

**IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT OF FIJI**

CRIMINAL APPEAL NO. AAU0038 of 1998S
(High Court Criminal Appeal No.HAC 0009 of 1995/S)

BETWEEN:

WAISALE ROKOTUIWAI

Appellant

AND:

THE STATE

Respondent

Coram:

**The Hon. Sir Moti Tikaram, President
The Rt. Hon. Sir Maurice Casey, Justice of Appeal
The Hon. Justice Kenneth R. Handley, Justice of Appeal**

Hearing:

Tuesday, 10 August 1999, Suva

Counsel:

**Dr. J. Cameron for the Appellant
Ms. R. Olutimayin and Ms A. Prasad
for the Respondent**

Date of Judgment: Friday, 13 August 1999

JUDGMENT OF THE COURT

The appellant was charged with the murder of Manasa Lewatoro at Bau Road Nausori on 16 May 1995 contrary to s.199 of the Penal Code. He stood trial before Pathik J. and assessors on 4 November 1996 and on 27 November the assessors were discharged before verdict and a re-trial was ordered. On 2 November 1998 the re-trial commenced before Sadal J. and assessors. The appellant pleaded not guilty to the charge of murder but guilty to grievous harm contrary to s.227 of the Penal Code. The Prosecution did not accept this plea of guilty and the trial commenced. After two witnesses had given evidence the prosecution was given leave to amend the information to charge grievous harm.

The appellant who was represented by experienced counsel objected to the amendment, but when leave to amend was granted and the amended information was filed he pleaded guilty. An agreed summary of facts was then tendered. On 6 November the appellant was convicted as charged and sentenced to 18 months imprisonment. The Judge took into account the period of 18 months pre-trial custody the appellant had already served.

The appellant has appealed against his sentence pursuant to leave granted by the President on 8 December. The amended grounds of appeal challenged the amendment to the information and the severity of the sentence.

The first point taken by Dr. Cameron, for the appellant, was that in the circumstances of this case there was no power under the Criminal Procedure Code (the Code) to amend the information in the manner permitted by the Judge. A power of amendment is conferred by s.274 (2) of the Code for the purpose of curing defects in the information but it was common ground that this power did not authorise the amendment. Section 214 of the Code which conferred a wider power of amendment only applies to a trial in the Magistrates' Court.

It seems therefore that there is no clear authority in the Code for amending an information when the Director wishes to substitute a lesser charge. However the practice of the High Court is to allow such amendments. State counsel referred us to The State v. Qoli (11/8/97 unreported), a decision of Pain J. where His Lordship said :

"This filing of a second information by the Director of Public Prosecutions is not unique. It is frequently done, usually as in this case, alleging a lesser offence than the original charge. There is no express statutory authorisation for this procedure but it is a common practice that has been regularly permitted in this Court. Furthermore in my view it is a procedure that is authorised by the Common Law."

It is not strictly necessary to express a view on this question because the appellant, on the advice of his counsel, pleaded guilty to the amended information, and in doing so waived any procedural irregularities that may have occurred. Moreover he had, when arraigned on the charge of murder, pleaded guilty to grievous harm contrary to s.227. This was permitted by s.278 of the Code where the accused "can lawfully be convicted on such information of some other offence not charged in such information". This is provided for in s.169(2) of the Code which states:-

"When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he was not charged with it."

On a trial of the original information charging murder this section authorised a conviction for causing grievous harm on a plea of guilty or otherwise without any amendment to the information. This is clear on the language of the two sections, and the contrary was not argued. A substantially similar provision appears as section 222 of the Indian Code of Criminal Procedure 1973 which corresponds to s. 238 of the Indian Code of 1898. Mitra "Code of Criminal Procedure" 16th ed. 1987 states (pp1374 - 5) that a minor offence is not defined in the 1973 Code and should be understood in its ordinary sense as meaning an offence deserving a lesser degree of punishment. However it must be cognate with the offence charged in the

information. These conditions were satisfied in the present case. It is clear therefore that when the prosecution changed its mind about pressing the charge of murder the appellant could have pleaded guilty to grievous harm, and this plea could have been accepted without any amendment to the information.

In any event it seems that the Director of Public Prosecutions may validly file a second information based on the same committal proceedings against the accused. Section 248 (1) of the Code provides that "after receipt of the authenticated copy of the depositions" of the committal proceedings the Director may form the opinion that the case should be tried upon information in the High Court, and if so the information shall be drawn up, signed and filed in the Court. Subsection (2) provides:-

"In any such information the Director of Public Prosecutions may charge the accused person with any offence which, in his opinion, is disclosed by the depositions either in addition to, or in substitution for, the offence upon which the accused person has been committed for trial."

There is nothing to indicate that this power once exercised, in relation to given committal proceedings, must be treated as exhausted. There is therefore nothing to exclude the application of s.35 of the Interpretation Act (cap 7) which provides:-

"Where any written law confers any power or imposes any duty, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion arises."

In our opinion therefore the filing of the amended information did not involve any procedural irregularity other than the description of the second information as amended. We therefore reject the appellant's challenge to his conviction.

The appeal by leave against the severity of the sentence depends in substance upon alleged errors in the Judge's remarks on sentence. Following the plea of guilty to the amended information an agreed summary of facts was tendered. No other facts were proved by the prosecution, and the defence did not call evidence. In his remarks on sentence the Judge quoted the agreed summary of facts in full, but added that this was a case where, "a man has lost his life". He continued "the accused had assaulted the deceased for no reason and had left him lying on the road. The deceased died on the same day because of the injuries."

In referring to the death of the victim, and more particularly his death "because of the injuries" the Judge went beyond the agreed summary of the facts. The additional matters had not been established and were not even supported by evidence in this trial.

In the absence of anything to the contrary it must be presumed that the Judge mentioned these matters because he considered that they were relevant to his function in determining the proper sentence for the accused. Nothing appears to the contrary, and it follows that the Judge took into account on sentence something which, as a matter of law, was not available for his consideration. The exercise of his sentencing discretion therefore miscarried and this Court must intervene and re-sentence the appellant.

Although a sentence of 18 months may not have been outside the range of a sound exercise of the Judge's sentencing discretion, he would presumably have imposed a lesser sentence if he had not taken into consideration the unproved and inadmissible fact that the accused had caused the death of the victim.

The appellant is therefore entitled to a significant reduction in his sentence. On any view of the admitted facts this was a serious assault and we would re-sentence the appellant to imprisonment for 12 months which, together with the time spent in remand custody pre-trial,

results in a total prison term of 2 years 6 months. He will be entitled to credit for time served since the sentence was imposed by the Judge before he was admitted to bail. The appellant's bail continued until the final determination of this appeal. Upon the publication of these reasons and orders his bail will have expired. He still has to serve the balance of the term of imprisonment we have imposed and he should therefore be taken into custody forthwith and returned to prison. We therefore make the following orders:-

1. Appeal against conviction dismissed.
2. Appeal against sentence allowed.
3. Sentence imposed by the High Court set aside.
4. In lieu thereof the appellant is re-sentenced to imprisonment for 12 months.



[Handwritten Signature]

 Sir Moti Tikaram
 President

[Handwritten Signature]

 Sir Maurice Casey
 Justice of Appeal

[Handwritten Signature]

 Justice Kenneth R. Handley
 Justice of Appeal

Solicitors:

Cameron Esq. for the Appellant
 Office of the Director of Public Prosecutions Office, Suva for the Respondent