 04/04/2011 that he was forced to change his plea to guilty and prior to that the Appellant had maintained a not guilty plea even though his legal representation had been denied.
- b. That the Appellant was forced to change his plea on the trial date (04/04/2011) because he was intimidated and apprehensive of the fact that he lacked knowledge of the law and how to conduct his defence.

On perusal of the Magistrate's Court record it reveals that the Appellant on his free will informed the court that he would be changing his plea to guilty. The court has given him more than 7 months to secure his legal representation. The Appellant opted to change his plea 9 months after trial date had been set. The above mentioned grounds of appeal fails as no evidence placed before this court to substantiate that he was forced or intimidated to change his plea to guilty.

- c. That at the time of changing his guilty plea the Appellant had not understood the consequences of a guilty plea to lack of legal advice. The Learned Magistrate erred in law and facts and in fact in failing to give allowance of sentence over the appellant's guilty plea.
- d. That the learned Magistrate failed in his duty to explain to the Appellant the consequence of a guilty plea before accepting the plea and convicting him.

The Court record is very clear on what happened on the day the Appellant changed his plea. It was done his own accord. He understood and admitted the summary of facts. Never mentioned not understanding the charge or he was forced or intimidated to change his plea to guilty. Hence these two grounds also fail.

Appeal Ground 2

[10] That the Learned Magistrate erred in fact and law in failing to consider that the Appellant was not served with full disclosures. The Learned Magistrate's ruling had erroneously stated that the Appellant has been served with full phase disclosures on the 27th of November 2009 when in fact he had not received full disclosure until he was sentenced.

According to court record on 27/11/2009 the DPP had served first disclosures to the Appellant in court. On 24/03/2010 The DPP had informed the court that full disclosures had been served on the Appellant. As per Disclosure Certificate (Annexure -1) the Appellant had been served with 16 documents including Complainant's statement and her Medical Report. The Appellant by placing his signature acknowledged the receipt of 16 documents. Documentary evidence correctly reflects that the Appellant had received full disclosures before he pleaded guilty to the charges. Therefore, this ground has no merit.

Appeal Ground 3

[11] That the learned Magistrate erred in fact and in law in accepting and admitting the summary of facts in his ruling, when there were discrepancies and differences in the dates noted in the summary of facts and the actual charge.

Thought Appellant mentioned in his 3 appeal ground that there were discrepancies and differences, but only 01 discrepancy noted in the summary of facts. That is in relation to count one only. Instead of "April" the month was written as "August" in the summary of facts.

The Appellant submits that putting incorrect information was put to the Appellant was misleading and breached his basic right to a fair trial. The Appellant pleaded guilty to 1st Count correctly and admitted the summary of facts. The Appellant was very well aware that he was pleading guilty to correct charge. The charge contained the correct information. The discrepancy noted in the summary of facts is a minor one and it certainly not breached the Appellant's right to a fair trial. Hence this ground too fails.

Appeal Ground 4

[12] That the Learned Magistrate erred in fact and in law in failing to give the Appellant the opportunity to elect or to choose on whether he preferred to have his case heard in the Magistrate's Court or High Court. The charges were electable offences and this opportunity to choose was not given to the Appellant.

The Criminal Procedure Decree came in to operation on 01/02/2010. The Appellant was first produced to Magistrate Court on 03/11/2009. According to court record it shows when the matter proceeded towards the setting of a trial date, the Appellant pleaded guilty to the charges.

Section 188 of Criminal Procedure Decree 2009 states:

- 1) If before or during the course of a trial before a Magistrates Court it appears to the magistrate that the case is one which ought to be tried by the High Court the magistrate may transfer the case to the High Court under Division 3 of this part.
- 2) Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the magistrate shall-
 - a) Hear and consider the reasons for the application.

- b) Hear and consider any submission made on behalf of the accused person as to the most appropriate court to hear and determine charges; and
- c) Otherwise determine matters relevant to the ground for the application-

And may continue to hear the case (unless the charges are of the nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3 of this part.

As per Section 188(2) (h) Criminal Procedure Decree 2009, the opportunity is only available to the Appellant if the public prosecutor or police prosecutor makes an application that the case is one which should be tried by the High Court. Nowhere in the court has record showed that public prosecutor or police prosecutor made an application under section 188(2) of the Criminal procedure Decree 2009. Therefore, it is incorrect to say that the Appellant was not given an opportunity to choose the court he wished to be tried. Therefore, I conclude that this ground has no merit.

Appeal Ground 6

[13] That the learned Magistrate erred in fact and in law in accepting the medical report to have contained evidence of sexual assault when in fact no such finding was recorded. The actual fact was that the complainant was medically examined in 2009 and the grounds of Assault Occasioning Actual Bodily harm, when the events relative to sexual assault were in 2007.

Part D (16) of the Medical Report (Summary and conclusion) of the victim states as follows:

- 16 year old Fijian girl, sexually, physically and emotionally abused and traumatised by step father over the last 4 years
- Strangulation this morning

The summary and conclusion of the doctor was accepted by the Learned Magistrate. Therefore the Learned Magistrate not erred in fact and in law

accepting the Medical Report of the victim and citing in the sentence. This ground too has no merit.

[14] As none of the grounds of appeal advanced by the Appellant showed any merit, I dismiss his appeal filed against the conviction and sentence.

[15] Appellant has 30 days to appeal.

P Kumararatnam
JUDGE

At Suva
06/12/2013

