IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

CRIMINAL APPELATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA: 36 OF 2017

BETWEEN : RITESH DAYAL

Appellant

AND : STATE

Respondent

Counsel : Ms. A. Swamy for Appellant

Ms. S. Kiran for Respondent

Date of Hearing : 5th July, 2017

Date of Judgment : 28th July, 2017

JUDGMENT

Introduction

1. This appeal was filed by the Appellant against his conviction and sentence.

2. The Appellant was charged in the Magistrates Court at Lautoka with one count of Act with Intent to Cause Grievous Harm contrary to Section 224(a) of the Penal Code, Cap 17.

3. The Appellant pleaded not guilty to the charge and was convicted after a full trial. On the 12th April, 2017, he was sentenced to 30 months' imprisonment.

4. Being aggrieved by the said conviction and sentence, the Appellant filed a petition of Appeal within appealable time on the grounds stated therein.

5. Appellant filed following amended grounds of appeal on 29th May 2017.

Grounds of Appeal

i. That the Learned Magistrate erred in law and fact in finding the Appellant guilty when the charge was defective as it failed to specify in the particulars of the charge the nature of the unlawful wounding that is alleged against the accused and the prosecution evidence as a whole did not establish the offence beyond reasonable doubt against the Appellant.

ii. That the Learned Magistrate erred in law and in fact by disregarding the evidence of the Appellant and defence witness, Ritesh Dayal and Rajesh Dayal and not finding that the evidence led by the Appellant and his witnesses created a doubt in the prosecution evidence.

iii. That the Learned Magistrate erred in law and in fact in holding and finding that accused using the knife on the complainant was with the intention to harm the complainant and not in the self-defence.

iv. That the Learned Magistrate erred in law and in fact in failing to consider the accused version of events, that he was only trying to save his father from an assault by the complainant.

v. That the Learned Magistrate erred in law and in fact not giving weight to the evidence led by the accused.

vi. That the Learned Magistrate erred in law and in fact in finding that the accused has act in causing such harm to the complainant was accompanied by an intent to maim, disfigure or disable by accused.

vii. That the Learned Magistrate erred in law and in fact in failing in sentencing the Appellant for 30 months' imprisonment when the sentencing and punishment was excessive in all the circumstance of the case.

6. Counsel for both parties filed helpful written submissions to which I have given full consideration to come to my conclusion.

Factual matrix

7. Version of the prosecution that the learned trial Magistrate believed:

> Complainant and Accused were residing in a neighbourhood of Vunda Back Road. On 26th July, 2008, Accused was driving his bullocks when he was stopped by Accused's father and started swearing at the Complainant saying "mother fucker". Complainant replied the same way. Accused came out of the house with a cane knife and started swinging it 3-4 times at the Complainant. Complainant managed to save himself and was about to run away when Accused's brother Rajesh came running and pulled his leg. When Complainant's leg was being pulled, Accused tried to chop Complainant's neck. Complainant defended with his left hand and received injuries on his wrist. Accused fled when Complainant's father approached the scene. Complainant was hospitalized for 3 days. Complainant said that the injury had not cured for 6 months; it was still painful as the nerves got damaged; and he could not fold his arm. The cane knife was exhibited at the trial so was the medical report which stated a deep cut wound 3 cm x 1cm on complainant's left forearm.

8. Version of the accused which the trial Magistrate rejected:

> The accused in his evidence stated that the complainant started the argument at the material time, when he started to use swear words at the accused's father and while doing that the complainant approached the accused's father to punch him, when the complainant was swearing at the accused's father, the accused was already outside the house weeding the garden which was next to his house and the whole incident took place within the accused's compound. In his evidence he stated that when his

father and the complainant were having the conversation, the accused at that time was 2 meters away from his father. The complainant first punched his father and by the time the accused jumped between his father and the complainant and in that process the complainant punched him and continued to punch him causing injuries to his forehead, lips, chest and his neck due to which he fell on the ground and the complainant started to suffocate the accused. An in acting in his self defence he lifted his hand in which he was holding the knife and the complainant with the force it his hand on the blunt side of the knife. The accused gave evidence that he had suffered injuires this time and he had acted in self defence.

Analysis

Appeal against Conviction

Grounds i and vi

9. The Counsel for Appellant submits that the charge was defective because it does not specify the nature of the unlawful wounding alleged and it only states "with intent to do some grievous harm"

10. The Appellant was charged as follows:

CHARGE

Statement of Offence (a)

<u>ACT WITH INTENT TO CAUSE GREVIOUS HARM</u>: Contrary to Section 224 (a) of Penal Code Cap 17.

Particulars of Offence (b)

PRITESH DAYAL s/o RAGHUBAR DAYAL on the 26th day of July 2008 at Lautoka in the Western Division with intent to do some grievous harm to **ARUN PRAKASH** s/o RAM KUMAR unlawfully wounded the said **ARUN PRAKASH s/o RAM KUMAR** with a cane knife

11. The Counsel for Appellant heavily relies on ***State v Haynes*** [2007] FJHC 92; HAC 07.2005 (19 November 2007) in which it was observed at paragraph 29 and 30

> *"A charge preferred under section 224(a) of the Penal Code Cap 17 must specify in the particulars of the charge the nature of the unlawful wounding that is alleged against the accused person. This is an essential element of the charge and when it is not included in the particulars of the offence the defect is terminal: Vilikona Bukai v The State, Crim App No: 40/1999*
>
> *Without the charge particularising the nature of the unlawful wounding alleged, it would not be possible to evaluate the existence or not of the specific intent to cause grievous bodily harm to the complainant"*

12. In ***Haynes*** (supra), the charge read as follows:

Statement of Offence

ACT WITH INTENT TO CAUSE GRIEVOUS BODILY HARM: Contrary to section 224(a) of the Penal Code Cap 17

Particulars of Offence

GRAHAM HAYNES AND LEONARD HAYNES, on the 13th day of November 2004 at Savusavu in the Northern Division, with intent to cause grievous harm, unlawfully wounded CLARENCE LEPPER.

13. The Counsel for Respondent, having quoted paragraph 24 of the said judgment, argues that the unlawful wounding which the court said was missing from the particulars of the charge was in fact the **act** of unlawful wounding.

14. Paragraph 24 of the said Ruling states:

> *"One of the major difficulty in this trial was the fact that the charge did not specify the* ***alleged unlawful wounding act*** *that caused the grievous bodily harm. This* ***meant it was unclear which unlawful acts allegedly committed by the accused persons that they say was accompanied with the specific intent to cause grievous harm"*** (emphasis added).

15. The Counsel for Respondent further argues that the charge read to the Appellant clearly states that unlawful wounding was caused by a cane knife which would assist the court to evaluate the specific intent element of the offence.

16. It is clear that in ***Haynes*** (supra), His Lordship emphasizes the fact that the charge should specify the alleged unlawful wounding act that caused the grievous bodily harm so that court could make necessary inference as to the specific intent that accompanied the particular act.

17. This position is further reinforced when one reads paragraphs 13 -15 of the said judgment which state as follows:

> *"Section 224(a) of the Penal Code Cap 21, is clear in its wording: any person with intent to cause grievous harm to another, unlawfully wounds or does grievous harm to that person is guilty.*
>
> *It therefore follows from the wording of the section itself that there must be evidence proving beyond reasonable doubt that the accused person at the time of wounding the other person had the intention to grievously wound or harm to that person.* ***It would not be enough to charge a person under this provision of the Penal Code if the wounds sustained results from a punch up or scuffling.***
>
> *In R v. Belfon [1976]3AllER 46 [English Court of Criminal Appeal] dealing with the specific intent requirements under similar statute, held that:*
>
> > *"it was necessary to prove that the accused had done the acts in question with intent to cause grievous bodily harm; the fact that the accused had foreseen that such harm was likely to result from his acts, or that he had been reckless whether such harm would result; did not constitute the necessary intent"* (emphasis added)

18. In ***Naosara v State*** [2007] FJHC 71; HAA047J.07S (2 November 2007) the Appellant was charged with Act with Intent to Cause Grievous Bodily Harm. It was alleged in the charge, that on the 3rd of June 2006 at Nasinu, the accused, with intent to do grievous harm to complainant, unlawfully wounded him with a kitchen knife.

19. During an operation the Appellant fled from a house and struck a Corporal with a kitchen knife causing him injuries. He swore at the Corporal and threatened to kill him. A tendered medical report showed that he had a 1-2cm cut on his chin and abrasions on the neck and jaw.

Madam Justice Shameem stated:

> *Although greater analysis was called for after the review of the evidence, the issue was essentially a simple one.* ***Did the Appellant strike at Cpl. Matou with a knife causing an injury and did he intend serious harm? Anyone who uses a knife on another in an aggressive way must be assumed to intend serious harm. That is the consequence of using potentially lethal weapons.*** (emphasis added)

20. It is therefore clear that, when a lethal weapon has been used to cause the wounding, whether or not the act or use of that weapon achieved the desired result or wound, the specific intent to cause grievous harm could be inferred from the use of such weapon and the inclusion of a lethal weapon in the particulars of the offence in the charge or information to describe the act or the manner in which the injuries were caused (instead of the nature of the wounding) is sufficient to constitute a valid charge.

21. In ***Haynes***, there was no evidence as to the nature of unlawful wounding. Complainant stated that the accused used their hands. Since the nature of unlawful wounding was missing in evidence, the court could not be satisfied that the specific intent had been made out. In this case, the cane knife which had admittedly caused the wounding is specified in the charge.

22. Careful reading of Section 224 (a) of the Penal Code indicates that, in this particular offence, what matters is not the nature of the wounding but the specific intent to do some grievous harm.

Section 224 (a) states;

> *Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person .....*

*(a) **unlawfully wounds** or does any grievous harm to any person by any means whatsoever; ....*

23. This position has received clear recognition when the Crimes Act 2009 enacted the same offence to read:

255. A person commits an indictable offence if he or she, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person—

(a) unlawfully wounds or does any grievous harm to any person by any means; or

(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife, or other dangerous or offensive weapon; or.....

24. In ***State v Korovata*** [2010] FJHC 17; HAC011.2009 (27 January 2010) Justice Madigan, having been confronted with a similar factual scenario, in his sentencing speech stated:

The facts show that when the victim was working in his cassava plot early on the morning of 24 October 2008, you came out of your house, meters away and approached him angrily, arguing that it was your cassava plot and not his and that he had no right to be there. You then suddenly swung the knife as if to strike a blow on his head, but he fended it off with his hands which resulted in very serious injuries to his right hand, and in fact causing him to lose a third of his middle finger.

3. One shudders to think of what would have happened had the victim not been able to deflect the blow. A cane knife is a very dangerous weapon and in the hands of an angry and belligerent assailant a lethal weapon. The way you swung the knife at Mr. Prakash's head that morning was unnecessary and it must be assumed that you intended to occasion serious harm - as the assessors unanimously found"

25. A charge must contain those particulars which give the accused an idea of the case which he has to meet. It may not contain elaborate details but there should be no doubt as to what the case against him is and what allegations he has to

meet. The question is whether the alleged defect makes the charge incurably bad or the charge is so defective that it does not disclose the offence known to law. If the charge is merely defective and no one is misled, deceived or prejudiced by reason of inadequate particulars then it cannot be suggested that any substantial miscarriage of justice has occurred. There was not the slightest doubt in my mind that the charge in the present case was not rendered incurably bad or defective by the omission to include the relevant nature of the wounding in the Particulars of Offence. The manner in which the defence counsel conducted the defence at the trial clearly shows that the accused was neither misled nor embarrassed by the charge.

26. In light of the above, Appellant's contention that charge is defective because it does not specify the nature of the harm or wounding appears to be misconceived and therefore is rejected.

27. The learned Magistrate had carefully analyzed the complainant's version of using the sharp side of the cane knife, the medical report and the cane knife exhibited at the trial to come to his conclusion as to the specific intent of the Appellant. He rejected Appellant's version of accidently using the blunt side of the cane knife and the version of self defence. He has given reasons for his decision.

28. There is clear evidence on the specific intent element. The Appellant admitted that the wounds were caused by the cane knife he was holding. The complainant said that he received cane knife injuries, hospitalized for three days and a surgery was done. The medical report was exhibited to describe the nature of the wounding (deep cut wound 3cmx 1cm etc.). Appellant had swung the cane knife as if to strike a blow on his neck, but Complainant fended it off with his hand which resulted in serious injuries to his left hand.

29. The doctor in his evidence explained how serious the injuries were. In his evidence doctor stated as follows:

"Deep cut 3 cm x 1 on the proximal aspect of his left forearm with cut ..... '....a laceration on dorsum of wrist-he was unable to actively extend 3rd-5 fingers.":

30. The Counsel for Appellant argues that prosecution failed to prove that the injuries /harm suffered by the complainant amounts to grievous harm within the meaning of Section 3 of the Penal Code.

31. I am unable to accept that contention. As pointed out at paragraph 24 above, what the Prosecution is required to prove is not that the nature of the wounding amounted to grievous harm but that accused had the specific intent to do such harm.

32. The Counsel for Appellant further argues that the Appellant had used the blunt side of the cane knife indicating that he had not acted with specific intent to cause harm but had acted in self defence.

33. The version of the Defence was rejected by the learned Magistrate with clear reasons given in the judgment. His Worship has mentioned in paragraph 20 of the judgment that *"..however according to PW3 that such injury received by the complainant can also be caused by a blunt side"*. The doctor (PW3) (who had not examined the patient) had only expressed an opinion and therefore his opinion is not conclusive. There is no indication by the learned Magistrate that he had accepted that the particular injury was caused by the blunt side of the cane knife. Even if he had accepted that the injury was caused by the blunt side, learned Magistrate had completely rejected the version of the accused that he had acted in self defence. Evidence of swinging a cane knife, which is capable of causing injuries of such a magnitude even from the blunt side, at an unarmed person is sufficient for a court to reject the version of self defence and to hold that accused had acted with a specific intent to cause grievous harm.

34. Prosecution adduced evidence in respect of all the elements of the offence in order to prove the guilt of the Appellant beyond reasonable doubt. Therefore, theses grounds must fail.

Grounds (ii), (iii), (iv) and (v)

35. These grounds can be grouped and considered together.

In his analysis, the learned Magistrate had correctly identified the issues to be decided and stated that this is a case where it all boils down to the credibility of

witnesses as both sides had given different versions as to the manner in which the complainant had received injuries.

36. The learned Magistrate found the evidence presented by the witnesses of the Prosecution to be credible and gave reasons for doing so. He relied on undisputed evidence that injury was caused by a cane knife. He then considered the probability of this injury being caused as the complainant and as the accused said. Having considered the evidence adduced by both parties the learned Magistrate decided to rely on the version of the Prosecution. In coming to that decision learned Magistrate considered the exhibits that included the medical report, the cane knife exhibited and the admission accused had made to PW.2. (This admission cannot be considered as a confession as it was not made whilst the accused was under arrest and not made to a police officer engaged in official duties)

37. The learned Magistrate rejected the version of the Defence which he found to be implausible. He gave reasons why he was not inclined to believe what witnesses called by Defence said. He highlighted inconsistencies and improbabilities in their evidence. Specifically, he did not believe the evidence that accused stood passive when he was being punched several times by the complainant while accused was still holding on to a cane knife. He also disbelieved accused's evidence that he had jumped from a 2-meter distance to defend his father who was at the receiving end of complainant's punches. If the Appellant was armed with a cane knife weeding 2 meters away from his father, it is highly improbable for the complainant, if he was a sensible man, to approach accused's father to punch him. Evidence of the Accused and his brother contradicted each other on material particular which the learned Magistrate highlighted in his judgment. Considering the above, the learned Magistrate gave no weight to the defence case and rejected the version of self defence.

38. The Counsel for Appellant having conceded that the learned Magistrate considered inconsistencies in accused's version submits that he had failed to consider the injuries suffered by the accused and the medical report to that effect.

39. The learned Magistrate had not given any weight to the evidence of the Appellant with regard to the so called injuries (of the accused) and the medical

39. The learned Magistrate had not given any weight to the evidence of the Appellant with regard to the so called injuries (of the accused) and the medical report. It appears that the learned Magistrate had had reasons for doing so. PW.2 who had visited the accused soon after the incident had not seen any injury on the accused. Defence Counsel never asked PW.2 as to whether he had seen any injury on the accused. Furthermore, the medical report had not come from a proper source. Accused stated that he lodged a complaint and he was accompanied to the hospital by a police officer and the medical report was given to the police officer. However, he failed to substantiate his version either by calling the police officer or the doctor. The medical report should have been produced though one of them.

40. The learned Magistrate completely rejected the version of the Defence and that of self defence. Therefore, he did not proceed to examine if Prosecution had established beyond reasonable doubt that the conduct of the accused was a reasonable response to the circumstances as they were perceived by the accused.

41. There was no error in fact or law on the part of the learned Magistrate in rejecting the evidence of the Defence and accepting that of the Prosecution. These grounds of appeal are dismissed.

Appeal Against Sentence

42. In his appeal, the Appellant has taken up the position that the learned Magistrate fell into error when he was sentenced to 30 months' imprisonment.

43. Sentencing approach taken by the learned Magistrate cannot be described as unlawful or unprincipled. Case law discussed below shows that a sentence of 30 months' imprisonment has not exceeded the tariff prescribed for this offence.

44. In ***State v Dikidikilati*** HAC 246 of 2012, Temo J, having quoted Shameem J in ***State v Mokubula*** [2003] FJHC 164; HAA0052J.2003S (23 December 2003), stated that tariff should range from 6 months to 5 years and, in cases where a weapon is used, starting point should be picked between 2 years and 5 years. In ***State v Emosi Tuigulagula*** [2002] FJHC 237 it was held that imposition of 2 ½ years' imprisonment is not excessive where there has been serious injury and weapon used.

45. In ***Ramji Lal Sharma*** Crim. App. No. 55 of 1983 a man struck the victim with a cane knife severing her left forearm. The cause of the dispute was land, and there was some evidence of provocation. The sentences of 4 years and 2 years' imprisonment on the two counts of act with intent to cause grievous harm were upheld.

46. There can be no doubt that the sentence of 30 months' imprisonment imposed on the Appellant is within the tariff range. The Fiji Court of Appeal in ***Sharma v State*** [2015] FJCA 178; AAU48.2011 (3 December 2015) stated that *even if there has been an error in the exercise of the sentencing discretion, the appellate court will still dismiss the appeal if in the exercise of its own discretion the Court considers that the sentence actually imposed falls within the permissible range.*

47. In ***State -v- Dinesh Chand*** Crim. App. No. AAU0027 of 2000S the offender was found guilty of assault with intent to cause grievous harm. He was given a suspended sentence. The State appealed against sentence. The appeal was heard after the operational period had expired. The Court declined to order an immediate custodial sentence in the circumstances but held that although the offender was a first offender and there was some provocation, a suspended sentence was not appropriate.

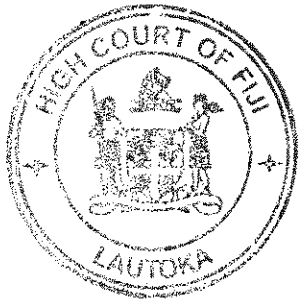
48. In Fiji, cane knives are frequently being used to commit this type of offences and therefore, the offender and potential offenders must be deterred. Courts should send a clear message to the society and a custodial sentence is warranted in such cases. However, the learned Magistrate in exercising his sentencing discretion should have considered the fact that the accused is a first and young offender (***Maharaj v State*** (2006) FJHC 84; HAM 15. 2006S (28 February 2006) ***Prasad v State*** (1994) FJCA 19; (24 May 1994). Complainant had also offered a degree of provocation when he drove his bullock and uttered the words -'mother fucker' to Accused's father who was an old man. Under these circumstances, in order to balance the competing interests in Section 4 of the Sentencing and Penalties Act, a partly suspended sentence should have been imposed in this case. Therefore, I quash the sentence of the learned Magistrate and substitute the following sentence.

50. Following orders are made:

i. Conviction recorded by the learned Magistrate is affirmed.

ii. Sentence passed by the learned Magistrate is quashed.

iii. Appellant is sentenced to 30 months' imprisonment and a period of 15 months is suspended for a period of two years. Accordingly, he is to serve only 15 months in prison with effect from 12th April, 2017.



Aruna Aluthge

Judge

AT LAUTOKA

28th July, 2017

Counsel: **Messrs Patel & Sharma for**

Office of the Director of Public Prosecution for Respondent