

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 20 OF 2019

BETWEEN: **SEMISI BAINIVALU** **APPELLANT**

A N D: **THE STATE** **RESPONDENT**

Counsel: Ms. A. Prakash for Appellant
 Mr. E. Samisoni for Respondent

Date of Hearing: 01st November 2019

Date of Judgment: 05th February 2020

J U D G M E N T

1. The Appellant had been charged in the Magistrate's Court at Nausori with one count of Grievous Harm, contrary to Section 258 of the Crimes Act. He was first produced in the Magistrate's Court on the 16th of December 2018. On the same day, the Appellant pleaded guilty to the said offence of Grievous Harm. On the 18th of April 2019, the learned Magistrate convicted and sentenced the Appellant for a period of three (3) years imprisonment with a non-parole period of two (2) years. Aggrieved with the said sentence, the Appellant filed this Petition of Appeal on the following grounds *inter alia*:

Appeal Against Sentence

- i) *The Learned Magistrate erred in law by taking into account the elements of the offence as aggravating factors thus, enhancing the sentence.*

ii) *The Sentence imposed on the Appellant is harsh in the circumstances.*

2. On the 23rd of September 2019, the Appellant and the Respondent were directed to file their respective written submissions, which they filed as per the directions. Thereafter, the matter proceeded to hearing on the 1st of November 2019. The learned Counsel for the Appellant and the Respondent were invited to make further oral submissions on the correctness of the conviction entered against the Appellant. The learned Counsel for the Appellant submitted that the summary of facts had not outlined the evidential backgrounds of the main elements of the offence, thus making the conviction wrong in law. The learned Counsel for the Respondent conceded this argument of the Appellant, admitting that the summary of facts had not revealed the main elements of the offence.
3. The learned Counsel for the Appellant further submitted in her submissions that the learned Magistrate has referred to the medical report of the complainant in his sentence. However, such a medical report cannot be found in the record of the proceedings in the Magistrate's Court which is forwarded by the learned Magistrate pursuant to Section 250 (1) of the Criminal Procedure Act.
4. Section 250 (1) of the Criminal Procedure Act states that:

"Upon receiving a petition of appeal, the Magistrate against whose order, sentence, ruling or decision the appeal is brought must ensure that the petition of appeal the record of the proceedings in the Magistrates' court is forwarded to the Chief Registrar of the High Court within 28 days."

5. Because of Section 250 (1) of the Criminal Procedure Act, it is the duty of the Magistrate and not the Registry of the Magistrate's Court to forward the record of the proceedings in the Magistrate's Court to the Chief Registrar of the High Court within 28 days. Section 250 (1) of the Criminal Procedure Act has specifically stated that the Magistrate must ensure to forward the complete record of the proceeding in the Magistrate's Court including all the necessary documents and exhibits tendered during the hearing. Such a complete record of

the proceedings in the Magistrate's Court would assist the High Court to determine the appeal comprehensively. In this case, I find the learned Magistrate has failed to forward the Medical Report tendered by the prosecution with the record of the proceedings in the Magistrate's Court.

6. Section 174 of the Criminal Procedure Act provides the procedure to be followed if an accused pleads guilty in the Magistrate's Court. Section 174 (1), (2) and (3) of the Criminal Procedure Act states that:

i) *The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.*

ii) *If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Act 2009.*

iii) *If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.*

7. The substance of the charge or the Complainant as stated under Section 174 (1) of the Criminal Procedure Act includes the charge and the summary of facts. The charge states the nature of the offence and reasonable information about the nature of the offence. (*vide Section 58 of the Criminal Procedure Act*) The summary of facts outlines the evidential backgrounds of the main elements of the offence as charged. Hence, it is the main document that provides the learned Magistrate the evidential background of the alleged offence. Therefore, the learned Magistrate has to ascertain whether the summary of facts reveals the main elements of the offence as charged. If it does not reveal the main elements of the offence, the accused cannot admit the truth of the charge as per Section 174 (1) of the

Criminal Procedure Act. Under such circumstances, the learned Magistrate is not allowed to proceed in convicting the accused under Section 174 (2) of the Criminal Procedure Act.

8. Justice Perera in Matoga v State [2019] FJHC 965; HAA05.2019 (4 October 2019) has outlined the steps that a Magistrate should follow when an accused pleads guilty to the charge. Perera J held that:

"The steps to be followed by a magistrate when an accused enters a plea of guilty to a charge should be as follows:

- a) Question the accused in order to satisfy himself/ herself whether the accused pleaded guilty on his/ her own freewill;*
- b) If the magistrate is satisfied that the accused had pleaded guilty on his/ her own freewill, then request the prosecution to file and read the summary of facts. Where necessary the summary of facts should also be explained to the accused in his/ her preferred language through the interpreter;*
- c) Inquire from the accused whether he/ she understood the summary of facts and whether he/ she admits same;*
- d) If the accused confirms that he/ she understood the summary of facts and admits same, then should consider whether all the elements of the offence concerned are established through the summary of facts.*

If the accused is unrepresented, the magistrate should also go through the cautioned interview of the accused to see whether there are any exculpatory explanations and if so, should raise same with the accused to ascertain whether he/ she maintains the same line of defence [see Nawaqa v State [2001] FJLawRp 25; [2001] 1 FLR 123 (15 March 2001)];

9. The main elements of the offence of Grievous Harm are that:

- i) the accused,
- ii) unlawfully and maliciously,
- iii) does grievous harm to another person.

10. Section 4 of the Crimes Act has defined the grievous harm as

"Grievous harm means any harm which,

- i) amounts to a maim or dangerous harm, or*
- ii) seriously or permanently injure health or which is likely so to injure health;*
or
- iii) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense,*

11. Dangerous harm means any harm that could endanger life. (*vide section 2 of the Crimes Act*).

12. Section 2 of the Crimes Act has further provided the meaning of harm as;

"harm" means any bodily hurt, disease or disorder (including harm to a person's mental health) whether permanent or temporary, and includes unconsciousness, pain, disfigurement, infection with a disease and physical contact with a person that the person might reasonably object to in the circumstances (whether or not the person was aware of it at the time);

13. The summary of facts must confirm that the harm caused to the Complainant by the Appellant comes within the definition of grievous harm as stipulated under Section 2 of the Crimes Act. The summary of facts has only outlined the nature of the assault and the reasons for the said assault. It has not specifically explained the nature of the injuries. Instead, it has merely mentioned that the medical report made by Dr. Sheetal Singh confirms that the

Complainant had multiples injuries on her body. According to D12 of the Medical Examination Report made by Dr. Sheetal Singh, there are no such injuries that fall under the definition of grievous harm as stipulated under Section 2. Wherefore, the summary of facts has not established that the Appellant has caused any grievous harm to the Complainant. As a consequence of this incomplete summary of facts, the conviction entered by the learned Magistrate against the Appellant is wrong in law.

14. In conclusion, I make the following orders that:

- i) The appeal against the conviction is allowed,
- ii) The conviction for the offence of grievous harm is quashed and the sentence is set aside.
- iii) A re-trial is ordered before another Resident Magistrate.

15. Thirty (30) days to appeal to the Fiji Court of Appeal.




R.D.R.T. Rajasinghe
Judge

At Suva
05th February 2020

Solicitors
Office of the Director of Legal Aid Commission for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.