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

CRIMINAL APPEAL NO. AAU0060 OF2006S
(High Court Criminal Action No. HAA 97 of 2006S)

BETWEEN: AZAMATULA

Appellant

AND: THE STATE

Respondent

Coram: Goundar, JA
Khan, JA
Lloyd, JA

Hearing: Thursday, 13th November 2008, Suva

Counsel: A.K. Singh for the Appellant
J. Nagnailevu for the Respondent

Date of Judgment: Friday, 14th November 2008, Suva

JUDGMENT OF THE COURT

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[1] Pursuant to the provisions of s22(1) of the Court of Appeal Act the appellant appeals to this Court against a decision of a judge of the High Court ordering that he be retried after the judge had allowed his appeal against conviction by a magistrate on one charge of indecent assault, on which charge the appellant had been sentenced to 18 months imprisonment.

The brief facts & chronology of events

[2] On 28 March 2003 the appellant was charged by the police with a single count of indecent assault, contrary to s154 (1) of the Penal Code, Cap 17. The charge averred

that the appellant indecently assaulted the named complainant between 1 January 1998 and 30 June 2000 at Manoca. The case was first mentioned in the Suva Magistrates' Court on 2 April 2003 on which day the appellant pleaded not guilty to the charge and the case was adjourned for further mention. After several more adjournments, on 29 September 2003 the hearing of the case against the appellant commenced. At that time the appellant was tried together with a co-accused. The co-accused died some time later and, given that fact, he will be referred to only briefly in this judgment.

[3] At the trial on 29 September 2003 the complainant was the first prosecution witness called to give evidence. She stated that she worked with the two accused at a factory. She was a machine operator and the two accused were the factory managers. She said that on approximately 10 different occasions before the coup in 2000 both accused touched her breasts and thighs and attempted to kiss her. She said that she lived in a squatter settlement and the accused indecently touched her because she wanted more work at the factory in order to survive. She further said that on one occasion during the 2000 coup the appellant undid the zip of his pants, pulled out his penis and asked her to touch his penis. She refused to do so. She said she had complained at the time to a Director of the company which employed her. She was made redundant by her employer and sometime after finishing work she made complaint about the appellant and his co-accused to the police and Human Rights Commission. In cross-examination it was suggested to her by counsel for the appellant that her account was false and that she made it up because she was laid off by the company and wanted money from the appellant. She denied this. A former workmate of the complainant then gave evidence. He was declared hostile and cross examined by the prosecutor.

[4] On 30 September 2003 three police officers were called to give evidence. Their evidence covered the interviewing of the two accused and the complainant. Both accused when interviewed by police denied the allegations of the complainant. When the prosecution case concluded defence counsel asked that the matter be

adjourned so that he could prepare written 'no case to answer' submissions. The prosecution case rested solely upon the uncorroborated evidence of the complainant. The Director of the complainant's employer to whom she said she complained was not called by the prosecution to give evidence nor was his absence explained.

[5] The magistrate acceded to the defence request that the matter be adjourned for written 'no case' submissions to be prepared. The case was then adjourned on several more occasions. On 2 December 2003 the magistrate ruled there was a case to answer. Thereafter the matter was adjourned on a number of different occasions and for a variety of reasons, including the trial magistrate not being available, on one occasion defence counsel not being present and on another occasion defence counsel being engaged elsewhere. Finally on 23 February 2006 the defence case was heard. The appellant denied committing the offence. Several of the complainant's former workmates were also called to say the complainant had never complained to them.

[6] The magistrate delivered his judgment in the matter on 21 April 2006. The magistrate convicted the appellant being satisfied that the prosecution had proved its case beyond reasonable doubt. The magistrate stated in his reasons for convicting the appellant that he had found the complainant to be a truthful and reliable witness who had given evidence in a forthright way and she was unperturbed by cross-examination. The magistrate kept a full note of the evidence of each witness. The magistrate sentenced the appellant to 18 months imprisonment.

The appeal to the High Court

[7] On 8 August 2006 the appellant filed amended grounds of appeal with the High Court Registry, challenging his conviction on a number of grounds. The grounds of appeal included the following: the matter should have been permanently stayed under s29(3) of the Constitution due to unreasonable delay; the complainant's

evidence was not corroborated; the absence of recent complaint; lack of particulars in the charge; shifting of the burden of proof and the sentence was excessive.

[8] The appeal against conviction and sentence was heard by a High Court judge on 29 September 2006. The judge delivered her judgment allowing the conviction appeal on 13 October 2006. In a lengthy judgment the judge dealt with some only of the grounds of appeal (delay and duplicity). There was no need to go into other grounds because the judge allowed the appeal on the ground that the charge was quite obviously bad for duplicity. The judge dealt with the issue of delay at great length applying the relevant principles from many well known cases on delay to the facts of the case. In ordering a retrial the judge found that there was no such pre or post trial delay as to suggest the appellant could not get a fair trial. She found that delay had caused no real prejudice to the appellant sufficient to justify a permanent stay of the proceedings.

The Appeal to the Court of Appeal

[9] In a Notice and Grounds of Appeal dated 6 November 2006 the appellant appeals to this Court against the order made by the judge below that he be retried and against her failure to grant him a permanent stay.

[10] The appeal to this Court is brought pursuant to the provisions of s 22(1) of the Court of Appeal Act. Such an appeal can only be brought on a question of law. As we understand the appellant's submissions, the question of law the subject of the challenge to the order for a retrial is that the judge's exercise of discretion in ordering the retrial miscarried, primarily for the reason that she gave too little weight to the prejudice that would be caused to him by the delay resulting from an order for his retrial, as well as breach of the appellant's constitutional right to have his case *'determined within a reasonable time'* (s29(3) of the Constitution). We agree that this raises a question of law.

[11] The ground of appeal that the judge erred in failing to grant a permanent stay is no ground of appeal at all. The High Court judge was not asked to grant a permanent

stay, so she cannot in any way be criticised for failing to do so. However the issues relevant to this ground are of primary relevance to the retrial ground and we are prepared to deal with them in that context.

The merits of the appeal

[12] The power of a High Court judge to order a retrial is found in the provisions of section 319 of the Criminal Procedure Code. The power is discretionary and as such the power must always be exercised judicially (***Shekar v State*** [2005] FJCA 18). As was said by the Privy Council in ***Au Pui-kuen v Attorney-General of Hong Kong*** ([1980] AC 351) *'no judge exercising his discretion judicially would require a person who had undergone this ordeal once to endure it for a second time unless the interests of justice required it'* (see also ***Ting James Henry v HKSAR*** [2007] HKCFA 71). The overriding consideration in the exercise of the power is the interests of justice (***Aminiasi Katonivualiku v. The State*** (CAV 0001/1999S; 17 April 2003).

[13] In the case of ***Au Pui-kuen*** the Privy Council went on to say that the exercise of discretion to order a retrial requires the consideration of a number of factors, some of which may weigh in favour of a retrial and some against. The Privy Council said that the interests of justice are not confined to the interests of either the prosecutor or the accused in any particular case. They also include the interests of the public that people who are guilty of serious crimes should be brought to justice and should not escape it merely because of a technical blunder by the judge below. One factor to be considered is the strength of evidence against an accused and the likelihood of a conviction being obtained on a retrial. The weaker the prosecution case, the less likely a retrial would be ordered. Another factor would be identifiable prejudice to an accused whilst awaiting a retrial such as might cause him to be unable to get a fair retrial. It has also been said that a retrial should not be ordered to enable the prosecution to make a new case or to fill in any gaps in evidence (***Togara v. State*** (by Majority) [1990] FJCA 6).

[14] The appellant's appeal cannot succeed unless it can be shown that the High Court Judge's decision to order a retrial was erroneous in accordance with the established principles governing appeals from discretionary judgments. Accordingly, it is for the appellant to show that the judge acted upon a wrong principle, took into account some extraneous consideration, failed to take into account a relevant consideration or mistook the facts (see ***House v The King*** (1936) 55 CLR 499 at page 505).

[15] In her judgment allowing the appellant's appeal against conviction and ordering a retrial, the judge articulated only one reason for ordering a retrial. The judge stated *'I order a retrial because of the seriousness of the alleged facts of the case'*. The strength of the prosecution case was not referred to by the judge at any stage in the judgment. Yet, in finding the appellant to have a case to answer on 2 December 2003 the magistrate specifically commented that it was a *'borderline case'*. In reality the prosecution case did not get any stronger during the defence case before the magistrate. The appellant merely denied the allegations and gave some evidence on possible reasons why the complainant might be telling lies. The evidence of the remaining defence witnesses took the matter no further.

Conclusion

[16] Taking all appropriate matters into account we are persuaded that the High Court judge's exercise of discretion in ordering a retrial miscarried. In our opinion the judge failed to take into account a most relevant factor, the strength of the prosecution case. The magistrate, at least at the end of the prosecution case, must have held real concerns as to the credibility and reliability of the complainant. Why else would he have stated it was a *'borderline case'* at the close of the prosecution case? Further, it will undoubtedly be difficult for the prosecution to draft new charges with sufficient particularity to enable the appellant to adequately defend himself. The conviction appeal was only allowed on the basis of duplicity and the prosecution were ordered by the judge to redraft charges so as to contain the requisite degree of particularity. All this will take place more than ten years after some of the events in question.

[17] We are also mindful of the appellant's constitutional right to have his case determined within a reasonable time. Whilst not in any way attempting to lessen the seriousness of the crime of indecent assault, it is not the most serious of crimes and we feel an almost 10 year delay in coming on for trial on such a charge is unreasonable. Little of the delay in this case can be placed at the feet of the appellant and given the time that has now elapsed (and will continue to elapse until a retrial can be heard) since the events in question and given the weakness of the prosecution case, we are of the view that the interests of justice are best served by there being no retrial.

Orders

(1) The appeal is allowed;

(2) The order made by the High Court Judge that the appellant be retried is set aside.

Goundar, JA

Khan, JA

Lloyd, JA

Solicitors:

Mehboob Raza and Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent