IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL N0. AAU0014 OF 2004S
(High Court Cr. Appeal N0.HAC0001 of 2004L)

BETWEEN:

RAMESH CHAND
f/n Mahesh Prasad

APPELLANT

AND:

THE STATE

RESPONDENT

Coram: Ward, P
Eichelbaum, JA
Gallen, JA

Counsel: Appellant in person
R Gibson for respondent

Hearing: Wednesday 20 July 2005

Judgment: Friday 29 July 2005

JUDGMENT OF THE COURT

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[1] The appellant was convicted in the magistrates court of four charges of obtaining money by false pretences and sentenced to 18 months imprisonment on each charge concurrent. He appealed to the High Court against conviction and sentence and the appeals were dismissed. The State also appealed to the High Court against the sentence. That appeal was allowed and the sentence increased to 2 years imprisonment on each charge.

[2] Before considering the merits of the appeal to this Court, it is necessary to look at the history of the case. The offences were committed in late 1998 and the appellant first came before the magistrates' court on 13 August 1999. On 23 August he pleaded not guilty to all charges. There followed nine adjournments (mostly because counsel on one side or the other were not ready) before the trial started on 23 June 2000. The hearing of the prosecution evidence took place over three days spread over a month and it closed its case on 19 July 2000. Counsel for the appellant then made a submission of no case to answer.

[3] The magistrate reserved his decision to 18 August 2000 but his ruling was not ready and the case was further adjourned to 11 September, 22 September and 13 October when it was delivered. The magistrate found a case to answer and there followed eight more adjournments before the defence case was called and completed on 20 September 2001.

[4] Judgment was reserved to 19 October 2001 but, as with the earlier ruling, it was not ready that day. The case was adjourned for this reason to 19 October, 16 November, 6 December 2001, 31 January and 28 February 2002. At the next hearing, on 27 March 2002, it was still not ready and the appellant told the court he wished to change his plea to guilty. Having taken the new plea, the magistrate adjourned the hearing to 10 April when the appellant was sentenced to a total of three and a half years imprisonment on each charge concurrent.

[5] He appealed against that conviction and sentence and it was allowed by Shameem J. She set aside the plea, conviction and sentence and ordered the magistrate to "proceed to judgment as expeditiously as possible" adding the thoroughly justified comment that "the conduct of these proceedings has encountered enough delay already."

[6] On 8 October 2002, the magistrate, having received the High Court decision, stated he would stand the case down until 3.0pm that day to deliver judgment but did not do so. On 10 October 2002 he adjourned it to 8 November 2002 for judgment but on that day an adjournment was requested by the defence and judgment was eventually delivered

on 15 November 2002. The appellant was convicted and, following a challenge to the accuracy of the previous convictions and twelve more (largely unexplained) adjournments, the appellant was sentenced on 1 August 2003 to 18 months imprisonment on each count concurrent with each other but consecutive to a sentence he was then serving. As can be seen, this was a few days short of four years from his first appearance on these charges in the Magistrates' Court and five years from the date of offence.

[7] The State's appeal to the High Court was heard, again by Shameem J, on 13 February 2004. It was listed as the State's appeal against sentence but, when it came before Shameem J, the appellant told the court he had filed an appeal against conviction and sentence. The learned judge, properly, allowed him to pursue his appeal and, as has been stated, it was dismissed and the State's appeal allowed.

[8] The appeal to this Court is bound by the terms of section 22 of the Court of Appeal Act and is therefore confined to grounds which involve a question of law only.

[9] The appellant, who appeared in person, raised six grounds of appeal against conviction and five against sentence.

[10] Of the grounds of appeal against conviction some referred to matters which had not been raised before the High Court. However, as the appellant was unrepresented and in some deference to the amount of work he had obviously put into the preparation of his appeal, we heard him and will deal with them briefly.

[11] His first two grounds challenged the manner in which the original charges were sworn. He points out that the signature of the officer bringing the complaint does not state his rank and suggests it is therefore a nullity. He was unable to cite any authority for that proposition and it is clearly wrong. He also points out that the date the charge was sworn in front of the magistrate is four days after the officer signed the charge. That is, he contends, clear evidence that the dates are wrong. Again we cannot accept that contention. There is no reason why the officer should swear the charge on the same day he signs it. We certainly do not see it as proof of any malpractice as was suggested by

the appellant. Both were matters of form rather than substance and do not render the charge a nullity

[12] At the magistrates' court, the prosecution filed amended charges on the 5 June 2000. Prior to their filing, there had been application by the defence for an adjournment which was opposed by the prosecution on the ground that it was ready to proceed. The adjournment was allowed. The third ground of appeal suggests, if we understand the appellant's arguments correctly, no application to amend was made before the amended charges were filed and the fact they were filed after the prosecution said it was ready to proceed was, in some way, improper. There is no substance in this argument and the record shows they were accepted for filing without objection by defence counsel. This ground is rejected also.

[13] The fourth ground suggested the learned judge had failed to consider properly the effect of the delay in the case. It is correct that, in her judgment on 27 February 2004, the judge confined her comments to the delay between conviction and sentence. That was clearly because the issue had been raised by the appellant solely in relation to the allowance he suggested should have been made when the appropriate length of sentence was being decided. In this Court he referred to the wider issue of the overall delay. That had been considered by the learned judge in her earlier judgment of 3 October 2002. Although that judgment is not the subject of this appeal we have looked at it and we see no grounds to criticise the judge's findings on the effect of delay in either appeal judgment but we will return to the issue of delay.

[14] The remaining grounds of appeal against conviction raise issues of fact. We allowed the appellant to address us on them in case a point of law was involved but there was not and we do not deal with them further.

[15] The appeal against conviction is dismissed.

[16] His grounds of appeal against sentence are confused but relate to a challenge which was raised to the list of previous convictions that had been produced to the court. It is correct that an objection was made in the magistrates' court. We questioned the

appellant closely on the actual inaccuracy about which he was concerned. The list submitted to the court included 36 previous convictions of which the majority were for similar offences. It included four convictions in May 1990 in relation to which there had been a successful appeal against the total sentence. The record of convictions supplied to the court correctly showed the appeal. The appellant's complaint was that the original sentence should not have been included. He also suggested the convictions more than 10 years old were not to be taken into consideration.

[17] This is an appeal against the sentence passed by the judge and can only be appealed on the ground that it was unlawful or passed in consequence of an error of law. The learned judge gave a lengthy and careful explanation of the sentence she was passing. There is no suggestion that the judge took into account any improper matters and the sentence she passed was clearly lawful.

[18] We do not consider there is any merit in the appellant's complaint that some of his older convictions should not have been placed before the court. By section 26 of the Rehabilitation of Offenders Act, 1998, where a fresh offence is committed before the rehabilitation period of an earlier offence has been completed, the rehabilitation period for the earlier offence does not expire until the rehabilitation period of the later conviction expires. In this case, the frequency of offending by this appellant prevented any earlier rehabilitation period expiring.

[19] The appeal against sentence is also dismissed.

[20] Before leaving this case, however, we must refer to the delays in this trial in the magistrates' court. Whilst some of the delay must be attributed to the unfortunate conduct of the defence, the overall delay and the part played in this by the magistrate cannot be justified on any ground. We accept that all magistrates work under a great deal of pressure and we have no evidence, of course, of the actual state of the list in the case of the magistrate involved. We were told that an intervening trial took priority and caused this case to be left for five months. Whatever the priority of that case, it is

inconceivable that the magistrate could not have made a maximum of two days available to finish a trial in which he had heard the prosecution case nine months before. The number of adjournments and the fact that, in very many of them, there is no reason given in the record, suggest what can only be described as a cavalier attitude to the rights of the accused to have his case heard within a reasonable time and a failure to follow the provisions of section 202(1) of the Criminal Procedure Code. That section falls within Part VI which provides for the procedure in trials before magistrates' courts:

> "202. (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless for good cause, which is to be stated in the record."

[21] This was not a case in involving any issues of unusual difficulty and there was no reason for the magistrate to seek written submissions on the submission of no case to answer. It was a clear case for immediate oral submissions and an oral ruling and the requirement to file written submission simply added to the delay. Neither can we see any justification for the delay of three month before the ruling was delivered. When it was eventually given, it was less than three pages of typescript of which the only passage which referred to the magistrate's considerations of the issues read:

> "I have carefully read and considered the evidence presented by the prosecution. Applying the above principles *[a reference to two paragraphs set out from a reported case]* to the facts of this case, I am of the view that, given the evidence so far laid before this Court, a reasonable tribunal might convict on it , and I thus find a prima facie case is made out on the remaining counts"

[22] The remainder of the ruling was devoted to non-contentious matters such as a statement of the charges, reference to the number of witnesses and the two paragraphs of the earlier case.

[23] Having made that ruling, the magistrate then adjourned the case to another date to fix a hearing date. No explanation is given for why that could not have been done the same day instead of further delaying the case, as a result, for another three months. On that hearing date the defence requested, and was given, an adjournment. No reason appears on the record but again it was adjourned to a mention date to fix a hearing date. Two further adjournments with no stated reason meant that the magistrate heard the defence evidence fourteen months after the close of the prosecution.

[24] There then followed six adjournments each of which was because the judgment was not ready until, six months after the defence case was completed, the appellant, having been told yet again that it was not ready, changed his plea. He tells this Court it was in desperation to have the matter completed and we accept that could well have been his motivation.

[25] Subsequent delays were the result of the first appeal.

[26] This Court has had occasion previously to comment on the length of time that is taken for judgments to be delivered. In *Shan Muga Vellu and Diamond Express v Shila Wati Prasad*, Civil Appeal ABU 40 of 2004, 18 March 2005, we commented on a delay in the delivery of a judgment in the High Court and suggested that the use of written submissions in a straight forward case was a significant reason for many delays in delivering judgment. We repeat that concern and add that a need for written submissions at any stage in a magistrates' court must be the very rare exception rather than the rule.

[27] However, that was only part of the reasons for the delays in this case. A major reason for what was a scandalous delay was the apparent failure of the magistrate to consider the feelings of the man appearing before him or to apply himself to the case properly.

[28] We also question the conduct of the defence lawyers in this case. They have a duty to their clients to see that a case is properly and promptly decided yet, in the present case, there is no record of any attempt to expedite the trial process. On the contrary, the record suggests the defence lawyer condoned the delay.

[29] We would recommend that the Chief Magistrate take appropriate steps to ensure magistrates are aware of their duty under section 202 of the Criminal Procedure Code.

Order:

Appeal against conviction and sentence dismissed.

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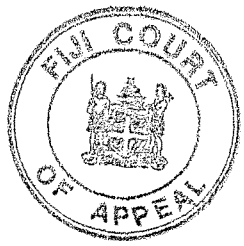
Ward, P.



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Eichelbaum, JA

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Gallen, JA

Solicitors:

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