IN THE COURT OF APPEAL
FIJI ISLANDS
APPELLATE JURISDICTION

Criminal Appeal No: AAU0079/08
(on appeal from HAA 59/08)

BETWEEN :

SESONI VOLAU

Appellant

AND :

THE STATE

Respondent

Coram: Goundar JA
Madigan JA

Appellant: In person
Respondent: Mr. P. Bulamainaivalu

Date of Hearing: 16 November 2009
Date of Judgment: 4 December 2009

JUDGMENT

The appellant, having been given leave by the single Judge on 13 October 2008, appeals against his conviction and sentence for breach of bail contrary to s.26 of the Bail Act 2002 wherein he was sentenced to 9 months imprisonment for failure to attend Magistrate's Court hearings of his robbery case in Suva on 15th December 2005, 9 January 2006 and 17 March 2006.

2. The applicant was facing two charges (one of robbery with violence and one of unlawful use of a motor vehicle) in the Magistrate's Court from June 1st 2005. For reasons we need not rehearse, the matter remained before the Magistrate throughout that year until it was finally determined by conviction and sentence a year later on May 30th 2006.

3. Between the 15th December 2005 and the 17th March 2006 the appellant, on bail, did not appear on 3 occasions. When he eventually did appear on the 20th March, 2006 he pleaded guilty to the two charges he faced.

4. The appellant was convicted on the 16th May 2006 after he admitted the summary of facts relating to the robbery and unlawful use of a vehicle. He was sentenced on the 30th May 2006 to two concurrent terms of 6 years. Following delivery of that sentence the Magistrate then enquired of this appellant, the then convict, of his whereabouts from December 2005 to March 2006 to which the appellant replied *"I was doing farming in my village"*. The Magistrate then forfeited his bail monies of $1,000 and *"in default nine months imprisonment"*. He then concluded proceedings for the day by noting in his record *"Six years, 9 months. Bail forfeited inclusive"*.

5. Apart from any questions of proper process, we consider that the record of proceedings on the 30th May 2006 is deplorable; both for its inadequacy and its ambiguity. The whole point of keeping a record of proceedings at first instance is to provide an appellate court a full picture of what transpired in the lower Court. To jump within minutes from *"in default nine months"* to *"total six years 9 months. Bail forfeited inclusive"*, is both inexplicable and illogical. It suggests that the Magistrate had no intention of allowing the convict a choice of penalty – he imposed a term of imprisonment and forfeited the bail monies in addition – all without hearing one word of mitigation from the appellant.

The offence of breaching conditions of bail

6. Breach of bail is defined by s.25 of the Bail Act 2002, Cap 22C which includes by 25(1)(c)

"absents himself or herself from the Court, without the Court's leave at any time after he or she has surrendered to custody"

Obviously the appellant's non attendance over 4 months would raise the presumption of a prima facie case against him for breach of bail.
s.26 provides the penalty for absconding on bail. It reads:

"26(1) A person who has been released on bail and who fails without reasonable cause to surrender to custody commits an offence and is liable on conviction to a fine of $2,000 and 12 months imprisonment.

(2) the burden is on the defendant to prove that he or she had reasonable cause for failing to surrender to custody".

7. It is quite apparent from a reading of s.26 that it was the intention of the Legislature to have a person accused of this offence mount a defence by showing (or not showing as the case may be) *"reasonable cause"* for not surrendering to custody. By fining this appellant $1,000 and sentencing him to nine months imprisonment in addition, before enquiring of the appellant's reasons, the Magistrate is defeating the import of s.26 which by its very interpretation calls for an enquiry.

8. To compound error upon error, the Magistrate has in his sentence purported to sentence the appellant for breach of bail pursuant to s.27(3) of the Bail Act. Section 27 is concerned with forfeiture of security and provides for estreatment of part or whole of any monies deposited or security given in guarantee of a bail undertaking. There being no evidence on the record of any deposits or securities given to secure bail for the appellant, the provisions of s.27 are entirely irrelevant to the within breach of bail conditions. If the Magistrate were to convict and sentence this appellant lawfully, he would do so pursuant to s.26 of the Bail Act, and <u>not</u> s.27.

<u>Procedure on proving breach or conditions of bail</u>

Two salient points can be taken from a reading of the penalty section, 26 of the Bail Act. They are:

(1) Without reasonable cause; and

(2) Conviction

Obviously, a sentence cannot be passed on a miscreant bailee without a conviction and a conviction cannot be entered without an enquiry in which the accused makes submissions on reasonable cause. Neither of those two conditions were satisfied in this case and for that reason alone, coupled with the fact that the Magistrate was seeming to rely on a totally irrelevant section of the Bail Act would lead this Court to the conclusion that there has been a miscarriage of justice in these proceedings for breach of bail and therefore the appeal must be allowed.

9. However, the matter does not rest there. The appellant argues in his home-made grounds that he cannot be "convicted" (if he indeed was) and sentenced, without a proper charge being laid bringing the offence of absconding before the Court, thereby enabling the misdeeds to be ascertained and argued and if convicted, mitigated against.

10. The State argues that the case of **Schiavo v. Anderton**[1986] 3WLR 176S is good authority for the proposition that s.26 does not require a charge but can be instituted by the Court's own motion. This proposition is gleaned from the judgment in **Schiavo** of Lord Watkins J who analysed the true import of section 6 of the English Bail Act 1976.

11. The **Schiavo** case discussed the nature of s.6 of the English Act and whether the section should be *"brought into play"* by an information, a charge for a summary offence or a warrant from the Bench. The discussion of that s.6 can be distinguished by the very fact that the wording of s.6 and the wording of s.26 in our Bail Act are totally different. The English s.6 is defined by seven sub-clauses which have the effect of minimizing the offence rather than the bold statement of offence that our s.26 would purport to be.

12. For that extent we do not agree that **Schiavo** can be any authority to preclude the laying of a charge in this jurisdiction and for the State to attempt to rely on it in their opposition to this appeal was inappropriate and misleading.

13. For the future proper conduct of trials for breach of bail conditions we could make the following stipulations:

1) that a formal charge be laid under s.26 of the Bail Act.
2) that the prosecutor (more probably a police prosecutor) set out the facts of the breach before the Court
3) that the Court record be relied upon as evidence (if indeed the breach is one of absconding)
4) that a case to answer be made out
5) that the accused be called upon to show reasonable cause.
6) verdict
7) mitigation (if appropriate)
8) sentence (if appropriate)

14. Such a procedure, though not necessarily lengthy would instill in both the accused and any interested observer, confidence in the due process of law.

15. It is quite apparent that in this case there has been an abuse of process. Not only has a conviction not been recorded against the bailee, there was no charge laid which would define the offence committed. The accused was given no opportunity to answer the "charge" and he was sentenced under a totally irrelevant section of the Act.

16. The Supreme Court in **Tirikula v. State** CAV0007 of 2008S in looking at questions on breach of bail said (at para 4)

> *"The petitioner has submitted that he was never tried for these offences, and was given no opportunity to show cause. He also*

submits that he was never informed, in a language that he could understand, of his obligation to surrender to his bail. (para 5) These points were not taken in the High Court or the Court of Appeal and the necessary evidence from the petitioner, and the Magistrate's reasons for convicting the petitioner, and imposing the sentences he did, are not in the record." And later [at para 26]

"If the supplementary record had supported the petitioner's claims his petition would almost certainly have been allowed and the sentences quashed".

17. Fortified by that dicta, and in the foregoing premises we have no hesitation whatsoever in allowing this appeal not only on the basis of the appellant's ground of no charge being laid, but on the additional and wider basis of the showing of lack of due process in the lower court to the prejudice of this appellant.

18. The appeal is allowed and the "conviction" and sentence of nine months both quashed.

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D. Goundar
Justice of Appeal

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Paul K. Madigan
Justice of Appeal

4 December 2009