IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Criminal Appeal No. 31 of 1985.

Between:

RAMESH CHANDRA f/n Bhagauti

Appellant

- and -

R E G I N A M

Respondent

Mr. M. Krishna for the Appellant.
Mr. G. E. Leung for the Respondent.

Date of Hearing : 3rd July, 1985

Delivery of Judgment: 20th July, 1985

JUDGMENT OF THE COURT

SPEIGHT, VP

This appellant was convicted in the Magistrate's Court at Labasa on the 13th August, 1982 on two charges.

(1) Robbery with violence of Mrs Chandra Wati - section 293(1)(b) Penal Code, Cap. 17;

(2) Doing grievous harm to Mrs Wati with intent to maim, disfigure or disable - section 224(a) Penal Code;

and he was sentenced to 2½ years imprisonment and 3½ years imprisonment cumulative. He appealed against conviction

and sentence to the Supreme Court and this was heard by Mr. Justice Scott at the Supreme Court Labasa on the 11th of March, 1985. In the judgment delivered on the 18th of March, the learned Judge allowed the appeal in part by quashing the conviction on the second charge. He expressed the view, with which we concur, that the ingredients of the second charge were comprehended within the first and that the second charge was unnecessary. If it should have been in the case at all it should have been as an alternative charge and hence no verdict returned on it. Because the Magistrate had imposed separate sentences it became the learned Judge's duty to reassess the question of total culpability,and he amended the sentence which had been imposed in respect of the first charge by quashing it and imposing what he regarded as an appropriate sentence for the whole matter before the court, which he was entitled to do under the Criminal Procedure Code, section 319(2) Cap. 21. He reduced the total of the two previous sentences to a single sentence of five years.

The appellant has appealed to this court against the judgment of the learned Judge in the Supreme Court, which of course he is entitled to do, but some care is needed in analysing the progress of events throughout the two courts because of course in a case such as this a second appeal only lies on a point of law. It is necessary to endeavour to identify, from the earnest submissions of Mr. Krishna, the matters he put forward which can be so classified.

Originally there was one charge only before the Magistrate - namely robbery with violence and appellant consented to being tried in that Court. The first day of hearing consisted of very lengthy evidence from the complainant regarding the assault; and evidence from a taxi driver who had taken two people whom he identified as the complainant and the defendant in his taxi to a place not far from the scene of the alleged assault at a time shortly before it was said to have taken place. At the end of the first day the court adjourned for a view of the scene.

Next morning the Magistrate announced that he had given some thought overnight to the nature of the charge laid and he expressed the view that, in view of the severe injury suffered, it would have been appropriate to have an additional charge under section 224(a) - namely of wounding or doing grievous harm with intent. Counsel for the defence objected to this suggestion and the prosecutor indicated that he saw no reason to add the charge and did not support the Magistrate. However, despite this opposition the Magistrate directed that the second charge already referred to should be laid, and this was done. It is clear that under section 214 of the Criminal Procedure Code there is power to do this. The hearing continued. On the following day the Magistrate delivered a memorandum of his reasons for adding the second charge. There was much criticism before us of this action but it seems that the Magistrate may have thought that, should the first charge fail for

proof of theft from Mrs Wati, what was prima facie a serious assault, if proved, might escape conviction. In so doing he may well have thought that Sections 169 and 183 of the Code did not cover the situation.

On appeal the learned Judge agreed with appellant's counsel that the course taken by the learned Magistrate was inappropriate and, as already stated, he quashed the conviction on the second charge. Indeed the Judge said and we agree with him, that it seems that by the time the Magistrate came to sentence, he realized that he had split the first charge into its two essential ingredients, namely of theft and of violence and accordingly sentenced for those ingredients separately. For the reasons that the learned Judge gave we are of the view that it was appropriate to quash the second conviction. Learned Counsel for the Crown did not express any contrary view. It is not doubted that a Magistrate has power to add a charge, indeed it is his duty to do so if proceedings before him are obviously defective; he has a duty to see that justice is properly administered. Yet it should only be in the rarest circumstances that this step is taken when the prosecution has not so applied and has no wish for it. In a case such as the present we think that the limit to which a Magistrate should go is to ask the prosecution whether it has considered the desirability of an alternative charge, but if this invitation is declined the responsibility for failing to present a case properly then lies on the shoulders of the prosecuting authority.

Little more need be said concerning this issue because of course it was dealt with by the Judge on appeal in the way that appellant had asked; but as we understand, it is Mr. Krishna's submission that there was some residual relevance in what occurred on this aspect on another ground of his appeal, still to be dealt with, relating to partiality.

We return to our narrative. The case in the Magistrate's Court continued, and on the opening of the hearing on the third morning Mr. Krishna applied to change his client's consent to being dealt with in the Magistrate's Court and sought to have the matter removed to the Supreme Court. Conflict arises as to what was the nature of the application then made. The record of the Magistrate's Court proceedings says that the application to change election only related to the second count. In dealing with this application and in declining it, the Magistrate said in lengthy written reasons for declining, given on the 4th day of the hearing viz. 22nd of June, that

> "The accused does not seek to change election on count 1 and is happy that the trial continue on this count."

He then proceeding to decline the application holding that he had no power to do so - more of this in a moment.

When the matter went on appeal to the Supreme Court Counsel for the Appellant put in written submissions in support of his appeal. In these it was said that the Magistrate had misconstrued the application, and that the appellant wished his election to be tried in the Supreme Court to be in respect of both counts. We are now advised that on the 4th of March, 1985 and the 8th of March, 1985, affidavits were filed to the effect that the request had related to both counts and had been motivated by appellant's feeling that the Magistrate, in his handling of the matter of the added charge had demonstrated partiality, and that he felt he would not get a fair trial at his hands.

In this court Mr. Krishna has said that as the wish to change election arose from discontent and distrust, it would have been absurd to ask for change of place of trial on one charge and not on the other. There is much force in this argument. It seems however that although the learned Judge was aware that some document had been filed claiming that it was an application for both, he noted that this did not accord with the record. He drew attention to the fact that a complaint of inaccuracy to the record must comply with the Chief Justice's Practice Direction No. 2 of 1982 to supplement the record. That procedure envisages the matter being referred back to the Magistrate for comment and that had not been done. We add that we have ourselves seen cases where this procedure has been properly followed, and if the Magistrate cannot clarify the position, affidavits are sometimes obtained from court staff and similar people if

there is some reliable source of recollection available.

At all events the present complaint is that the learned Judge did not come to grips with the contents of the affidavit and deal fully with this as a separate ground of appeal, namely that by adding the second charge and by refusing change of election the Magistrate had indicated such partiality as to invalidate the proceedings. In this respect, we agree with the learned Judge that it would have been better had this matter been raised much earlier and the proper procedure resorted to, but out of consideration for the interests of justice we have ourselves received and examined the affidavits and will comment further when we come to the question of partiality.

Before doing this however, we find it necessary to deal with the argument before us, that when this question of change of consent was raised, the learned Judge erred in upholding the Magistrate's refusal. He did accept the submission, which had been contained in Counsel's written material, that although there is no absolute right in a defendant who has made his election to alter his consent part way through the hearing, there can be circumstances where the trial Magistrate has a discretion - see Shiu Ram v. The Magistrate's Court of Labasa (F.C.A. 52 of 1980) - but the circumstances would need to be unusual. While accepting that the submission was correct and that the Magistrate had been in error, the learned Judge went on to point out that the Magistrate had, as a precaution, also said that he had turned his mind to what he would have

done if he had such a power.

> "In case my view of the law should not be correct, I have deemed it proper to consider the present application on its merits and to indicate how I would have exercised my discretion had I determined that this course was open to me."
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> "I am not satisfied that consent was given under the influence of any mistake, or that the accused will be in any way disadvantaged if the trial proceeds in this Court. It is undesirable that another court be called upon to adjudicate on a change arising out of the same set of facts. For all these reasons had the discretion been available to me I would have exercised it against the application and refused the accused leave to withdraw his consent given under section 4(1) of the CPC to trial in this Court."

We agree with the appeal Judge's view that the Magistrate reviewed the total circumstances and said that it would be inappropriate for a change of election to be permitted so late in lengthy proceedings. If these applications were granted in such circumstances the defence could continually abort a trial which appeared to be going against it. In truth we do not really think that this aspect of the matter fell for determination by us as an appeal on a point of law, but because of the rather confused circumstances concerning the record we have thought it appropriate to deal with it, but we see no reason for differing from the finding of the learned Judge.

For the same reason concerning the unresolved challenge to the record, the Supreme Court was not

properly seized of the claim put before us of magisterial partiality. Again we are prepared to consider the submission made, out of an abundance of consideration for the appearance of justice. It was submitted before us that the cumulative effect of the additional charge and the vigour with which the Magistrate insisted upon it, taken together with his dismissal of the latter application indicated overzealousness on the point of partiality. We do not say that the learned Judge did not deal with this point, but because it has been elaborated more fully before us, we deal with it. Where an inferior tribunal has clearly demonstrated bias, appellate courts will interfere; but it would need more than the material put forward here. All we have is the evidence of the Magistrate's use of legitimate procedural processes, taken together with the affidavit saying that this led the defendant to feel that the court was against him, and counsel's submission in Court to us that there were "murmurings among the spectators". This is quite insufficient to justify such a serious allegation. It is not possible to specify all the circumstances which would need to be demonstrated but there would have to be proper material evidencing that the judicial officer was patently departing from the path of fairness. This has not been demonstrated.

Finally there was advanced to us a lengthy analysis of the evidence of witnesses who it was said tended to favour the appellant's defence of alibi. That however is an argument based on weight of evidence. This is not

a point of law unless it can be taken to the point of showing that there was no credible evidence upon which a conviction could be founded. We have already mentioned that the complainant gave a lengthy account of being grievously assaulted by this man. There is no doubt that she was found in a badly battered condition the following day, and had suffered severe injuries. Indeed at one stage she must have been close to death. Not only did she identify the appellant as her assailant but there was the unshaken testimony of the taxi driver and he identified these two people as travelling in his taxi together near the crucial locality at the appropriate time. In such circumstances no appeal based on the availability of other conflicting evidence can be elevated to a point of law.

We have examined the various matters put forward on a wider basis than would normally be done but can see no reason for differing from the conclusions reached by the learned Judge. The appeal is dismissed. The quantum of sentence was also complained of in the notice of appeal, but no submission was made to us. All that need be said is that in effect the learned Judge reduced the total period by one year and we are far from satisfied that five years imprisonment for a crime of this nature is excessive.

All appeals are dismissed.

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Vice-President

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Judge of Appeal

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Judge of Appeal