IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 80 OF 2017

BETWEEN: AISAKE LAGILAGI SALATO

APPLICANT

AND: STATE

RESPONDENT

Counsel : Mr. Mohammed Yunus for Applicant

: Ms. S. Naibe for Respondent

Date of Hearing : 24th October, 2017

Date of Ruling : 08th November, 2017

RULING

INTRODUCTION

1. This is an application for leave to appeal out of time in respect of Criminal Case No. 470 of 2016 of Magistrates Court at Lautoka.

2. On the 17th October, 2016, the Applicant was found guilty on his own plea to one count of Grievous Harm contrary to Section 258 of the Crimes Act 2009 when he agreed the summary of facts filed by the State. The Applicant was unrepresented at the court below.

3. As per the Court Record, a conviction was entered on the same day whereupon mitigating factors were recorded.

4. The matter was adjourned twice for farther mitigation in view of possible reconciliation.

5. On, 24th January, 2017, the victim was present in Court and confirmed reconciliation. The police prosecutor indicated that *'this is a reconcilable offence and court had the power to terminate proceedings'*.

6. The learned Magistrate proceeded to sentence. By his written Ruling dated 6th March, 2017, the Applicant was sentenced to 9 months imprisonment suspended for 2 years. The Applicant was also ordered to pay a compensation of FJD 500 to the complainant. In his Ruling at paragraph 2, the learned Magistrate reconfirmed the conviction. However, at paragraph 9, the learned Magistrate appears to have reconsidered his decision to record the conviction and decided not to record a conviction in view of the negative impact the conviction would have on Applicant's economic wellbeing and prospects of his employment as a police officer.

7. Being dissatisfied with the said Ruling, the State filed a timely appeal, HAA 32 of 2017, in this Court against the said sentence.

8. Upon being notified of the appeal filed by the State, the Applicant filed a notice of appeal against his conviction on the 7th July 2017 in the Lautoka High Court Registry.

THE LAW

9. Section 247 of the Criminal Procedure Act dictates a limitation on right to appeal in cases where a conviction has been recorded by a Magistrates Court on a plea of guilt. Section 247 states:

> *"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates Court, except as to the extent, appropriateness or legality of the sentence".*

10. Section 248 of the Criminal Procedure Act lays down the procedure to be followed in filing appeals in the High Court:

> *248 (1) Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and within 28 days of the date of the decision appealed against –*
>
> *(a) It shall be presented to the Magistrates Court from the decision of which the appeal is lodged.*
>
> *(b) A copy of the petition shall be filed at the registry of the High Court; and*
>
> *(c) A copy shall be served on the Director of Public Prosecutions or on the Commissioner of the Fiji Independent Commission Against Corruption.*
>
> *(2) The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section.*
>
> *(3) For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include –*
>
> *(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;*
>
> *(b) any case in which a question of law of unusual difficulty is involved;*

(c) *a case in which the sanction of the Director of Public Prosecutions or of the Commissioner of the Fiji Independent Commission Against Corruption is required by any law;*

(d) *the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents.*

11. The principles for an extension of time to appeal are settled. The Supreme Court in ***Kumar v State; Sinu v State*** [2012] FJSC 17; 2 CAV0001.2009 (21 August 2012) summarized the principles at paragraph [4]:

> *"Appellate courts examine five factors by way of a principled approach to such applications. These factors are:*
>
> (i) *The reason for the failure to file within time.*
>
> (ii) *The length of the delay.*
>
> (iii) *Whether there is a ground of merit justifying the appellate courts consideration.*
>
> (iv) *Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?*
>
> (v) *If time is enlarged, will the respondent be unfairly prejudiced?"*

12. In ***Rasaku v State*** [2013] FJSC 4; CAV0009, 0013.2009 (24 April 2013), the Supreme Court confirmed the above principles and said at paragraph [21];

> *"These factors may not be necessarily exhaustive, but they are certainly convenient yardsticks to assess the merit of an application for enlargement of time. Ultimately, it is for the court to uphold its own rules, while always endeavoring to avoid or redress any grave injustice that might result from the strict application of the rules of court."*

13. In ***Waqamailau v State*** [2012] FJCA 90; AAU102.2011 (30 November 2012) it was observed:

"The practice of courts to accept delays of up to three months are excusable where the appellant has been in prison and if there is merit. Leave to appeal one month out of time is refused because the proposed appeal on rape of girlfriend has no merit as the court considered guilty plea, and is bound to fail: per Powel JA in Isimeli Seresere v State [2008] AAU 92/2008 (5 November 2008), State v. Ramesh Patel [2002] AAU 2/2002 (15 November 2002), Milio Nakoroluvu v. State [2007] AAU1 58/05(25 June 2007). The appellant must demonstrate that there is a good reason why he should be granted leave to appeal out of time. Appeal 4 months out of time was refused in Veretariki Vetaukula v State [2008] AAU 17/2008 (29 May.2008) An appeal received 2½ months out of time was refused in Opeti Delana Koro v State [2007] AAU 28/2008 (14 May 2008), Shakir Buksh, Jitoko Metui & Are Amea v State [2008] AAU 59/2006 (4 November 2008).

ANALYSIS

Right to Appeal against Conviction

14. In the present case, the Applicant does not dispute that he pleaded guilty to the charge on his own free will. Therefore, in view of Section 247 of the Criminal Procedure Act, the Applicant does not automatically have the right to appeal against conviction. However it has been accepted by courts in Fiji that this section is not an absolute bar to an appeal against conviction.

15. In ***Niubasaga v State*** [2017] FJHC 66; HAA54.2016 (6 February 2017) it was observed:

> *"Despite this limitation, it has long been accepted that the section is not an absolute bar to successful appeals. It could be that the facts in evidence do not support the offence admitted to, or that the plea was shown to be equivocal"*

16. The Applicant does not dispute the equivocation of the plea of guilt. His contention is that the facts in evidence (summary of facts and the medical report) do not support a conviction of the offence he admitted.

17. On the basis of the dictum in ***Nuibasaga*** (above), if the Court can be satisfied that the offence of Grievous Harm is not supported by the facts in evidence

(summary of facts and the medical report), the Applicant is not barred to bring in a successful appeal.

The Length and Reasons for Delay

18. The Applicant was sentenced on 6th March 2017. He filed his notice of Appeal on 7th July, 2017 although he was supposed to file his appeal within 28 days of the sentence. Therefore, his appeal is late by 3 months and 4 days which is considerable in the circumstances of this case.

19. It appears that the Applicant had waived his right to legal representation and was not represented by a legal counsel when he tendered the plea. However, the Applicant was informed of his right to appeal within 28 days by the learned Magistrate in his written Ruling.

20. The Applicant is a police officer for 7 years and therefore should be well acquainted with court procedures and his right to appeal. In ***Natakuru v The State*** [2004] FJHC 179; HAM0006D.2004S (27 February 2004) Shameem J observed;

> *"In this case, I cannot accept the Applicant's submission that his lack of legal knowledge was responsible for his failure to file an appeal in time. The Applicant is no stranger to our courts, and no legal knowledge is required to understand the words: "28 days to appeal."*

21. The explanation for delay advanced by the Applicant is that he was satisfied with the decision of the court below until he became aware of the appeal filed by the DPP against the sentence.

22. The reason advanced by the Applicant in my opinion does not show a good cause warranting an enlargement of time.

Likely Success in Appeal

23. The Applicant filed his petition of appeal on the ground that the learned Magistrate erred in law and in fact in convicting the Appellant when the summary of fact and the medical report failed to disclose the specific nature of the injuries on the victim to substantiate the offence of Grievous Harm.

24. The learned Magistrate's decision is not straightforward so far as the conviction is concerned. Although a conviction was recorded initially on 17th October, 2016, the learned Magistrate by his written Ruling dated 6th March, 2017, (at paragraph 9), supposedly exercising his direction under Section 16 of the Sentencing and Penalties Act, did not record a conviction in view of the negative impact the conviction would have on Applicant's economic wellbeing and prospects of his employment as a police officer.

25. It is this non-conviction recorded by the learned Magistrate that has been appealed by the State in HAA 32 of 2017. It is also this non-conviction that had satisfied the Applicant when he decided not to file an appeal against learned Magistrate's decision within appealable time. In this context, it has to be accepted that at the end of the day, there is no conviction recorded by the learned Magistrate. Therefore, this ground of appeal appears to be misconceived.

26. Even if it is accepted that a conviction had been recorded, this ground of appeal has no chance of success.

27. The summary of facts admitted by the Applicant reads as follows:

> *The victim in this matter is TIMOCI BAVADRA (PW 1), 17 years old, Unemployed of Tomuka, Lautoka.*
>
> *On the 23rd of April, 2016 at about 11.00 pm at Shirley Park, Lautoka, PW 1 was sitting down with two of his friends namely; JONE RATUMAIBAU (PW 2) and MELI SEREVI (PW 3), both Students of Tomuka, Lautoka. The Accused was on Mobile Patrol around the city and he was driving vehicle registration number GP 119. The Accused parked the vehicle along Shirley Park and approached PW 1 and confronted him about going to his home, swearing and threatening his family. PW 1 denied the allegation and then the Accused swore at him, punched him on the mouth and then hit his head with a black torch light several times.*
>
> *PW 2 and PW 3 were both with PW 1 at the material time and place, they saw the Accused punching PW 1 several times on the face and also hitting PW 1's jaw and head with a black torch light.*

The matter was reported at the Lautoka Police Station. PW 1 was then taken for medical examination at the Lautoka Hospital. PW 1 was admitted at the Surgical Ward for 2 weeks with a broken jaw. Accused was arrested; caution interviewed and was later charged with Grievous Harm contrary to Section 258 of the Crimes Decree No. 44 of 2009.

28. The medical report tendered in Court describes the injuries as follows;

D12- Specific Medical Finding: *"bilateral submandibular swelling and tenderness "*

D14- Professional opinion of the doctor: *'acute injury'*

D18- Summary and Conclusion: *'fracture of both right and left mandible'*

29. The summary of facts stated that Applicant swore at the victim, punched him on mouth and then hit his head with a black torch light several times; the victim was taken for a medical examination at the Lautoka Hospital where he was admitted at the surgical ward for two weeks with a broken jaw.

30. The Counsel for Applicant submits that the injuries mentioned in the summary of facts and the medical report only constitute bodily harm, but not grievous harm and therefore the charge read to the Applicant is either defective or that Applicant should have been convicted for a lesser offence. He further submits that the charge failed to clearly spell out how the injuries were caused and whether those injuries were permanent or dangerous.

31. Although the doctor has not pointed out any permanent injuries, the injuries disclosed in the summary of facts and medical report, in my opinion, constitute grievous harm within the meaning of the definition in the Crimes Act.

32. As per the medical report, the 'acute injury' is elucidated as 'fracture of both right and left mandible'. The paired submandibular bones are major bones located beneath the floor of the mouth. According to Dorland's Illustrated Medical Dictionary, the mandible is the horseshoe-shaped bone forming the lower jaw, the largest and strongest bone of the face, presenting a body and pair of rami, which articulate with the skull at the temporomandibular joints.

33. 'Grievous harm' is defined in Section 4 of the Crimes Act as follows;

"grievous harm" means any harm which—

(a) amounts to a maim or dangerous harm; or

(b) seriously or permanently injures health or which is likely so to injure health; or

(c) extends to permanent disfigurement, or to any permanent or serious injury to any external or internal organ, member or sense;

34. The Counsel for Applicant relies on ***Niumataiwalu v State*** [2016] FJCA 163; AAU0072.2016 (30 November 2016) to establish his position that facts constitute bodily harm, but not grievous harm.

35. The facts tendered by the prosecution in ***Niumataiwalu*** (supra) case in support of the charge of Act with Intent to Cause Grievous Harm were that the appellant approached the victim and hit her head with an empty Fiji Gold bottle. The facts stated 'he wacked the bottle 3 times on the complainant's head'. The facts stated that the medical examination noted the following injuries to the victim:

Blackish red **bruises** on right and left shoulders

Blackish red **bruises** on left upper harm

Left ear lobe **swelling**

Left eye penohital **swelling**

3cm **laceration** on left upper eye brow

Tenders on the left panoto occiput region

36. The facts admitted by the Applicant in the instant case, in my opinion, are clearly distinguishable in that they (the summary of facts and the medical report) clearly disclosed injuries (fracture of both right and left mandible) which constitute grievous harm within the meaning of Section 4 of the Crimes Act. Therefore, the summary of facts proved the elements of the offence of Grievous Harm.

37. The charge framed against the Applicant in my opinion is not defective. The statement of offence disclosed the offence with which the Applicant was charged. The elements of the offence as required by Section 258 of the Criminal Procedure

Act are included in the particulars of the offence to the extent that any reasonable person would be able to understand.

38. It cannot be said that the Applicant was prejudiced or embarrassed by the charge although it did not specify the weapon used or the manner in which the injuries were caused. How the injuries were caused and the object that was used to cause the injuries are clearly outlined in the summary of facts. The Applicant had punched the victim several times on the mouth and used a black torch to hit victim's head several times.

39. Therefore, the ground of appeal raised by the Applicant is not meritorious in the sense that it will most probably be successful in appeal.

Will the Respondent be Prejudiced?

40. The Respondent has already filed an appeal against the sentence. Therefore, the Respondent will not be prejudiced unfairly if the time is enlarged. However, the Applicant has failed to satisfy the other grounds warranting an enlargement.

CONCLUSION

41. The delay is unreasonable in the circumstances of the case. The ground of appeal raised by the Applicant does not merit serious judicial consideration in the sense that it will most probably be successful in appeal. Therefore, the application for leave to appeal out of time in respect of Lautoka Criminal Case No. 470 of 2016 is refused.

Aruna Aluthge

Judge

AT LAUTOKA

08th November, 2017

Solicitors: Mr. Mohammed Yunus for Applicant

Office of the Director of Public Prosecution for Respondent