

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 85 of 2018

BETWEEN : **ASIF ISMAIL**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel : Mr. I. Khan for the Appellant.
: Mr. A. Singh for the Respondent.

Date of Hearing : 27 November, 2018

Date of Ruling : 5 December, 2018

JUDGMENT

1. The appellant was charged in the Magistrate's Court at Lautoka for one count of Grievous Harm contrary to section 258 of the Crimes Act. It was alleged that the appellant with another on the 16th day of October, 2015 at Lautoka unlawfully and maliciously did grievous harm to Lalesh Kumar Deo.

2. The appellant pleaded not guilty and the matter proceeded to hearing. The prosecution called the complainant and the doctor whilst the defence called the accused and two other witnesses. In a judgment delivered on 27 December, 2017 the learned Magistrate found the appellant guilty and convicted him as charged.
3. The brief facts are as follows:
The victim was employed by the appellant as a Sales and Marketing Manager. On 16 October, 2015 the appellant and the victim were having a discussion relating to the victim's employment.
4. During the discussions the appellant started to swear at the victim and then pushed him. The victim fell and when he was trying to fetch his mobile phone which had fallen on the floor the appellant kicked him on his right jaw.
5. The appellant was wearing safety boots when he kicked the victim, at this time other unknown persons also joined the appellant in kicking the victim on his jaw and in further assaulting the victim. The victim managed to leave the shop and with the help of a Police Officer he went and reported the matter to the police.
6. As per the medical report of the victim he suffered a fractured right mandible apart from some minor injuries.
7. After hearing mitigation on 12 November, 2018 the appellant was sentenced to 2 years and 3 months imprisonment.
8. The appellant being dissatisfied with the conviction and sentence filed a timely appeal in this court.

9. The appellant's counsel filed skeleton submissions, the state counsel did not file any written submissions but both counsel made oral submissions during the hearing for which this court is grateful.
10. The appellant filed numerous grounds of appeal against conviction and sentence. On the day of the hearing counsel abandoned the other grounds of appeal except for the following ground of appeal against conviction.

Ground One

The learned Trial Magistrate did not comply with the mandatory provisions of section 4 (1) (b) of the Criminal Procedure Act and as such the said conviction and sentence was nullity.

11. Counsel for the appellant submits that the offence with which the appellant was charged was an indictable offence triable summarily. The right of election was not put to the appellant hence the entire proceedings was a nullity.
12. The copy record of the Magistrate's Court at pages 18 to 20 states the following:

"16/10/15

Pros: WPC Francis Bale

Acc: Present – Mr. J. Reddy

Preferred language – English

Charge is read and explained. Accused understands the charge.

Disclosures served. Plea is deferred.

Prosecution does not object for bail.

Accused is granted bail in the sum of \$1000 with a surety.

Accused should report to Lautoka Police Station on every Saturday before 9.00am – 5.00pm.

Should surrender the travel documents to the Court. Should not interfere with witnesses or re-offend.

For plea 01/12/15

01/12/15

Pros: Cpl. Vinod

Acc: Present – Mr. Reddy

Preferred language – English.

Charge is read out and explained. Accused pleads not guilty.

Case is fixed for hearing.

Hearing 09/05/16

22/03/16

Pros: WPC Francis Bale

Acc: Present – Mr. Reddy

The Accused has file motion seeking the hearing to be vacated.

Prosecution has no objection.

Hearing is vacated which is scheduled for 09/05/16

Re-fixed for hearing.

Hearing 09/09/16

09/09/16

Pros: Cpl. Shelvin

Acc: Present – Mr. Singh

The case is taken up for hearing. A witness is called...

13. The state counsel in his usual fairness conceded the appeal agreeing that the mandatory election was not put to the appellant before the proceedings began.

DETERMINATION

The appellant was charged under section 258 of the Crimes Act for the offence of grievous harm. This offence is an indictable offence triable summarily. Section 4 (1) (b) of the Criminal Procedure Act states:

“(b) any indictable offence triable summarily under the Crimes Act shall be tried by the High Court or a Magistrate Court at the election of the accused person...”

14. “Indictable offence triable summarily” means any offence stated in the Crimes Act 2009 or any other law prescribing offences to be an indictable offence triable summarily, and which shall be triable – (a) in the High Court in accordance with the provisions of this Act; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Act (see section 2 of the Criminal Procedure Act 2009).
15. Indictable offences are tried in the High Court, however, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b) of the Criminal Procedure Act). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate’s Court that he or she wishes to be tried in the High Court (section 35(2)(b)(ii) of the Criminal Procedure Act 2009).
16. A similar situation arose in *Vereniki Batikalou v The State, criminal appeal no. AAU 0031 of 2011 (2/01/2015)*. The appellant was not given the statutory option laid down by law to choose the court to stand trial. The appellant was convicted for the offence of robbery contrary to section 310 (1) (a) (i) of the Crimes Act which was an indictable offence triable summarily. The Court of Appeal whilst quashing the conviction and

setting aside the sentence made the following pertinent observations at paragraph 30:

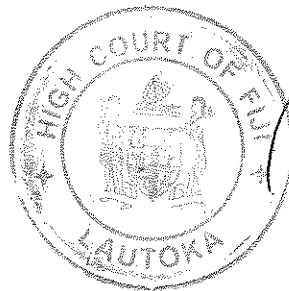
“It is not disputed that the appellant was deprived of a statutory requirement. The appellant possessed a legal right to choose to be tried either in the Magistrate’s Court or the High Court, a right given by law. Can this right arbitrarily be taken away? The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.

17. The accused was represented by counsel at the time the plea was taken, and there was no issue taken by defence in respect of the right of election not being put to the accused as required by law. There is also no evidence of any prejudice caused to the accused during the entire trial as a result of the election not being put to the accused. However, this court is bound by the decision of the Court of Appeal in *Vereniki’s* case.
18. The copy record does not show that the accused was given his right of election that is whether he wanted a Magistrate’s Court trial or a High Court trial. The right of election imposed by section 4(1) (b) of the Criminal Procedure Act is mandatory. The oversight or omission in putting the right of election to the appellant before the Magistrate’s Court trial is fatal to the conviction and sentence.
19. A mandatory requirement of law had not been put to the appellant. A right that accrued to the appellant cannot be arbitrarily taken away under any circumstances. The learned Magistrate erred when he failed to put the mandatory election to the accused before the trial began since the accused was charged with an indictable offence triable summarily.

20. The error by the Magistrate's Court is fatal to the conviction resulting in a trial which was a nullity. In the interest of justice a retrial is the only option available for this court to order.
21. The alleged offending took place on 16 October, 2015 there is a need for the matter to be determined as soon as possible. In the interest of justice this court wishes to express the need to have the matter heard by the Magistrate's Court without any delay.

ORDERS

1. The appeal against conviction is allowed.
2. The conviction and sentence are quashed and set aside.
3. The matter is remitted to the Magistrate's Court at Lautoka to be tried "*de novo*" before another Magistrate and a hearing date is to be assigned as a matter of urgency. This matter is adjourned to 10 December, 2018 for mention at Magistrate's Court, Lautoka.
4. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

5 December, 2018

Solicitors

Messrs Iqbal Khan & Associates for the Appellant.

Office of the Director of Public Prosecutions for the Respondent.