

IN THE HIGH COURT OF FIJI
AT LABASA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. 027 OF 2019

BETWEEN : **AJIT KUMAR**

AND : **STATE**

Counsel : Ms J Fatiaki for the State
Mr A Sen for the Appellant

Date of Hearing : **19 November 2020**

Date of Judgment : **17 February 2021**

JUDGMENT

- [1] This is an appeal against both conviction and sentence. The State concedes the appeal.
- [2] The appellant was charged with two counts of criminal intimidation contrary to section 375(1) (a) (iv) of the Crimes Act. The charges alleged that on 16 October 2016 the appellant threatened his neighbour with the intention to cause alarm. The complainants were mother and son.
- [3] Before the alleged incident there was an animosity between the appellant and the complainants over an easement that went through the appellant's property. On the day of the incident the appellant was cleaning his yard when he saw the child complainant come to his fence to fetch a ball.
- [4] The child complainant's evidence was that when he went to fetch his soccer ball the appellant swore at him and threatened to chop his legs off. The child went and complained to his mother.

- [5] The mother's evidence was that when she confronted the appellant he swore at her and threatened to break her face and also chop her legs off.
- [6] The appellant's account was that when he saw the child complainant he told him that he should not come to his side of the fence. He denied hurling any threats to the child or his mother as alleged by them.
- [7] After trial, the learned magistrate acquitted the appellant on count one, but convicted him on count two. The reason for the acquittal was that the learned magistrate was not satisfied beyond reasonable doubt that the alleged threats against the mother (count one) was in fact made by the appellant.
- [8] However, on count two, the learned magistrate was satisfied beyond reasonable doubt that the appellant did in fact threatened the child as alleged by him (count two).
- [9] On 25 October 2019, the appellant was sentenced to 2 years and 6 months imprisonment.
- [10] On 31 October 2019, this Court granted the appellant bail pending appeal after the State did not object to the application.
- [11] The Petition of Appeal contains six grounds of appeal. Five relate to conviction and one concerns sentence. The alleged errors are not properly particularized in the grounds of appeal. I accept the State's submissions that the appellant's grounds of appeal against conviction are without merits.
- [12] It is rather unfortunate to see that the issue raised by the State counsel in fairness to the appellant is not expressly raised as a ground of appeal by the appellant's counsel. However, ineffectiveness of counsel on appeal does not prevent an appellate court from considering an issue that may have resulted in a miscarriage of justice, but is not being raised as a ground of appeal.

- [13] The reason the State concedes the appeal is that the appellant was convicted and sentenced for a more serious offence of criminal intimidation that he was not charged.
- [14] The appellant was charged with criminal intimidation contrary to section 375(1)(a)(i) and (iv) of the Crimes Act. This section reads:
- (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 —(i) their person or persons - with intent —(iv) to cause alarm to that person or those persons;
Penalty — Imprisonment for 5 years.
- [15] The two essential elements of this offence are the act of threat to cause an injury to another person without lawful excuse and the intention to cause alarm to that person. The act of threat to cause an injury is the physical element while the intention to cause alarm by that threat is the fault element.
- [16] In paragraph 43 of her judgment, the learned magistrate correctly identified the elements of the charged offence as follows:
1. You (the Accused)
 2. Without lawful excuse
 3. Threatened another person
 4. With injury to their person
 5. With intent to cause alarm to that person.
- [17] In her judgment, the learned magistrate said that identification was not an issue and that there was no suggestion that the appellant had a lawful excuse. The main issue for determination was whether the appellant threatened the complainants with an injury with the intention to cause alarm to them.
- [18] After analyzing all the evidence the learned magistrate was not sure whether the appellant had in fact threatened the complainant (mother) on count one. She acquitted the appellant of that charge.

[19] On count two, the learned magistrate believed the evidence of the child complainant that the appellant had made a verbal threat to chop his legs off. However, she made the following finding in respect to the physical element of the charge:

I have no hesitation in finding that you had threatened to cause grievous harm to Shazil Khan on 16 October 2016. This element is proven beyond reasonable doubt (paragraphs 59-60 of the judgment).

[20] Threatening to cause grievous harm or death to a person is a separate offence contrary to section 375 (2) (a) of the Crimes Act. The offence is indictable offence triable summarily on the election of the accused. The maximum penalty for the offence is 10 years imprisonment.

[21] Section 375 (2) (a) of the Crimes Act states:

(2) If the threat is—(a) to cause death or grievous hurt- the offender commits an indictable offence (which is triable summarily).
Penalty — Imprisonment for 10 years.

[22] Apart from convicting the appellant for threatening to cause grievous harm to the child complainant, the learned magistrate also sentenced him for the serious offence.

[23] In paragraph 3 of the sentence, the learned magistrate said:

The threat was to cause grievous harm. The maximum penalty is 10 years imprisonment.

[24] The learned magistrate also used the threat of grievous harm as an aggravating factor in sentence:

This was a threat of grievous harm made toward a child (paragraph 5)

[25] There is a well-established principle in sentencing that a convicted person must not be sentenced for uncharged offences or matters of aggravation which would

have warranted a conviction for a more serious offence (*De Simoni* [1981] HCA 31; (1981) 147 CLR 383; *Vakalalabure v The State* [2006] FJSC 8; CAV0003U.2004S (15 June 2006)).

- [26] In the present case, the learned magistrate made a fundamental error by convicting the appellant for a more serious offence of criminal intimidation which the appellant was not charged, and then sentencing him for the uncharged offence. The appellant was not convicted according to law, resulting in a miscarriage of justice.
- [27] The only evidence against the Accused was from a child complainant who said that the appellant hurled abuse at him from his yard when he went to the fence to fetch a ball. There was no evidence that the appellant did more than hurling abuse from which an inference could be drawn that he intended to cause alarm by his threat. The learned magistrate did not believe the evidence of the child complainant's mother that the appellant hurled abuse at her when she confronted him. The prosecution evidence against the appellant is weak. I also take into account the age of the offence and that the appellant had served one week in prison before he was granted bail.
- [28] I am satisfied that it is not in the interests of justice to order a retrial.
- [29] The appeal is allowed and the conviction and sentence are set aside.



A handwritten signature in blue ink, appearing to read 'Daniel Goundar'.

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Hon. Mr Justice Daniel Goundar

Solicitors:

Office of the Director of Public Prosecutions for the State
Maqbool & Company for the Appellant