IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 127 of 2017

BETWEEN : **VIANE TANUA WILLIE**

APPELLANT

A N D : **THE STATE**

RESPONDENT

Counsel	:	Ms. A. Chand and Mr. S. F. Koya for the Appellant.
	:	Ms. S. Kiran for the Respondent.
Date of Hearing	:	17 August, 2018
Date of Judgment	:	22 August, 2018

JUDGMENT

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1. The appellant was charged in the Magistrate's Court at Nadi with the offence of Criminal Intimidation contrary to section 375 (2) (a) of the Crimes Act. It was alleged that the appellant on the 9th day of April, 2014 at Nadi without lawful excuse, threatened Birate Tenua to cause death by saying "I will kill you".

2. The appellant had pleaded not guilty to the charge and the matter proceeded to hearing. The prosecution called three witnesses and the defence called the appellant.

3. After hearing evidence, on 13 October, 2017 the appellant was found guilty as charged and convicted accordingly. After considering mitigation, on 6 November, 2017 the appellant was sentenced to 12 months imprisonment suspended for a period of 3 years. In addition a fine of $500.00 was imposed.

4. The brief facts were:

On 9th April, 2014 at about 7pm the victim was at the Nadi Airport with his cousin and his son waiting for the arrival of his cousin's wife. Whilst they were at the car park the appellant came and punched the victim from behind. The victim and the appellant were known to each other. The victim also threw a punch at the appellant. The appellant wanted to fight, the victim replied that the appellant was too old for a fight. Upon hearing this, the appellant said *"okay wait I am going to kill you wait for me I am going to get my knife"*. The appellant went to his vehicle and came back with a knife. When the victim saw the knife he realized the seriousness of the threat. The appellant threatened the victim with the knife. At the scene the appellant was apprehended by security officers and the matter reported to the police.

5. The appellant being dissatisfied with the conviction and sentence filed a timely appeal. The amended grounds of appeal dated 25 May, 2018 are as follows:

APPEAL AGAINST CONVICTION

Ground One

"The learned trial Magistrate erred in law and in fact in continuing the trial on the basis that the prosecution failed to disclose the statement of the witness who had given evidence and the Appellant did not have a fair

opportunity to prepare for his trial pursuant to section 14 (e) and 15 (1) of the Constitution that led to a denial of a fair trial and as such a substantive miscarriage of justice.

APPEAL AGAINST SENTENCE

Ground Two

The learned trial Magistrate erred in law and in fact by sentencing the Appellant without taking into consideration the mitigation submissions both oral and written presented by counsel about the impact of a conviction on the Appellants economic or social well-being, and on his employment prospects.

Ground Three

The learned trial Magistrate erred in law and in fact in not taking into consideration the provisions of section 16 (1) (c) of the Sentencing and Penalties Act adequately when she passed the sentence against the Appellant.

6. Both counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful.

APPEAL AGAINST CONVICTION

Ground One

"The learned trial Magistrate erred in law and in fact in continuing the trial on the basis that the prosecution failed to disclose the statement of the witness who had given evidence and the Appellant did not have a fair opportunity to prepare for his trial pursuant to section 14 (e) and 15 (1) of the Constitution that led to a denial of a fair trial and as such a substantive miscarriage of justice".

7. The learned counsel for the appellant submits that when the trial began on 13 March, 2017 it was revealed during cross examination of the victim that the prosecution had failed to disclose the police statement of the victim to the defence. This issue was raised at the time with the learned Magistrate.

8. Counsel further submits that as a result of the conduct of the prosecution the appellant did not receive fair trial guaranteed by the Constitution of Fiji resulting in substantial miscarriage of justice.

9. To address the issue raised it is important to have a look at the copy record in particular the cross examination of the victim by defence counsel from page 50 to page 52:

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"Q: If I put a statement before you, will you be able to recognize it that it was your statement?
A: I should be able to recognize it.

Q: O.k. I seek the court indulgence to tender the statement, madam. Mr. Teabuna, please go through the statement and see whether this was the statement that you gave to the police officers.
A:

Q: If I read your statement to you, will you be able to tell me whether that is yours or not?

Crt: Signature can .....
No signature?

Ms. Nand: Madam, I have one that he had signed.
A: This is not my signature.

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Q: *So you are telling this court that you did not give any statement to the police?*

A: *I gave a statement.*

Q: *Madam, the statement that we have before us is part of the disclosures, Madam.*

Crt: *Don't write anything.*
You have taken a statement, prosecution?

Mr. Chand: *Yes, we have the typed one and the original.*

Crt: *Right, you can give it to him. He was also given a further statement on the 16th day of April, 2014.*

Ms. Nand: *Madam may I proceed. Mr. Teabuna regardless of whether those signatures was yours or not, do you recall giving a statement that is similar to that or is that your statement?*

A: *I just go through the statement...*

Q: *So, are you telling the court that that statement is not yours?*

A: *Part of it was my statement.*

Q: *Are you going to rely on that statement?*

A: *Part of it I will rely on*

Q: *Madam, it's not part of disclosures.*

Prosecution: *Madam I object. We have brought that as an exhibit to the court. Whatever is given as evidence on oath, she should cross examined.*

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Ms. Nand: *However, I understand what my learned friend is saying but to prepare for this trial we have relied on what was given to us and what he is saying right now.*

Crt: *Same one?*

Ms. Nand: *Yes, Madam, the same statement that we received and he is saying that it's not his signature.*

Crt: *Part of?*

Ms. Nand: *Yes, madam*

Crt: *Somebody knows*

Ms. Nand: *I would like to seek your directive, madam.*

Crt: *Right. Now, the thing is that part of that he has admit it so we can ask questions about his ...*

Ms. Nand: *Yes, Madam there a crucial things in that, he might say that he is not admitting.*

Crt: *It's for the credibility, you can ask question.*

Ms. Nand: *O.k thank you madam. Mr. Teabuna, I will take you to line 11 on my statement I'll read out to you that he went to his car and came back to me and I did not see him holding the knife. So, Mr. Teabuna.*

Crt: *The hand written one or the typed one?*

Ms. Nand: *The typed one.*
Mr. Teabuna, can just read that one that is typed, please.

Crt: *The typed one. Give it to the witness.*

A: *This is my signature not this one...*
Q: *Thank you. Could you please read the 2nd line..."*

10. The above is a chronology of the evidence contained in the copy record. It is obvious from the evidence adduced in court that the prosecution had disclosed to the defence the police statement of the victim. The trial counsel did not at any time raise any issue of non-disclosure at trial.

When one looks at the cross examination conducted by the defence counsel at page 52 of the copy record the victim was referred to lines 2 and 11 of his police statement which was in the possession of the defence.

11. Had there been any non-disclosure as suggested by the appellant's counsel the trial counsel would no doubt have raised it immediately in court. The trial counsel did not make any application about the non-disclosure of the victim's police statement. At page 52 counsel confirms receipt in the following words *"Yes, madam, the same statement that we received and he is saying that it's not his signature".*

12. Considering the above, the prosecution had complied with its obligation of disclosure of documents. There has been no breach of sections 14 (e) and 15 (1) of the Constitution of the Republic of Fiji as asserted by the appellant.

13. This ground of appeal is dismissed due to lack of merits.

APPEAL AGAINST SENTENCE

14. The appellant has advanced two grounds of appeal against sentence.

Ground Two

"The learned trial Magistrate erred in law and in fact by sentencing the Appellant without taking into consideration the mitigation submissions both oral and written presented by counsel about the impact of a conviction on the Appellants economic or social well-being, and on his employment prospects.

Ground Three

"The learned trial Magistrate erred in law and in fact in not taking into consideration the provisions of section 16 (1) (c) of the Sentencing and Penalties Act adequately when she passed the sentence against the Appellant.

15. Both grounds of appeal against sentence can by dealt with together.

16. The learned counsel for the appellant submits that the learned Magistrate did not take into consideration the mitigation presented on behalf of the appellant that a conviction would impact upon the appellant's economic or social well-being and his employment prospects. Counsel further submitted that the learned Magistrate did not adequately consider section 16 of the Sentencing and Penalties Act in recording the appellant's conviction.

LAW

17. In sentencing an offender the sentencing court exercises a judicial discretion. An appellant who challenges this discretion must demonstrate to the appellate court that the sentencing court fell in error whilst exercising its sentencing discretion.

18. The Supreme Court of Fiji in *Simeli Bili Naisua vs. The State, Criminal Appeal No. CAV0010 of 2013 (20 November 2013)* stated the grounds for appeal against sentence at paragraph 19 as:-

"It is clear that the Court of Appeal will approach an appeal against sentence using the principles set out in House v The King [1936] HCA 40; (1936) 55 CLR 499 and adopted in Kim Nam Bae v The State Criminal

Appeal No. AAU0015 at [2]. Appellate Courts will interfere with a sentence if it is demonstrated that the trial judge made one of the following errors:-

(i) Acted upon a wrong principle;

(ii) Allowed extraneous or irrelevant matters to guide or affect him;

(iii) Mistook the facts;

(iv) Failed to take into account some relevant consideration."

19. At paragraph 6 of the sentence the learned Magistrate took the following mitigation into consideration:

"(i) You are 62 years old, currently resides at Lautoka, married with nine children. You are a pilot by profession, and have been in this profession for 38 years.

(ii) Good character – you were awarded the order of Kiribati last year, you have helped with education of children completing their studies in FNU.

(iii) You have three children, who are still studying and rely on you, and you look after your elderly wife and five grandchildren financially and their basic needs."

20. The counsel for the appellant argues that the learned Magistrate did not take into consideration the mitigation they had presented on behalf of the appellant to the effect that:

"The accused is a Captain by hierarchy in Fiji Airways, and to get to that position he has worked very hard, he has made several overseas trips yet there has been no complaints or incidents that may question the character of the accused ever since he has been in this profession. He wishes not to lose his career that he had taken so long to build."

21. The main thrust of the appeal against sentence by the appellant is that a conviction ought not to have been entered against him since his employment as a pilot was at risk. This court notes that the appellant had pleaded not guilty, the allegation arose in 2014 and the trial was finalized in 2017. Counsel also stresses that the dependents of the appellant will suffer financially due to the loss of his employment as a result of the conviction.

22. This court notes from the mitigation presented on behalf of the appellant that he was not solely reliant on his employment for financial support as per the character reference of Sulita T. Tuiqali dated 20 October, 2017. The character reference states inter alia:

"He employs on his farm and market stalls, those who struggle financially."

23. When it comes to recording a conviction or not the law bestows upon the sentencing court discretion as per section 16 of the Sentencing and Penalties Act. This discretion must be exercised judicially by the sentencer having regards to all the circumstances of the case including:
    (a) the nature of the offence;
    (b) the character and past history of the offender;
    (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

24. The appellant had pleaded not guilty, after hearing evidence the learned Magistrate by judgment dated 13 October, 2017 had found the appellant guilty and convicted him. The learned Magistrate had correctly recorded a conviction after finding the appellant guilty. The counsel's submission

that learned Magistrate should not have recorded a conviction against the appellant is misconceived.

25. Considering the nature and circumstances of the offending it cannot be said to be a trivial offending. The maximum penalty under section 375 2(a) of the Crimes Act is 10 years imprisonment. From the facts of the case it was the appellant who had approached the victim punched him and then invited the victim to have a fist fight.

26. The victim understandably retaliated and there was an exchange of punches. The matter did not rest there, the appellant after threatening the victim went to his car and brought with him a knife (dagger). Although the knife was not used on the victim the fact that this lethal weapon was in possession of the appellant created a very dangerous situation. The appellant is lucky the learned Magistrate did not take the possession of the knife as an aggravating factor.

27. Although the appellant was a first offender with an impeccable record a conviction was inevitable and warranted considering the nature and circumstances of the offending. In any event the appellant has been given a lenient sentence.

28. It is not for an Appellate Court to revisit mitigation which was before the Magistrate's Court at the time of sentencing unless manifest injustice will be caused to the appellant (see *Josaia Leone & Sakiusa Naulumatua vs. State [2011] HAA 11 of 2011 (8 July, 2011).* Here the learned Magistrate had taken all the mitigating factors as presented into account and no manifest injustice has been caused to the appellant.

29. The learned Magistrate had complied with the purposes of the sentencing guidelines stated in section 4 (1) of the Sentencing and Penalties Act and the factors that must be taken into account namely section 4 (2).

30. It is not incumbent upon a court to list and consider every point made by counsel. The court will of course consider and adopt all points that are relevant.

31. Furthermore, there is no requirement of the law that where there are several mitigating factors each one of them should be dealt with separately. The Supreme Court in *Solomone Qurai vs. The State, Criminal Petition No. CAV 24 of 2014 (20th August, 2015)* stated this very clearly at paragraph 53 in the following words:-

"Although section 4 (2) (j) of the Sentencing and Penalties [Act] requires the High Court Judge to have regard to the presence of any aggravating or mitigating factor concerning the offender or any other circumstance relevant to the commission of the offence, there is no requirement that in any case where there are several mitigating circumstances, each one of them should be dealt with separately..."

32. There is no error by the learned Magistrate in the sentence. These grounds of appeal are also dismissed.

33. This court notes that since the appellant was charged under section 375 (2) (a) of the Crimes Act he was alleged to have committed an indictable offence which was 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's Court at the election of the accused person..."

34. The copy record does not show that the accused was given his right of election that is whether he wanted a Magistrates Court trial or a High Court trial. The right of election imposed by section 4(1) (b) of the Criminal Procedure Act is mandatory. This right is not negotiable. 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 the sentence.

35. "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).

36. 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).

37. 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.

CONCLUSION

38. This court would like to acknowledge the assistance rendered by the State Counsel Ms. Kiran for pointing out the failure by the Magistrate's Court to put the election to the appellant in her submissions. The State Counsel in her usual fairness concedes the error of law in this respect.

39. This court agrees that 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 she failed to put the mandatory election to the appellant before the trial began since the appellant was charged with an indictable offence triable summarily.

40. The error by the Magistrate's Court is fatal to the conviction resulting from a trial which was a nullity. In the interest of justice a retrial is the only option available for this court to order.

ORDERS

1. The appeal is allowed since there has been a non-compliance with the legal requirement of section 4 (1) (b) of the Criminal Procedure Act;

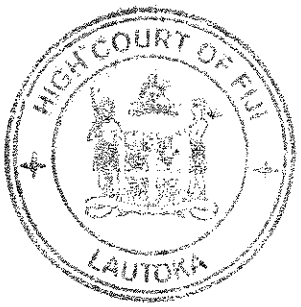
2. The conviction is quashed and sentence set aside;

3. This matter is to be heard afresh by another Magistrate expeditiously;

4. The fine of $500.00 paid by the appellant is to be refunded to him within 14 days from today;

5. The appellant is bailed on his own recognizance of $1,000.00 with the usual terms and conditions of bail and is to appear in the Nadi Magistrate's court on 30th day of August, 2018 for mention at 9am.

6. 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka
22 August, 2018

Solicitors

Messrs. Siddiq Koya Lawyers for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.