IN THE HIGH COURT OF FIJI
AT LAUTOKA
REVIEW JURISDICTION

CRIMINAL REVIEW NO. HAR 02 OF 2019

BETWEEN	:	**STATE**
A N D	:	**UMESH PRASAD**
Counsel	:	Mr. J.B. Niudamu for the State.
	:	Ms. J. Singh for the Respondent.
Date of Hearing	:	27 April, 2020
Date of Judgment	:	27 April, 2020

JUDGMENT ON REVIEW

BACKGROUND INFORMATION

1. This matter has been referred to this court pursuant to section 260 (2) of the Criminal Procedure Act by the Acting Chief Justice for a review of the sentence delivered by the Magistrate's Court at Ba on 19th April, 2017.

2. The respondent was charged in the Magistrate's Court at Tavua for one count of disobedience of lawful orders contrary to section 202 of the Crimes Act. The complainant was the Resident Magistrate, Tavua hence the file was sent to the Magistrate's Court at Ba to be tried before another Magistrate.

3. On 15th January, 2016 the charge was read and explained to the respondent who pleaded guilty. Thereafter the respondent admitted the summary of facts.

4. The learned Magistrate upon being satisfied that the guilty plea was unequivocal convicted the respondent as charged.

5. For completeness the summary of facts read in the Magistrate's Court which was admitted by the respondent is reproduced herewith:

"In June 2013, Umesh Prasad, aged 44 years, Court Officer of Suva ("the defendant") was based at Tavua Magistrates' Court as the Court Officer. The Resident Magistrate at the said Court was Mr. Samuela Qica, aged 41 years, of Tavua ("the complainant").

On 25th June 2013, the complainant was presiding over a civil matter listed for 'Hearing' in the Courtroom. Present in the Courtroom for the 'Hearing' at the time were counsels Ms. Sanjana Datt ("PW2") and Mr. Jitendra Reddy ("PW3"), and Court Clerks namely Manaini and Rajneel. Rajneel was doing the interpreting in the case.

The complainant had on an earlier occasion directed the defendant not to be present in any court proceedings without the complainant's permission. This directive was given by the complainant because the complainant had received complaints from other senior staff that the defendant had a habit of interfering with court proceedings.

After sometime, Manaini went out of the Courtroom and then the defendant came in with a Criminal File from Rakiraki jurisdiction, which had already been called and dealt with before the said 'Hearing' commenced. During the 'Hearing', the defendant stood up without the complainant's

permission and started to re-interpret some of the direct evidence from the witness, which Rajneel had already interpreted.

The complainant then saw the defendant trying to interact with PW3 at which time the complainant reminded the defendant in open court that the defendant was earlier directed not to be present in the Courtroom without the complainant's express permission. The defendant was told to leave the Courtroom which he did.

Afterwards both PW2 and PW3 confirmed to the complainant that the defendant was interfering with the proceedings, and that PW2 and PW3 had no complaints about Rajneel's interpretation (Copies of the Police Statements of PW2 and PW3 are annexed).

The complainant referred the incident to the Chief Magistrate and the then Acting Chief Registrar. The matter was later reported to the police for formal investigations. The defendant was caution interviewed during which he admitted at Q 38 that he got up and re-interpreted the direct evidence on two occasions during the 'Hearing'. At Q 48; Q 49; and Q 52 the defendant denied that he was interfering with PW2 and PW3's questioning during the 'Hearing' (Copy of the Caution Interview is annexed)."

The defendant was charged with 1 count of 'Disobedience of Lawful Order' contrary to section 202 of the Crimes [Act] 2009. He voluntarily pleaded 'guilty' to the charge on 15th January 2016. The defendant is a 1st offender.

6. On 19th April, 2017 after having heard mitigation and sentence submissions the learned Magistrate purporting to act in accordance with section 15 (1) (f) of the Sentencing and Penalties Act dismissed the charge without recording a conviction. At the outset I would like to point

out that this was an incorrect provision of the law the learned Magistrate had mentioned in his sentence.

LAW ON REVIEW

7. Section 260 of the Criminal Procedure Act states:

(1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to —

(a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and

(b) the regularity of any proceedings of any Magistrates Court.

(2) ***The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken.*** *(my emphasis)*

8. The power of revision or review is provided for by section 262(1) of the Criminal Procedure Act whereby the High Court may in the case of a conviction exercise any of the powers conferred upon it by section 256 and 257 of the Criminal Procedure Act. In the case of any order other than an order of acquittal made by the Magistrate's Court, this court may make an order to alter or reverse the order of the lower court.

9. In accordance with section 262 (2) of the Criminal Procedure Act no order can be made to the prejudice of the respondent unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.

SUBMISSIONS

10. As per the order of this court both counsel filed helpful written submissions and also made oral submissions during the hearing for which this court is grateful.

DETERMINATION

11. Like I have stated earlier the learned Magistrate incorrectly mentioned section 15 (1) (f) of the Sentencing and Penalties Act in his sentence. The correct provision is section 15 (1) (j) as per the sentence delivered. For completeness section 15 (1) (f) and (j) are reproduced herewith:

(1) If a court finds a person guilty of an offence, it may, subject to any specific provision relating to the offence, and subject to the provisions of this [Act] —

(a) ...

(f) *with or without recording a conviction, order the offender to pay a fine; ...*

(j) *without recording a conviction, order the dismissal of the charge; ...*

12. As a matter of law, when sentencing options are being considered by a sentencing court in accordance with section 15 of the Sentencing and Penalties Act and in particular whether a conviction is to be recorded or not the sentencing court must take into account section 16(1) of the Sentencing and Penalties Act. Under section 16 (1) the sentencing court must have regard to all the circumstances of the case, including:

(a) the nature of the offence committed;

(b) the character and past history of the offender; and

(c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.

13. Unfortunately, in this case the learned Magistrate when exercising his sentence discretion not to record a conviction did not direct his mind to section 16 of the Sentencing and Penalties Act at all.

14. Although section 221 of the Criminal Procedure Act did give the learned Magistrate a discretion whether to convict the respondent or not, the learned Magistrate at paragraph 1 of his sentence had convicted the respondent. Paragraph 1 of the sentence states:

"I am therefore satisfied that you have entered your guilty plea freely and voluntarily. Accordingly, you are convicted as charged."

15. The learned Magistrate fell in error when he did not direct his mind to the conviction he had already entered when he was concluding his sentence. Moreover, section 15 of the Sentencing and Penalties Act only applies after a person has been found guilty of an offence and before being convicted that is the reason why the option not to enter a conviction is open to the sentencer if he or she is considering whether to convict or not. Furthermore, there is nothing in the copy record that would suggest that the conviction had been set aside.

16. Additionally, the learned Magistrate also erred by failing to consider section 16 (1) factors of the Sentencing and Penalties Act which ought to have been taken into account in conjunction with section 15 of the Sentencing and Penalties Act. As a result the learned Magistrate did not give any consideration to the circumstances of the offending and the following important issues:

(a) **NATURE OF OFFENCE COMMITTED**

17. There is no doubt that a serious offence had been committed in disturbing circumstances, interference with judicial proceedings cannot be taken lightly. The respondent was a long serving senior officer of the Judicial Department who had engaged in an incongruous and unprofessional conduct in full view of the members of the public, litigants and their counsel.

18. This court denounces the manner and the circumstances in which this offence was committed by the respondent. The culpability of the respondent is obvious which cannot be ignored.

19. Judicial processes play an important role in the administration of justice any slight interference with this process will undermine public confidence which is unacceptable.

20. Moreover, at latter part of paragraph 9 of the sentence the learned Magistrate had stated the following:

"This court, a court of justice therefore finds that a section 15 (1) (f) as above ...is appropriate in all of the circumstances. With the sword therefore of Madam Lady Justice all injustices against you is slayed and the current charge against you dismissed."

21. This court is unable to comprehend what injustices the learned Magistrate was referring to when he made the above comments. The respondent had entered an unequivocal plea of guilty and thereafter admitted the summary of facts. The court had found the respondent guilty and convicted him yet the learned Magistrate went ahead to make this unsubstantiated comment.

22. The learned Magistrate was aware that the respondent had been subjected to a disciplinary hearing by the Judicial Department at the time of the sentencing. The outcome of the disciplinary hearing was that the respondent was cautioned and then transferred to another jurisdiction. This meant the respondent was still employed by the Judicial Department (which he does to date) accordingly the transfer and the continued employment of the respondent is favourable to him and therefore no injustice was caused to the respondent.

23 In view of the above, the issue of relocation from Tavua to Suva, leaving the family behind and adapting to life in the capital city as highlighted by the learned Magistrate in his sentence was irrelevant.

(b) **CHARACTER AND PAST HISTORY**

24. There is no doubt that the respondent was a first offender when he committed the offence.

(c) **IMPACT OF CONVICTION**

25. The respondent in his mitigation had stated that a conviction would impact on his economic or social well-being and on his employment prospects.

26. In *State vs. David Batiratu [2012] Revisional Case no. HAR 001 of 2012* at paragraph 29 His Lordship Gates CJ (as he was) mentioned the following questions that must be answered if a discharge without conviction is urged upon the sentencing court whether:

"(a) The offender is morally blameless.

(b) *Whether only a technical breach in the law has occurred.*

(c) *Whether the offence is of a trivial or minor nature.*

(d) *Whether the public interest in the enforcement and effectiveness of the legislation is such that escape from penalty is not consistent with that interest.*

(e) *Whether circumstances exist in which it is inappropriate to record a conviction, or merely to impose nominal punishment.*

(f) *Are there any other extenuating or exceptional circumstances, a rare situation, justifying a court showing mercy to an offender."*

27. The above has also been stated in sections 43 and 45 of the Sentencing and Penalties Act.

28. In *State v Nand Kumar Cr. App. No. HAA014 of 2000 (2 February, 2001)* Gates J. (as he was) in the matter of an appeal from the Magistrate's Court against an order of absolute discharge for the offence of common assault said:

"...The court, in its sentencing remarks, said rightly, it was faced with "a very awkward situation" for this accused was facing dismissal from his employment if a conviction were to be entered. Nevertheless, a discharge without conviction being entered, was not an appropriate sentence here. Absolute discharges are appropriate only in a limited number of circumstances, such as where no moral blame attaches (R v O'Toole (1971) 55 Cr App p 206) or where a mere technical breach of the law has occurred, perhaps by imprudence without dishonesty (R v Kavanagh (unreported) May 16th 1972 CA)".

29. In this case, general and specific deterrence demands the imposition of a penalty and not a dismissal of the charge without conviction. The imposition of a fine or a term of imprisonment will override mitigating factors such as previous good character or guilty plea or other personal mitigating factors in cases of this nature. The impact of a conviction on the respondent is a secondary issue here since the offending is serious particularly when it is directly concerned with administration of justice.

CONCLUSION

30. For the above reasons, the sentence of the learned Magistrate cannot be allowed to stand which is erroneous in law and wrong in principle. The learned Magistrate also wrongly exercised his sentence discretion when he took into account irrelevant considerations as mentioned in paragraphs 20 to 23 above.

31. Although this matter has come to court after a lapse of about 3 years from the date of the sentence by the Magistrate's Court (that is 19 April, 2017) any prejudice caused to the respondent by this court's intervention is outweighed by the damage that will be caused if the sentence of the Magistrate's Court is not reviewed and reversed.

32. The respondent being a senior officer of the Judicial Department carried a high degree of responsibility in upholding the integrity of the judicial system and its process which he blatantly violated.

33. In view of the above, the sentence of the Magistrate's Court is reviewed and reversed, the respondent is convicted as charged. The maximum penalty for disobedience of lawful orders is 2 years imprisonment although there is no established tariff for this offence generally the courts have sentenced offenders for such an offending from a suspended sentence or a fine to 6 months imprisonment depending on the type of

the order breached and the nature of the offending *(see The State v. Shiu Kumar, case no. 3388 of 2007, The State v. Ajmat Ali, case no. 546 of 2010, Mohammed Sattar and another v. The State, criminal appeal no. 83 of 1999 and State v. Alipate Nasevani, criminal case no. HAC 205 of 2018).*

34. Considering the length of time that has lapsed from the date of the allegation (25 June, 2013) and the fact that the order breached was an administrative one in my judgment a conviction and a fine will be appropriate as opposed to a term of imprisonment or a suspended sentence. Bearing this in mind, the following orders are made:

ORDERS

(a) The sentence of the Magistrate's Court is reviewed and reversed;

(b) The respondent is convicted of one count of disobedience of lawful orders contrary to section 202 of the Crimes Act;

(c) The respondent is to pay a fine in the sum of $300.00 within 60 days from today in default 2 months imprisonment.

HIGH COURT OF FIJI LAUTOKA

Sunil Sharma
Judge

At Lautoka
27 April, 2020

Solicitors

Office of the Director of Public Prosecutions for the State.

Office of the Legal Aid Commission for the Respondent.