

IN THE HIGH COURT OF FIJI
CRIMINAL JURISDICTION
AT LAUTOKA

CRIMINAL CASE: HAA 21 OF 2013

BETWEEN : THE STATE
APPELLANT

AND : CHARLES YUSUF KHAN
RESPONDENT

Counsel : Ms. J. Fatiaki for the Appellant
The Respondent in absence

Date of Hearing : 10th of June 2015
Date of Judgment : 02nd October 2015

JUDGMENT

1. The Applicant files this petition of appeal against the ruling of the learned Magistrate dated 27th of May 2013 on following grounds, *inter alia*;
 - i. *The learned trial Magistrate erred in law in denying the prosecution the opportunity to call witnesses in respect of the trial of Charles Yusuf Khan on 27 of May 2013,*
 - ii. *The learned trial Magistrate erred in law in finding that the accused had no case to answer in circumstances where the learned trial Magistrate had denied the prosecution the right to call witnesses against Charles Yusuf Khan,*
 - iii. *The learned trial Magistrate erred in law in acquitting Charles Yusuf Khan pursuant to a finding on no case to answer,*

- iv. The state prays that the Honourable High Court of Fiji as Lautoka quash the order of acquittal and order a re-trial,*
2. This petition of appeal has been adjourned on several days as the Respondent failed to appear in court. In the meantime, the Appellant filed their submissions on 21st of March 2014. The Appellant further filed additional submissions on 11th of August 2014. Having made several attempts to serve the notice of the hearing on the Respondent, the court has issued a bench warrant. The Respondent appeared in court on 2nd of October 2015, and informed that he does not intend to file any submissions. Accordingly, I will proceed to pronounce my judgment as follows.

Background

3. The Respondent was charged in the Magistrate court for one count of Obtaining Property by Deception contrary to Section 317 (1) of the Crimes Decree. The Respondent pleaded not guilty for this offence; hence the matter was set down for hearing on 6th of July 2012 in the Magistrate Court. The Respondent did not appear on the date of the hearing, while two civilian witnesses of the prosecution were present. The learned Magistrate has issued a bench warrant against the Respondent and vacated the hearing on 6th of July 2012.
4. The matter was again set down for hearing on 6th of December 2012. The prosecution filed a substitute charge against the Respondent on 6th of December 2012, which was challenged by the counsel of the Respondent on the ground that the substitute charge has contravened the Section 182 (1) of the Criminal Procedure Decree. The learned Magistrate, having considered the objections of the Respondent, ruled that the filing of substitute charge was

wrong pursuant to Section 182(1) of the Criminal Procedure Decree and refused it. It appears from the copy record of the proceedings on 6th of December 2012, the learned Magistrate has vacated the hearing on the ground of insufficient time to conclude the hearing on that day. The record states that the prosecution was ready to proceed with the hearing and six witnesses were present. The hearing was re-fixed on 27 and 28 of May 2013.

5. On 27th of May 2013, the prosecutor has informed the court that he has not received the file from the DPP's office and the complainant was out of the country. Furthermore, he has stated that only two witnesses were present for the hearing. At that point, the Defence made an application to acquit the accused on the ground of no case to answer pursuant to Section 178 of the Criminal Procedure Decree. The prosecutor has informed the court that he is ready to proceed with the available witnesses. However, the learned Magistrate has refused the application of the prosecution and ruled that the available witnesses were not material witnesses. He further ruled that the prosecution cannot proceed with the matter in the absence of the complainant; therefore, he allowed the application of the Defence. Having held such, the learned Magistrate dismissed the charges and acquitted the Respondent pursuant to Section 178 of the Criminal Procedure Decree.

6. Section 178 of the Criminal Procedure Decree states that;


"if at the close of the evidence in support of the charge, it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused".

7. The court is allowed to exercise its jurisdiction under Section 178 only after the close of the evidence in support of the charge. In this instant case, the

prosecution was ready to offer evidence in support of the charge. However, the learned Magistrate denied the prosecution to present the available evidence on the ground that they were not material witnesses. The learned Magistrate then ruled that a case is not made out against the accused person sufficiently to require him to make a defence and acquitted the Respondent.

8. The learned Magistrate has erroneously determined the available two witnesses were not material witnesses and refused them to present their respective evidence, which in fact is not an appropriate and acceptable procedure. The learned Magistrate should have allowed the prosecution to present their evidence, and then make his ruling pursuant to Section 178 of the Criminal Procedure Decree. Accordingly, it is my opinion that the learned Magistrate has erred in law in denying the prosecution to present their evidence and subsequently finding that the accused has no case to answer pursuant to Section 178 of the Criminal Procedure Decree. I accordingly, quash the order of acquittal of the Respondent and order for a re-trial in the Magistrate court.
9. 30 days to appeal to the Fiji Court of Appeal.




R. D. R. Thushara Rajasinghe
Judge

At Lautoka

02nd October 2015

Solicitors : Office of the Director of Public Prosecutions