IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 1 OF 2014

BETWEEN: STATE

Appellant

AND:
1. SALENDRA SEN SINHA
2. LOMANI DERENALAGI

Respondents

Counsels: Ms. S. Kiran for the Appellant
The 1st Respondent in person
Mr. E. Sailo for the 2nd Respondent

Date of Judgment: 30 June 2014

JUDGMENT

1. The respondents were charged before the Lautoka Magistrate under following counts:

First Count
Statement of Offence

KEEPING IN CONFINEMENT OF ABDUCTED PERSON: Contrary to Section 253 of the Penal Code, Cap, 17.

Particulars of the Offence

SALENDRA SEN SINHA f/n JOGENDRA PRASAD and **LOMANI DERENALAGI** on the 10th day of July, 2008 at Tauva in the Western Division having abducted Police Constable Vishwa Baran, wrongly confined the said Police Constable Vishwa Baran in vehicle registration number LR 969.

ALTERNATE COUNT
Statement of Offence

WRONGFUL CONFINEMENT: - Contrary to Section 256 of the Penal Code, Cap. 17

Particulars of the Offence

SALENDRA SEN SINHA f/n JOGENDRA PRASAD and **LOMANI DERENALAGI** on the 10th day of July, 2008 at Tauva in the Western Division wrongfully confined Police Constable Vishwa Baran in vehicle registration number LR 969.

2. On 3rd December 2013 the learned Magistrate refused the application by the State for adjournment to call another witness and acquitted both accused. By that time prosecution had led the evidence of two witnesses. The third police witness is from Sigatoka and the reason for her absence was that she had to attend to an ongoing wedding ceremony and take part in the rituals as a family member. She was ready to attend Court on any day the following week. The 1st accused strongly objected to this application. The Magistrate had observed that Section 170 (1) and (2) of the Criminal Procedure Decree limits the Magistrate's discretion to allowing adjournments. An adjournment will only be allowed if there is "good cause".

3. According to the learned Magistrate:

"Even though the request for adjournment is to next week Monday and if it is granted, it still constitutes a delay which is to the detriment of the Accused person's rights to have their trial begin and conclude without reasonable delay. The issue then arising is whether the reasons given to support an adjournment constitute delay or good cause."
"I find that the reasons given for the non-attendance of the witness who is supposed to be in court today are unreasonable and is not a good cause in light of the fact that there had been more than enough time for planning and set herself free for the trial date. On the same note, even though the date was set in July 2013, she may have been served summons to witness only a month ago and if so, her plans for the rituals may have been already set."

4. It is against this acquittal that the State appealed within time.

5. The ground of appeal are :

(a) That the learned Magistrate erred in law and fact in not exercising his discretion to adjourn judicially, by refusing the request of the Prosecution and accordingly acquitting the Respondents.
(b) That the learned Magistrate erred in law in not allowing the prosecution to close its case and then failed to give a no case to answer ruling as there were already evidence before him.

6. Both parties have filed written submissions.

7. The 1st respondent had taken up the position that DPP personally had not signed the notice of appeal and therefore had not complied with the provisions in Section 246 of the Criminal Procedure Decree and there is no sanction of the DPP.

8. The legal position on this issue is now settled. In **Fiji Independent Commission Against Corruption v Apolosi Pio Sekitogo** Crim. App. No. AAU 0058 of 2012 (5th December 2013) it was held that such sanction is not needed when the appeal against acquittal is filed either by DPP or FICAC.

"[17] *If FICAC or the DPP files an appeal against the acquittal by the Magistrates' Court in compliance with their statutory right, then there is a presumption that the official decision to prosecute an appeal is made in a principled manner. In those circumstances, there is no logic in requiring a written sanction to validate your own appeal. Written sanction is only required if an appeal is brought in the High Court by a person or institution other than FICAC or DPP. Based on those reasons, we hold that the High Court erred in law in dismissing FICAC's appeal for want of written sanction."*

9. The Section 170 of the Criminal Procedure Decree is as follows.

(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 there is good cause, which is to be stated in the record.

(2) For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.

(3) An adjournment under sub-section (1) must be to a time and place to be then appointed and stated in the presence and hearing of the party or parties, or their respective lawyers then present.

(4) During the adjournment of a case under sub-section (1), the magistrate may-

(a) Permit the accused person to leave the court until the further hearing of the case; or
(b) Commit the accused to prison; or
(c) Release the accused upon his or her entering into a bond (with or without sureties at the discretion of the magistrate) conditioned for his or her appearance at the time and place to which the hearing or further hearing is adjourned.

(5) If the accused person has been committed to prison during an adjournment the adjournment may not be for more than 48 hours.

(6) If a case is adjourned, the magistrate may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or to offer no evidence on the day fixed for the adjourned hearing, before adjudicating on the case.

(7) A case must not be adjourned to a date later than 12 months after the summons was served on the accused unless the magistrate (for good cause which is to be stated in the record) considers such an adjournment to be required in the interests of justice.

10. The section 202 of the Criminal Procedure Code is similar to this section.

1st Ground of Appeal

11. The law on discretion is settled in Fiji.

12. In ***Siwan v State*** 2008] FJHC 189; HAA 050.2008L (29 August 2008) Hon. Mr. Justice Daniel Goundar held that an order made pursuant to Section 201 (2) (b) of the Criminal Procedure Code is clearly discretionary. He further held:

*"The law in relation to an appeal against the exercise of discretion is settled. The discretion will be reviewed on appeal, if the trial court acts on wrong principle, or mistakes the facts, or is influenced by extraneous considerations or fails to take into account of relevant considerations. In addition, if it should appear that on the facts the order made is unreasonable or plainly unjust, even if the nature of the error is not discoverable, the order will be reviewed (**House v The King** [1936] HCA 40; (1936) 55 CLR 499, **Evans v Bartlam**[1937] AC 437). Failure to give weight or sufficient to relevant considerations will also vitiate the exercise of a judicial discretion but only if that failure is central to the exercise of the discretion (**Charles Osenton & co. v Johnston**[1942]AC 130).*

13. In ***State v Sivaro*** *[1996] FJHC 44; HAA 0038j.1996s (29 August 1996) Hon. Mr. Justice D. Pathik held that:*

"The granting of an adjournment is always the exercise of a judicial discretion. (ROBERT TWEEDLE MACAHILL and REGINAM, (Crim. App. 43/80 FCA). I am of the view that, in the exercise of his judicial discretion the learned Magistrate ought to have granted an adjournment to allow the ***State*** *to muster its absent witnesses. For the learned Magistrate to say that it was a "final" hearing day and he will not budge from that means that he is fettering the exercise of the judicial discretion vested in him which he cannot do. This approach of his is certainly going to cause injustice to the parties. Not only that, this was a very serious offence involving a huge quantity of 'drug' for which the law provides imprisonment for a few years and mandatory custodial sentence if the Respondent is found guilty and convicted. I find that if ever there was a case for the exercise of*

discretion it was this. On this aspect I refer to the following passage from the judgment of ATKIN L.J. in MAXWELL v KEUN (1928) 1 K.B. 645 at 653 C.A.:

"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

"As stated earlier the Court has to consider whether in this case it was an appropriate, fitting and lawful exercise of the learned Magistrate's discretion to acquit the accused."

"A similar situation arose in the Hong Kong Court of Appeal case of ATTORNEY GENERAL v TUNG YING CHUEN (1987) 2 HKC 349 at 350 and I find the following passage from the judgment of KEMPSTER J.A. pertinent to this case:

One relevant factor must be the time during which an accused person has been kept in custody. Another must be the gravity of the charges. A third may be the behaviour of the prosecution. We incline to the view that not only must someone sitting in a judicial capacity give an opportunity for the explanation of failure by any party to have a case ready, whether in relation to documents, the availability of witnesses or otherwise but also, unless, for example, a party has shown a contemptuous disregard of his obligation to further the expeditious discharge of business, for that party to put his house in order within a reasonable time.

We think, even without recourse to authority, that here the judge failed to do justice to the Crown. After all, the interests of the community have to be considered as well as those of the individual charged. Really there is only one way in which the judge's discretion could properly have been exercised and that was to grant a further short adjournment to allow for provision to be made for the material witness to be brought before the court or for some explanation to be given for her absence."

"Here it is the Appellant's contention that the learned Magistrate did not exercise his discretion in a judicial way. In R v BIRMINGHAM JUSTICES, ex. p LAM & ANOR (1983) 3 AER 23, 28 WOOLF J said:

"When exercising the discretion which they have whether or not to adjourn cases, the justices have to exercise their discretion judicially. Doing that, they must be just not only to the defendants but to the prosecution as well. They must not use their powers to refuse an adjournment to give a semblance of justification for their decision to dismiss the prosecution when the refusal of an adjournment means that that is an inevitable consequence."

14. In **Rajesh Chand & Shailesh Kumar - v - The State** Criminal Appeal No. AAU0056 of 1999S [2001] 2 FLR 400 the Court of Appeal considered an appeal from a decision of the High Court to set aside an acquittal after a refusal of an adjournment in the Tavua Magistrates' Court. In that case, the prosecutor had four witnesses available (out of six who were to be called) and said that the case could be part-heard. The Magistrate refused to allow the case to proceed on a "part-heard" basis, saying that he had been instructed by the Chief Magistrate not to commence any part-heard cases "as it will cost us a lot of time and money." The accused in that case was acquitted under Section 210 of the Criminal Procedure Code. The High Court in considering the acquittal said that the Magistrate had failed to act judicially. He had not considered the previous history of the case, whether the summons had been served, or when the prosecutor became aware of the failure of the witnesses to obey the court's process. The acquittal was set aside.

The Court of Appeal upheld this decision, saying, at page 402:

"The principals upon which an appellate court should act when reviewing a decision by a judge or magistrate to grant or refuse adjournment are well settled. The judge or the magistrate has a discretion as to the proper mode and time of trying an action. The exercise of that discretion should be interfered with by an appellate court only on exceptional circumstances. If it appears that the result of the order made in the court below is to defeat the rights of the parties altogether or to do an injustice to one or other of the parties, the appellate court has a duty to review such an order. Where the refusal of an adjournment would seriously prejudice a party, the application should be granted. If not granted, an appellate court will intervene if the discretion has not been exercised judicially or where its exercise was based on a wrong principle or resulted in an injustice: Maxwell - v - Keun (1928) 1 KB 645; GSA Industries Pty Ltd. - v - NT Gas Ltd. 24 NSWLR 710.

In the present case we are satisfied that the Magistrate exercised his discretion on a wrong principle. It is apparent from his decision that we have reproduced above that he was primarily concerned at the administrative inconvenience and cost to the Court of part hearing the case, and the Magistrate then being required to return to Tavua to complete the hearing. This was not a proper reason for denying the State the right to have the charges heard and determined by the Court. We accept that financial considerations and the convenience of the Court can be taken into account in determining how and when a case is to be heard, but that can never over-ride the interests of justice. In the present case, if these factors were considered to be relevant, with the result that a part-hearing was inappropriate, the correct course was to adjourn the hearing to a date and time when it could be properly heard and determined. By refusing either to part-hear the case, or to adjourn it, the Magistrate's decision resulted in an injustice to the State."

15. Considering the Section 170 of the Criminal Procedure Decree and the application of the State to adjourn the case for a week, this Court is of the view that the learned Magistrate erred in law and fact in not exercising his discretion to adjourn judicially, by refusing the request of the Prosecution and accordingly acquitting the Respondents. Therefore the ground 1 has merit and it succeeds.

Ground 2

16. What is the procedure the learned Magistrate should have followed in the event that he decided to refuse the application of the State to grant an adjournment.

17. It was held in **DPP v Vikash Sharma, Atish Prasad & Rakesh Lal** [1994] 40 FLR 234 at 236 by Hon. Mr. Justice Pain that:

"For clarity I record the formal steps that should be taken by a Magistrate in this situation. ***(After he refuses the prosecutor's adjournment application)*** *These rulings by him must be formally noted in the record:*

(i) The application for an adjournment is refused;

(ii) The hearing then proceeds by the Magistrate calling upon the Defendants to plead (if they have not already done so) and then calling upon the prosecutor to begin;

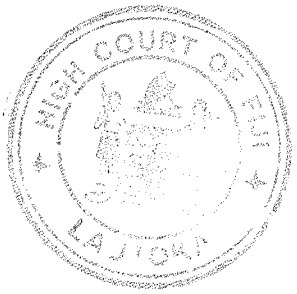
(iii) If no evidence is called by the Prosecutor, then the Defendant or Defendants can be acquitted under Section 210 of the Criminal Procedure Code."

18. This decision was cited with approval by Hon. Madam Justice Nizhat Shameem in **Land Transport Authority v Sharma** [2002] FJHC 112; HAA 0034J.2002S (16 May 2002) and **State v Talawadua** [2002] FJHC 148; HAA 0032J.2002S (16 August 2002) Hon. Mr. Justice Daniel Gounder also cited this decision in approval in **State v Vatukatakata** [2009] FJHC 185; Criminal Miscellaneous Case No.7 of 2009 (31 August 2009) and **State v Kumar** [2009] FJHC 266; HAA 056.2009 (30 November 2009).

19. In this case learned Magistrate in his ruling dated 3rd December 2013 gives reasons why the adjournment is refused. However, he had failed to direct the prosecutor to present the available evidence and to consider evidence already led in the case. This ground too has merits and it succeeds.

20. Therefore the appeal is allowed. The order of acquittal is quashed. The state and the two respondents want the matter to be heard by the same Magistrate. The trial to continue before the same learned Magistrate. State is allowed to call the witnesses.

21. Considering the delay in this trial, learned Magistrate is directed to conclude this trial within a month from the next mention date. The case is listed for mention in the Magistrate Court at Lautoka on 7 July 2013, at 9.00 a.m. to fix a hearing date before the Hon. Resident Magistrate Peni W Dalituicama.



Sudharshana De Silva
JUDGE

At Lautoka
30th June 2014

Solicitors : **Office of the Director of Public Prosecutions for Appellant**
1st Respondent in Person
Koyas for the 2nd Respondent