

IN THE HIGH COURT

AT LAUTOKA

REVISIONAL CASE NO. HAR 06 OF 2017

LAUTOKA MAGISTRATES CRIMINAL CASE NO: 05 OF 17

STATE

V

DINESHWAR SINGH

Date of Hearing: 12th May, 2017

Date of Judgment: 13th June, 2017

Counsel: Mr. S. Naibe for the State

Heard in absentia

JUDGMENT ON REVISION

Background

1. This matter was referred to this Court by Chief Justice for a review pursuant to Section 260 (2) of the Criminal Procedure Act (CPA).
2. Above named Accused (for the sake of convenience I shall refer to Mr. Dineshwar Singh as the Accused) was charged with the following offences in the Magistrates Court at Lautoka.

FIRST COUNT

Statement of Offence (a)

OBSTRUCTING POLICE OFFICER: - Contrary to Section 277 [b] of the Crimes Decree No. 44 of 2009.

Particulars of Offence (b)

DINESHWAR SINGH on the 31st day of December, 2016 at Lautoka in the Western Division willfully obstructed CORPORAL 2752 SALENDRA RAM in the due execution of his duty.

SECOND COUNT

Statement of Offence (a)

DRUNK AND DISORDERLY: - Contrary to Section 4 of the Minor Offences Act, Cap 18.

Particulars of Offence (b)

DINESHWAR SINGH on the 31st day of December, 2016 at Lautoka in the Western Division was drunk and disorderly in a public place namely Queens Road, Lomolomo.

3. Accused tendered an unequivocal plea of guilty when the charges were read out on 3rd January, 2017. Upon agreement of facts by the Accused, learned Magistrate found the Accused guilty on each count.
4. Learned Magistrate having decided that this was a fit case in which no conviction need be entered, without proceeding to conviction, ordered to pay \$ 50 to the complainant as compensation on 1st count, and on the second count, to buy 10 large sized (XL) pizzas from Lautoka Hotel together with 10x2 liters of juice of any brand and supply the same to Assistant Superintendence of Police Apete within 3 hours of the 'sentence'.

The Law on Revision

5. Section 260 of the Criminal Procedure Act follows the spirit of the supervisory jurisdiction in civil and criminal proceedings given to the High Court by Section 6(3) of the Administration of Justice Decree 2009, which was formerly

provided by Section 120(6) of the 1997 Constitution. *State v Batiratu* HAR 001/2012 (13 February, 2012).

6. 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. (emphasis added)

7. A power of revision is provided by Section 262(1) for the High Court in the case of any order other than an order of acquittal, to alter or reverse such order.

8. Besides the discretionary power of the Court to hear parties on a revision [Section 263] no order can be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence [Section 262(2)].

Discussion

9. When the matter was referred to this Court by Chief Justice, I ordered that notices on revision papers be served on the Director of Public Prosecutions, the Accused and Mr. A.R. Singh, the Counsel who had originally appeared for Accused in the Magistrates Court.

10. The notice was issued on Mr. A.R. Singh's office on 24th March, 2017. The process server of this Court who had gone for the second time to Mr. A.R. Singh's office to serve the notice was informed that the Accused, who is an Australian citizen, had already left the country and that Mr. A.R. Singh was only instructed to appear in the Magistrates Court matter. Accused's fixed address in Australia was not known to the office and Court and no further attempt was made to serve the notice thereafter.

11. The State Counsel finally tendered a useful written submission.

12. Pursuant to Section 263 of the Criminal Procedure Act, no party has any right to be heard either personally or by lawyer before the High Court when exercising its powers for revision. However, in view of Section 262(2) of the Criminal Procedure Act, the discretionary power of the High Court to hear parties is supplemented by giving an opportunity to an accused person to be heard either personally or by a lawyer. *Batiratu* (supra)
13. Amid practical difficulty to serve notice on the Accused, the Court, having considered Section 263 of the CPA and the public interest factor involved in the matter warranting immediate supervisory intervention, decided to hear the matter in the absence of the Accused.

The Proceedings in the Magistrates Court

14. Accused appeared in Court on the eve of New Year, 3rd January, 2017 (a Tuesday) having been produced by police. Accused had been in police custody for nearly three days from Saturday early morning. Defence Counsel informed court that the Accused is a foreign citizen and ready to plead guilty to the charges without wasting courts' time. Counsel pleaded that his client be allowed to depart in the scheduled flight at 6.p.m. for his home country, Australia. Then the learned Magistrate read out the charges to the Accused. Accused tendered an unequivocal plea of guilty on both counts.
15. Summary of facts admitted by the Accused reveals that the incident occurred at Lomolomo Police Post check point at the dawn of 31st December, 2016. Summary of facts reads to the Accused is as follows:

On the 31st day of December, 2016 at about 005hrs at Lomolomo Post Check Point Dineshwar Singh (B-1), 46 yrs, Mechanic at Votualevu, Nadi an Australian Citizen was drunk and behaving in a disorderly manner whereby obstructed police officer namely Salendra Ram (A-1), 40 yrs, of Lovu, Lautoka in due execution of his duty.

On above date, time and place, (A-1) was doing operation duties, conducting roadblock at Lomolomo check point when they stopped vehicle Re. No. FF 153 for driver to be tested for suspected drunk and drive. The driver was tested and arrested for sufficient evidence of alcohol present in the breathe. (B-1) started acting in a disorderly manner and despite being warned several times by police, (B-1) pushed (A-1) and started swearing saying "mother fucker" and "Fuck all Fiji Cops" and challenge (A-1) for fights. (B-1) was arrested and locked in the cell for obstructing Police Officer and drunk and disorderly. Matter was reported to police.

16. Accused admitted the above summary of facts except for having uttered the words "mother fucker" and "fuck all Fiji Cops".

17. The Court then asked the Defence Counsel whether he was ready with mitigation. The Defence Counsel having submitted facts in mitigation, amongst them were early guilty plea and remorsefulness, sought forgiveness of the Court and a discharge order.
18. The learned Magistrate, having decided that this was a fit case in which no conviction need be entered, without proceeding to conviction ordered to pay \$ 50 to the complainant as compensation on the 1st count, and on the second count, to buy 10 large sized (XL) pizzas from Lautoka Hotel together with 10x2 liters of juice of any brand and supply the same to Assistant Superintendence of Police Apete within 3 hours of the 'sentence The passport of the Accused was retained to ensure due performance of Orders. The Court discharged the Accused upon his compliance with those conditions.
19. The learned Magistrate did not specify under which provision of law these orders were made.

Conditional discharge without conviction entered

20. Section 15 of the Sentencing and Penalties Act (SPA) allows a court to make following orders upon being satisfied that a person is guilty of an offence.

15. (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 Decree —

(a) record a conviction and order that the offender serve a term of imprisonment;

(b) record a conviction and order that the offender serve a term of imprisonment partly in custody and partly in the community;

(c) record a conviction and make a drug treatment order in accordance with regulations made under section 30;

(d) record a conviction and order that the offender serve a term of imprisonment that is wholly or partly suspended;

(e) with or without recording a conviction, make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];

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

(g) record a conviction and order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(h) record a conviction and order the discharge of the offender;

(i) without recording a conviction, order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

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

(k) impose any other sentence or make any other order that is authorised under this Decree or any other Act.

21. It appears that the learned Magistrate had acted under Section 15 (1) (i) above.
22. In exercising its discretion whether or not to record a conviction, a court under Section 16(1) of the SPA, must have regard to all the circumstances of the case, including
 - (a) the nature of the offence
 - (b) the character and past history of the offender;
 - (c) the impact of a conviction on the offender's economic or social well-being, and on his or her employment prospects.
23. The learned Magistrate considered none of these grounds. He failed to record any other ground or reason why a conviction should not be recorded.
24. Willful obstructing police officer who is engaged in the due execution of official duties is a serious matter. As a matter of public policy, failure to denounce and condemn such actions by courts will have drastic consequences on the rule of law of the country.
25. In respect of the 1st count, the learned Magistrate ordered compensation to be paid to the complainant police officer who was doing his official duties. This case cannot be described as one where reconciliation between parties can be promoted under Section 154 of the Criminal Procedure Act. Not only is Obstructing Police Officer not included in the list of offences where reconciliation may be considered, the offence is one too serious by its nature

for the matter to be settled in such a way. Though the instant case may be one "not aggravated by degree", it is not one "substantially of a personal or private nature." The real 'victim' of the offence is not the complainant himself but the system he was tasked to protect. In other words, the offence Accused had committed in its strict sense is an offence against the public or State. As a matter of public policy for the maintenance of law and order, use of force on police cases like those of domestic violence would be entirely unsuitable for termination by mere amicable settlement. (Batiratu)

26. The SPA provides for discharges in general terms. It does so under the chapter heading "Dismissals, Discharges and Adjournments". It encapsulates much of the common law and case law of the last 30 years or so. (Batiratu)

27. Section 43 states:

(1) An order may be made under this Part

(a) to provide for the rehabilitation of an offender by allowing the sentence to be served in the community unsupervised;

(b) to take account of the trivial, technical or minor nature of the offence committed;

(c) to allow for circumstances in which it is inappropriate to inflict any punishment other than nominal punishment;

(d) to allow for circumstances in which it is inappropriate to record a conviction;

(e) to allow for the existence of other extenuating or exceptional circumstances that justify a court showing mercy to an offender."

28. Section 45 of the SPA specifically deals with discharges or releases without conviction.

29. In State v Nayacalagilagi (2009) FJHC 73; HAC165.2007 (17th March 2009) Goundar J considered the principles upon which the discretion under the old section 44 of the CPC was to be exercised. His lordship summarized the position:

"Subsequent authorities have held that absolute discharge without conviction is for the morally blameless offender, or for an offender who has committed only a technical breach of the law (State v. Nand Kumar [2001] HAA014/00L; State v Kisun Sami Krishna [2007] HAA040/07S; Land Transport Authority

v Isimeli Neneboto [2002] HAA87/02. In Commissioner of Inland Revenue v Atunaisa Bani Druavesi [1997] 43 FLR 150 HAA 0012/97, Scott J held that the discharge powers under section 44 of the Penal Code should be exercised sparingly where direct or indirect consequences of convictions are out of all proportion to the gravity of the offence and after the court has balanced all the public interest considerations."

30. In Batiratu (supra) the court observed:

"It is clear from the cases that the public interest in enforcement and deterrence is of some significance when considering whether a discharge can be imposed. Because of the need to enforce safety and public health or tax legislation, the public interest lies in imposing a penalty and not a discharge in such cases. Penalties, whether fines or terms of imprisonment may override mitigating factors such as previous good character or other personal issues: Foster v The State (supra); Commissioner of Inland Revenue v George Rubine [1995] HAC79 OF 1993; Tebbutt v Commissioner of Inland Revenue Cr. App. 108 of 1998S; LTA v Lochan Cr. App. HAA88.2002S (22nd November 2002)".

31. Having considered the above case law and the purport of the more detailed provisions of the SPA with regard to discharges without conviction, the Court in (Batiratu) elaborated the questions a sentencer must address. They are, 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?

32. The learned Magistrate considered none of the above. He was in error in feeling obliged not to enter a conviction without addressing any of the issues discussed in Batiratu (supra). Therefore, learned Magistrate's decision to discharge the Accused without recording a conviction should not be allowed to stand.

33. The next question is whether the incidental orders made by the learned Magistrate are lawful or morally justified even in a situation where the decision not to enter a conviction is held to be justified.

34. The learned Magistrate ordered the Accused to pay \$ 50 compensation to the complainant on 1st count, and on the second count, to buy 10 large sized (XL) pizzas from Lautoka Hotel together with 10x2 liters of juice of any brand and supply the same to Assistant Superintendence of Police Apete within 3 hours of the 'sentence'. He retained the passport of the Accused to ensure compliance with the said order.

35. In a situation where a court feels obliged not to enter a conviction it can make following orders listed under Section 15 of the SPA.

(e) make an order for community work to be undertaken in accordance with the Community Work Act 1994 or for a probation order under the Probation of Offenders Act [Cap. 22];

(f) ...order the offender to pay a fine;

(i)... order the release of the offender on the adjournment of the hearing, and subject to the offender complying with certain conditions determined by the court;

(j), order the dismissal of the charge; or

(k) ... any other sentence or make any other order that is authorised under this Decree or any other Act.

36. One can find learned Magistrate's Order to have been founded on (i) above. The question is whether conditions attached to the order are justified or proper. However, *he did not release the offender on the adjournment of the hearing.*

37. I have already discussed at paragraph 25 the impropriety in ordering compensation in respect of count 1 to be payable to a police officer who is only a trustee of the State or public tasked to maintain law and order.

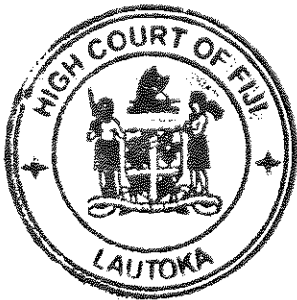
38. Second count is Drunk and Disorderly, an offence committed plainly against tranquility of the public. There is no logical or moral, not to mention lawful basis for a court to order pizzas and juices to a high ranking police officer who is not even involved in arresting the Accused. Courts must not allow police officers to be rewarded by offenders for performance of their official

duties. The situation is further exacerbated when a judicial officer goes to the extent of naming the hotel pizzas to be ordered.

39. Justice must not only be done but also appear to be done. Appearance matters, because the public's perception of how the courts are performing affects the public's confidence in the judicial system. There is a direct correlation between the public's perception of how the courts are performing and the confidence in the judicial system as the guardians of the rule of law. *A judicial officer shall not knowingly permit court staff or others subject to the judge's influence, direction or authority, to ask for, or accept, any gift, bequest, loan or favor in relation to anything done or to be done or omitted to be done in connection with his or her duties or functions.* (Bangalore Principles of judicial Conduct 2002 4.15)
40. The incidental orders made by the learned Magistrate offend the norms and principles of propriety expected of a judicial office. Therefore, I have no hesitation in revising the orders made by the learned Magistrate.
41. However, a difficulty arises as to what fresh order or orders ought to be made once the impugned 'no conviction order' is set aside. In view of Section 262(2) of the Criminal Procedure Act, Court is faced with a dilemma as it dictates that *no order can be made to the prejudice of an accused person unless he or she has had an opportunity of being heard either personally or by a lawyer in his or her defence.*
42. Accused is an Australian citizen and has now left the country. His whereabouts cannot be ascertained. Various attempts made to serve a notice of revision papers on him have not been successful. Giving an opportunity to the Accused of being heard either personally or by a lawyer in his defence has become impracticable and impossible.
43. Where a plea of guilty is tendered by an accused and the Court finds him guilty of the offence/ offences to which he has pleaded, then it is purely a matter of discretion rested in the hands of the sentencer to decide as to what course of action he or she should take under Section 15 (1) of the SPA. Therefore, any order made under Section 15(1) cannot be considered as an order made to the prejudice of an accused person although he has not had an opportunity of being heard.
44. Accused had pleaded guilty to the charges before the learned Magistrate and expressed remorse and sought forgiveness. He had obeyed the court and complied with the impugned Orders in the belief that they were valid and passed according to law. Therefore, he should not be punished twice for the same offences.

Conclusion

45. Orders made not according to law cannot be allowed to stand. If allowed, the decision making process of the judiciary will be called into question in the eyes of the public and the public will ultimately lose confidence in the judiciary and the administration of justice. Any prejudice if any caused to the Accused in not giving him an opportunity of being heard in this matter is far outweighed by the damage that will be caused to the administration of justice if the impugned orders are not revised and set aside. An accused who has once obeyed court orders should not be punished twice for the same offence.
46. Therefore, following orders are made:
- (a) The Orders given by the learned Magistrate is revised and set aside.
 - (b) In its place, a conviction is recorded.
 - (c) Pursuant to Section 15(1) (h) of the Sentencing and Penalties Act Accused is discharged.




Aruna Aluthge
Judge

At Lautoka
13th June 2017

Counsel: Director of Public Prosecution for State