

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**APPELLATE JURISDICTION**

**CRIMINAL APPEAL NO. HAA 83 of 2020**

**BETWEEN** : **MUNESH BIMAL KRISHNA**

**APPELLANT**

**A N D** : **THE STATE**

**RESPONDENT**

**Counsel** : Ms. P. Kumar and Ms. J. Lagonilakeba for the  
Appellant.

: Ms. R. Uce for the Respondent.

**Date of Submissions** : 28 June, 2021

**Date of Hearing** : 30 June, 2021

**Date of Judgment** : 09 July, 2021

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**JUDGMENT**

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**BACKGROUND INFORMATION**

1. The appellant is charged for one count of grievous harm contrary to section 258 of the Crimes Act and one count of breach of suspended sentence contrary to section 28(1) of the Sentencing and Penalties Act.

2. On 14<sup>th</sup> July, 2020, the appellant (represented by counsel) appeared in the Magistrate's Court at Nadi and elected to be tried by the Magistrate's Court since the first count of grievous harm is an electable offence.
3. On this day both counts were read and understood by the appellant thereafter, he was bailed and the matter was adjourned to 16<sup>th</sup> September, 2020 for plea to be taken.
4. On 16<sup>th</sup> September, the appellant appeared in court with his counsel and informed the court that he was ready to take plea. On this day the appellant had preferred that the charge be read and explained to him in the Hindi language.
5. The appellant pleaded not guilty to the first count of grievous harm, but pleaded guilty to the second count of breach of suspended sentence.
6. The matter was adjourned to 27<sup>th</sup> October, 2020 for mention in respect of the first count and the summary of facts to be read for the second count.
7. Before this date, the appellant through his counsel filed a Notice of Motion in the Magistrate's Court supported by his own affidavit which was called on 5<sup>th</sup> October, 2020. In the Notice of Motion the appellant sought an order that his plea taken on 16<sup>th</sup> September in respect of count two be vacated.
8. On 7<sup>th</sup> December after hearing both parties the learned Magistrate dismissed the Notice of Motion.

#### **APPEAL TO THE HIGH COURT**

9. The appellant being aggrieved by the refusal of the learned Magistrate filed a timely appeal in this court.
10. On 16<sup>th</sup> March, 2021 the appellant's counsel requested for the Magistrate's Court transcript of the proceedings of 16<sup>th</sup> September, 2020.

### **AMENDED GROUNDS OF APPEAL**

11. On 6<sup>th</sup> April both counsel were provided the above, the appellant's counsel upon leave of this court filed an amended petition of appeal and advanced the following grounds of appeal:
- i) *The learned Magistrate erred in law and in fact by recording a plea of guilty against the Appellant/Accused for one count of Breach of Suspended Sentence Contrary to Section 28(1) of the Sentencing and Penalties Act of 2009, when the Copy Record does not reflect this;*
  - ii) *The learned Magistrate erred in law and fact by failing to follow correct procedure in that the commission of a secondary offence being one count of grievous bodily harm contrary to Section 258 of the Crimes Act No. 44 of 2009 does not automatically enliven a suspended sentence. Rather, that a suspended sentence can only be enlivened upon the conviction of a secondary offence. As a result, the Appellant/Accused should not have been called to plea for one count of breach of suspended sentence contrary to Section 28 (1) of the Sentencing and Penalties Act of 2009 on or about 16<sup>th</sup> September 2020 and that the subsequent guilty plea should have been vacated;*
  - iii) *That the learned Magistrate erred in law and in fact by failing to consider that the Appellant/Accused and his counsel were not given prior notice of the second charge until it was put to the Accused/Appellant to plea to. That the Appellant/Accused and his counsel were not served with a charge sheet and particulars for one count of breach of suspended sentence contrary to section 28 (1) of the Sentencing and Penalties Act of 2009. This resulted in the Appellant/Accused taking his plea without appropriate legal advice;*

- iv) That the learned Magistrate erred in law and in fact by failing to vacate the Appellant/Accused guilty plea when his plea was given on a misunderstanding of the facts thereby causing a substantial miscarriage of justice;*
- v) That the learned Magistrate erred in law and in fact by failing to take into consideration that the Prosecution did not object to the Appellant/Accused application to vacate his plea;*
- vi) That the learned Magistrate erred in law and in fact when she did not allow the Appellant/Accused to vacate his guilty plea, when a change of plea from guilty to not guilty may be entertained at any time before sentence is passed in court.*

12. Both counsel filed written submissions and also made oral submissions during the hearing which was conducted virtually (by consent) for which this court is grateful. Counsel for the appellant withdrew the first ground of appeal before the hearing started.

### **PRELIMINARY**

13. There is no dispute that on 16<sup>th</sup> September, 2020 both counts were read and explained to the appellant, however, the summary of facts in respect of count two is yet to be read. It is also noted (from the copy record) that the appellant has not been found guilty for the count of breach of suspended sentence (the appellant had pleaded guilty to).
14. The appellant is asking this court to allow the appeal by vacating the guilty plea in respect of the second count of breach of suspended sentence or in the alternative this count be deferred until the determination of the first count of grievous harm.

## **GROUND TWO**

*The learned Magistrate erred in law and fact by failing to follow correct procedure in that the commission of a secondary offence being one count of grievous bodily harm contrary to Section 258 of the Crimes Act No. 44 of 2009 does not automatically enliven a suspended sentence. Rather, that a suspended sentence can only be enlivened upon the conviction of a secondary offence. As a result, the Appellant/Accused should not have been called to plea for one count of breach of suspended sentence contrary to Section 28 (1) of the Sentencing and Penalties Act of 2009 on or about 16<sup>th</sup> September 2020 and that the subsequent guilty plea should have been vacated.*

15. Counsel argued that since the appellant had pleaded not guilty to the primary offence of grievous harm the appellant should not have been called to take plea to the secondary offence of breach of suspended sentence (count two). The court ought to first deal with the offence of grievous harm and upon determination of guilt the second count should be dealt with.
16. Counsel further argued that the secondary offence of breach of suspended sentence arises from the primary offence of grievous harm. Therefore, there was no rationale behind pleading not guilty to the offence of grievous harm and pleading guilty to the offence of breach of suspended sentence.
17. According to counsel section 216 of the Criminal Procedure Act is relevant in respect of the procedure to be followed by the court when the information contains a count charging an accused with having previously been convicted of any offence. The procedure shall be that the part of information stating the previous conviction shall not be read out in court, nor shall the accused be asked whether he has been previously convicted as alleged in the information, unless and until he or she either pleaded guilty to or been convicted of the subsequent offence. Counsel further submitted the plea

taken in respect of count two was equivocal which will be argued in other grounds of appeal.

18. The above provision of the law applies to the High Court, however, by virtue of section 175 of the Criminal Procedure Act the procedure prescribed in the High Court shall apply to the Magistrate's Court with alterations or modifications.
19. There is no doubt that the charge of breach of suspended sentence contains reference to a previous offence, however, section 216 of the Criminal Procedure Act does not apply to this case because the appellant had pleaded to this count (section 216 (1) (a)).
20. When count two was read to the appellant no objection was taken by the appellant's counsel as it is the plea taking in the Magistrate's Court is incomplete and it is only proper that this process takes its course. This court cannot interfere with the judicial process of the Magistrate's Court.
21. Furthermore, it is important to look at the charge that was filed in the Magistrate's Court:

**COUNT ONE**  
**Statement of Offence**

**GRIEVOUS HARM:** contrary to section 258 of the Crimes Act 2009.

**Particulars of Offence**

**MUNESH BIMAL KRISHNA** on the 12<sup>th</sup> day of July, 2020 at Nadi in the Western Division unlawfully and maliciously did grievous harm to **AOUNESH MUNESH MUDALIAR**.

**COUNT TWO**  
**Statement of Offence**

**BREACH OF SUSPENDED SENTENCE:** contrary to 28(1) of the Sentencing and Penalties Act 2009.

### Particulars of Offence

**MUNESH BIMAL KRISHNA** on the 12<sup>th</sup> day of July 2020 at Nadi in the Western Division, breached the suspended sentence of 12 months imprisonment suspended for 3 years vide Nadi Magistrate's Court Case File No. 688/19 dated 17<sup>th</sup> March 2019 by committing an offence of GRIEVOUS HARM.

22. A perusal of the charge filed shows that the offences alleged are separate and distinct, the charge of breach of suspended sentence (count two) may have arisen from the alleged offence of grievous harm, however, there is no harm in having both counts together in one charge sheet. It is incumbent upon the court hearing the matter to exercise caution to avoid any prejudice to the accused. If the prosecution is unable to prove count one then obviously it will have an effect on the count of breach of suspended sentence.
23. The offence of breach of suspended sentence can only be used in activating an earlier suspended sentence once the court has found the accused guilty and convicted him of the offence of breach of suspended sentence.
24. In this case the appellant has not been found guilty and convicted of the offence of breach of suspended sentence. Madigan J in *Isoa Nausa vs. State, Criminal Appeal No. HAA 022 of 2010*, at paragraph 8 had expressed the above succinctly in the following words:

*“All judicial officers, all Counsel (including State Counsel) and all police officers should by now know that activation of suspended sentences can only be effected pursuant to section 28 of the Sentencing and Penalties Decree 2009. If a suspect is in breach or thought to be in breach of a suspended sentence he must be charged with breach under section 28(1) and if he is found guilty of the breach then and only then must a Court activate the sentence.*

### **GROUND THREE**

*The learned Magistrate erred in law and in fact by failing to consider that the Appellant/Accused and his counsel were not given prior notice of the second charge until it was put to the Accused/Appellant to plea to. That the Appellant/Accused and his counsel were not served with a charge sheet and particulars for one count of breach of suspended sentence contrary to section 28 (1) of the Sentencing and Penalties Act of 2009. This resulted in the Appellant/Accused taking his plea without appropriate legal advice.*

25. The appellant's counsel argued that when the matter was called for plea to be taken on 16<sup>th</sup> September, the appellant's counsel had advised the court that she was ready for plea to be taken. However, the appellant and his counsel were expecting plea to be taken in respect of count one (offence of grievous harm) only.
26. Appellant's counsel further submitted that the charge sheet in the possession of the counsel showed one count of grievous harm only, and neither the appellant nor his counsel were aware that the appellant will be taking his plea for the offence of breach of suspended sentence (second count).
27. Counsel stated that on page 3 of the copy record (transcribed version) the clerk had asked the appellant in the Hindi language "*Aap ke disclosure milge, charge sheet, statement*". There is no answer attributed to the appellant instead it is stated "*disclosure served*".
28. In view of the above, the appellant was not legally advised and had pleaded guilty without fully understanding what he was pleading guilty to.
29. It is important to note that the appellant was represented by counsel when he first appeared in the Magistrate's Court on 14<sup>th</sup> July, 2020 where both counts were read and understood by him in the Hindi language. Counsel did not inform the court that she had not received the charge sheet in respect of the second count.



30. Moreover, counsel did not take any objection to the second count being read to the appellant. There is nothing in the copy record to suggest that the appellant had not understood the second count on this date.
31. Thereafter, on 16<sup>th</sup> September both counts were again read and understood by the appellant in the presence of his counsel yet no objection was taken by counsel in respect of count two. I am certain if counsel was not served with the complete charge sheet she would have brought the issue of non-service of the charge sheet in respect of the second count to the attention of the learned Magistrate.
32. This court is surprised by the stance taken by counsel that the appellant and his counsel were not served with count two when the charge sheet exhibited in the copy record at page 14 shows both counts together.
33. This court is concerned at the assertions made by the appellant's counsel that neither the appellant nor the counsel had been served with the charge sheet in respect of count two when the copy record shows otherwise.

#### **GROUND FOUR**

*The learned Magistrate erred in law and in fact by failing to vacate the Appellant/Accused guilty plea when his plea was given on a misunderstanding of the facts thereby causing a substantial miscarriage of justice.*

34. Counsel argued that the appellant pleaded guilty to count two on the basis of material mistake of facts. He misunderstood what was being put to him by the clerk as well as the fact that he was not served with the charge sheet containing this count.
35. In view of the discussions in third ground of appeal above there is no need for me to address the issue of non-service of charge sheet any further but to say that this allegation of non-service appears to be an afterthought which is quite misleading on the face to the copy record. I don't think counsel in

the Magistrate's Court would have kept quiet if she was not served with the charge sheet that did not mention the second count.

36. In respect to the material mistake of facts by the appellant the copy record is self-explanatory the appellant was read and explained both counts in his preferred language in the presence of his counsel which he had understood. Counsel also did not take any objections at the time. There is no substantial miscarriage of justice caused to the appellant.
37. In *Tevita Tuisavusavu and another vs The State, Criminal Appeal No. AAU0064 of 2004 (3<sup>rd</sup> April, 2009)* the Court of Appeal made the following observations at paragraphs 9 and 10:

Paragraph 9

*The authorities relating to equivocal pleas make it quite clear that the onus falls upon an appellant to establish facts upon which the validity of a guilty plea is challenged (see Bogiwalu v State [1998] FJCA 16 and cases cited therein). It has been said that a court should approach the question of allowing an accused to withdraw a plea 'with caution bordering on circumspection' (Liberti (1991) 55 A Crim R 120 at 122). The same can be said as regards an appellate court considering the issue of an allegedly equivocal plea.*

Paragraph 10

*Whether a guilty plea is effective and binding is a question of fact to be determined by the appellate court ascertaining from the record and from any other evidence tendered what took place at the time the plea was entered. We are in no doubt from the material before us that the 1st appellant's plea was not in any way equivocal. As the 1st appellant admitted to us during argument, he pleaded guilty to the charge after having been advised to do so by his counsel in the hope of obtaining a reduced sentence. As was stated by the High Court of Australia in Meissner v The Queen [1995] HCA 41; (1995) 184 CLR 132);*

*"It is true that a person may plead guilty upon grounds which extend beyond that person's belief in his guilt. He may do so for all manner of reasons: for example, to avoid worry, inconvenience or expense; to avoid publicity; to protect his family or friends; or in the hope of obtaining a more lenient sentence than he would if convicted after a plea of not guilty. The entry of a plea of guilty upon grounds such as these nevertheless constitutes an admission of all the elements of the offence and a conviction entered upon the basis of such a plea will not be set aside on appeal unless it can be shown that a miscarriage of justice has occurred. Ordinarily that will only be where the accused did not understand the nature of the charge or did not intend to admit he was guilty of it or if upon the facts admitted by the plea he could not in law have been guilty of the offence."*

#### **GROUND FIVE**

*The learned Magistrate erred in law and in fact by failing to take into consideration that the Prosecution did not object to the Appellant/Accused application to vacate his plea.*

38. Counsel submits that the plea of guilty in respect of the second count should have been vacated because the prosecution did not object to the order sought in the Notice of Motion filed on behalf of the appellant.
39. The above submission shows a lack of understanding about the role of the court hearing an application. It is trite law that the final arbiter is the court, the fact that the prosecution did not object to the Notice of Motion hence the order ought to have been granted is shallow. Whether the prosecution objects or not to any application pending before the court is immaterial to the judicial decision making process. The final decision was made by the court after due consideration that is what matters.

## **GROUND SIX**

*The learned Magistrate erred in law and in fact when she did not allow the Appellant/ Accused to vacate his guilty plea, when a change of plea from guilty to not guilty may be entertained at any time before sentence is passed in court.*

40. Counsel argued that the learned Magistrate erred when she did not vacate the plea of guilty since sentence is yet to be passed and in this instance the summary of facts was yet to be read.

41. At paragraph 4 of the ruling on change of plea the learned Magistrate stated:

*On 16<sup>th</sup> September, 2020 your counsel Ms. Kumar was present in court and your counsel confirmed to the court that you are ready to proceed with the plea. Again both counts were read to you in your preferred language. When you were asked whether you understood the charges you answered saying “yes”. You pleaded not guilty to the first count and pleaded guilty to the second count on your own free will. Your counsel never made any comments before the court with regards to your plea or disputing to plea instruction given to her by you.*

42. A change of plea from guilty to not guilty is a discretionary matter upon the court taking plea which must be exercised judicially. A plea cannot be changed for the sake of it. There are certain conditions that must be met.

43. In considering an application for change of plea a court should only allow such an application if there was evidence of an equivocal plea or the summary of facts did not disclose the offence charged or there was prejudice caused to the accused as a result of lack of legal representation.

44. The learned Magistrate was correct when she mentioned in her ruling that the matter before the court was pending the reading of the summary of facts and after perusing the affidavit filed by the appellant no good cause was shown for the court to vacate the appellant’s plea.

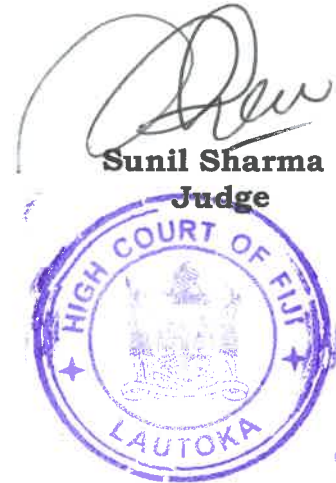
45. Before I leave, it is important to note that the process of plea taking in the Magistrate's Court was not complete in respect of count two.
46. A plea is not complete until the summary of facts is read to an accused and thereafter he/she is asked whether the facts are admitted or not. Unfortunately, the appellant's counsel did not focus her mind to this crucial aspect before proceeding to file the Notice of Motion in the Magistrate's Court.
47. The learned Magistrate had correctly alerted the appellant's counsel at page 10 of the copy record (transcribed version) in the following words:
- "... summary of facts is not ready, he can make his submission at the summary of facts."*
48. The above in my view was a polite way of saying that the appellant had the opportunity to have his say when the summary of facts is read to him.
49. The process of plea taking was not complete when the appellant had pleaded guilty to the second count, in my view there was no need for an application to vacate plea in the Magistrate's Court when the appellant still had the opportunity to answer to the summary of facts. The appellant was also not been found guilty of this offence hence the Notice of Motion in the Magistrate's Court was premature and misconceived. At this time, I wish to also add that a bit of caution on the part of counsel would not have unduly delayed the progress of this matter in the Magistrate's Court.

### **CONCLUSION**

50. After considering the appeal filed and the submissions made by counsel all the amended grounds of appeal are dismissed as frivolous. This file is remitted to the Magistrate's Court at Nadi for continuation according to law. There is no error made by the learned Magistrate in dismissing the Notice of Motion of the appellant in respect of change of plea.

**ORDERS**

1. The appeal is dismissed as frivolous;
2. This matter is remitted to the Magistrate's Court at Nadi to be dealt with in accordance with the law.



**Sunil Sharma  
Judge**

**At Lautoka**

09 July, 2021

**Solicitors**

**Messrs Lal Patel Bale Lawyers for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**