IN THE HIGH COURT OF FIJI
AT LAUTOKA
MISCELLANEOUS JURISDICTION

HAA NO. 23 OF 2016

BETWEEN : EPELI RASARO

Appellant

AND : THE STATE

Respondent

Counsel : Ms. P. Chand for Appellent
Mr. A. Singh for Respondent

Date of Judgment : 29th of August 2016

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the conviction and the sentence imposed by the learned Magistrate of Nadi on the 21st of April 2016 on the following grounds inter alia;

Appeal against Conviction,

i) *The learned Magistrate erred in law and fact when he has convicted and sentenced the Appellant for the second count of theft when he had pleaded not guilty for the offence,*

ii) The learned Magistrate erred in law when he failed to put the election of the Appellant before he took his plea for the first count of Burglary,

Appeal Against Sentence,

i) The learned Magistrate erred in law and in fact when he failed to consider the mitigating factors of the Appellant prior to sentencing the Appellant,

ii) The learned Magistrate erred in fact and law when the Appellant was sentenced to two years which was harsh and excessive under the circumstances of the offence,

2. Pursuant to the service of the petition of Appeal, the Appellant and the Respondent appeared in court on the 21st of July 2016. The learned counsel for the Appellant and the Respondent informed the court that they would like to conduct the hearing by way of written submissions. I accordingly, directed them to file their respective written submissions, which they filed as per the direction. Having carefully perused the Petition of Appeal, respective written submissions of the parties, and the copy of the proceedings of the Magistrates' court, I now proceed to pronounce my judgment as follows.

Background

3. The Appellant was charged in the Magistrate court of Nadi for one count of Burglary, contrary to Section 312 (1) of the Crimes Decree and one count of Theft, contrary to Section 291 (1) of the Crimes Decree. The Appellant pleaded guilty for the first count on his own free will and pleaded not guilty for the second count on the 13th of July 2015. The matter has been then adjourned till 10th of

August 2015 for filing of the summery of facts in respect of the first count and for the grounds for voir dire for the second count. The Appellant had failed to appear on the 10th of August 2015. Hence a bench warrant had been issued against him by the learned Magistrate. The Appellant had appeared on the 26th of October 2015 and he had been granted bail and bench warrant had been cancelled. Matter was then adjourned till 4th of December 2015 for filing of the Summery of Facts. On the 4th of December 2015, the summery of facts were read over to the Appellant and he had admitted it accordingly. The learned Magistrate has then convicted the accused for the first count and had given fourteen days to the Appellant to file his submissions in mitigation. Moreover, the Appellant was given fourteen days to file his grounds for voir dire in respect of the second count. The matter was adjourned till 19th of February 2016 for the Sentence.

4. According to the record of the proceedings in the Magistrates' court the Appellant had once again failed to appear on the 19th of February 2016. Hence, the Learned Magistrate has issued a bench warrant and has adjourned the matter till 2nd of May 2016. However, on the 21st of April 2016, the Appellant has appeared in court. Thereafter, the learned Magistrate sentenced him for 2 years of imprisonment for the offence of Burglary and 8 months of imprisonment for the offence of Theft. Both of the sentences to be served concurrently. The learned Magistrate has not considered the submissions in mitigation filed by the Appellant as it was not filed on time and the sentence had already been prepared by then. Aggrieved with the said sentence, the Appellant files this Petition of Appeal.

The Laws

5. Since the Appellant has been convicted upon his own plea of guilt, he is only allowed to appeal against the Sentence pursuant to Section 247 of the Criminal Procedure Decree, which states that;

"No appeal shall be allowed in the case of an accused person who has pleaded guilty, and who has been convicted on such plea by a Magistrates court, except as to the extent, appropriateness or legality of the sentence"

6. The Fiji Court of Appeal in **Kim Nam Bae v The State [1999] FJCA 21; AAU 0015 of 1998** has discussed the applicable approach of the Appellate court in intervening into the sentences imposed by the lower courts. It states;

'It is well established law that before this court can disturb the sentence, the appellant must demonstrate that the Court below fell into error in exercising its sentencing discretion. If the trial judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some of the relevant considerations, then the appellate court may impose a different sentence.'

7. Gounder JA in **Saqainaivalu v State [2015] FJCA 168; AAU0093.2010 (3 December 2015)** has discussed the applicable principles of reviewing of a sentence by an appellate court, where his Lordship held that;

"It is well established that on appeals, sentences are reviewed for errors in the sentencing discretion (Naisua v The State, unreported Cr. App. No. CAV0010 of 2013;

20 November 2013 at [19]). Errors in the sentencing discretion fall under four broad categories as follows:

i) Whether the sentencing judge acted upon a wrong principle;

ii) Whether the sentencing judge allowed extraneous or irrelevant matters to guide or affect him;

iii) Whether the sentencing judge mistook the facts;

iv) Whether the sentencing judge failed to take into account some relevant consideration.

First Ground of Appeal against the conviction,

8. I first draw my attention to the first ground of the appeal, founded on the contention that the learned Magistrate erred in law and fact when he convicted and sentenced the Appellant for the second count of Theft, when he actually pleaded not guilty for the said offence.

9. Section 174 of the Criminal Procedure Decree has laid down the procedure of taking the plea of the accused in the Magistrates' court. Section 174 (1), (2) and (3) states that;

i) The substance of the charge or complaint shall be stated to the accused person by the court, and the accused shall be asked whether he or she admits or denies the truth of the charge.

ii) If the accused person admits the truth of the charge, the admission shall be recorded as nearly as possible in the words used by the accused, and the court shall convict the accused and proceed to sentence in accordance with the Sentencing and Penalties Decree 2009.

iii) If the accused person does not admit the truth of the charge, the court shall proceed to hear the case as provided in this Decree.

10. Accordingly, the court is required to state the accused the charge that he has been charged with and ask him whether he admits or denies it. If the accused admits the charge, the court must convict him and then proceed to sentence. Meanwhile, if the accused does not admit the charge, the court must proceed to hear the case as per the procedure provided under the Criminal Procedure Decree.

11. In this instant case, the Appellant has pleaded guilty only for the first count of Burglary. He did not admit the second count of Theft. The learned Magistrate has then correctly convicted the Appellant for the first count and proceeded to sentence him. However, the learned Magistrate has erroneously convicted the Appellant for the second count instead of proceeding to hear it as required under Section 174 (3) of the Criminal Procedure Decree. Hence, I find the conviction and subsequent sentence of the Appellant for the second count of Theft by the learned Magistrate is wrong and invalid.

Second Ground of Appeal against the Conviction

12. The second ground of the appeal highlights that the learned Magistrate erred in law by failing to allow the Appellant to elect whether he wishes to proceed in the Magistrates' court or in the High Court in respect of the first count of Burglary.

13. According to Section 312 (1) of the Crimes Decree, the offence of Burglary is an indictable offence, but could be tried summarily. Section 2 of the Criminal Procedure Code has defined the indictable offence triable summarily as;

"indictable offence triable summarily" means any offence stated in the Crimes Decree 2009 or any other law prescribing offences to be an indictable offence triable summarily, and which shall be triable –

a) in the High Court in accordance with the provisions of this Decree; or

b) at the election of the accused person, in a Magistrates Court in accordance with the provisions of this Decree;

14. Section 4 (1) (b) of the Criminal Procedure Decree has stipulated that any indictable offence triable summarily must be tried by the High Court or a Magistrate Court at the election of the accused person. Section 4 (1) (b) stats that;

"any indictable offence triable summarily under the Crimes Decree 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person"

15. In view of Sections 2 and 4 (1) (b) of the Criminal Procedure Decree, the Magistrates' court could hear an indictable offence triable summarily only if the

accused person elects to proceed it in the Magistrates' court. Hence, in the absence of such an election made by the accused person, the Magistrate's court has no jurisdiction to hear and try an indictable offence triable summarily pursuant to Sections 2 and 4(1) (b) of the Criminal Procedure Decree.

16. According to the record of the proceedings of the Magistrate's court, the learned Magistrate has not given the Appellant an opportunity to elect whether to proceed the hearing of the first count of Burglary in the Magistrates' court or not. Without obtaining such an election of the Appellant, the learned Magistrate has put the charges to the Appellant and recorded his plea of guilt for the offence. The learned Magistrate has then convicted the Appellant and sentenced him for a period of two years.

17. Justice Temo in **Koroi v State [2013] FJHC 306; HAM186.2012S (21 June 2013)** in dealing with a similar situation as of this case, held that;

> *"Did the Learned Magistrate err in law in not putting the election for a Magistrate Court or High Court trial to the applicant before the charge was put to him on 22nd July 2010? Burglary, contrary to section 312 (1) of the Crimes Decree 2009 is an indictable offence, which is triable summarily. As such, section 4 (1) (b) of the Criminal Procedure Decree 2009 mandates that the offence shall be tried in the High Court or Magistrate Court at the election of the accused. Without the election been put to the accused before the plea was put to him, the Magistrate Court, in this case, did not have the jurisdiction to deal with the matter at all. In proceeding with the matter without complying with the mandatory requirement of section 4 (1) (b) of the Criminal Procedure Decree 2009, the conviction and sentence, were in effect, a nullity.*

18. In view of the above discussed reasons and the observation made by Justice Temo in **Koroi (supra)** I conclude that the conviction and the subsequent sentence imposed by the learned Magistrate for the count of Burglary is null and void. Accordingly, the second ground of the appeal is succeeded.

First Ground of Appeal against Sentence

19. I now draw my attention to the first ground of appeal against the sentence. It is founded on the contention that the learned Magistrate has failed to consider the mitigation submissions filed by the Appellant in his sentence.

20. On the 4th of December 2015, the learned Magistrate has given the Appellant fourteen days to file his submissions in mitigation. The matter was adjourned till 19th of February 2016 for the Sentence. However, the Appellant has failed to file his submissions in mitigation as per the said direction. Moreover, he has failed to appear in court on the 19th of February 2016. Hence the matter was adjourned till 2nd of May 2016. Meanwhile, the learned counsel for the Appellant has filed the submission in mitigation on the 17th of March 2016. On the 21st of April 2016, the Appellant appeared in court. The learned Magistrate has then pronounced the sentence without taking into consideration the submission in mitigation filed by the Appellant on the 21st of April 2016.

21. It appears that the learned Magistrate has not considered the submission in mitigation on the ground that it was not available for him to consider it when preparing the sentence. It is true that the Appellant has not complied with the direction given by the court to file his mitigation .He had also failed to appear in court to receive the sentence on 19th of February 2016. Accordingly the sentence

was not delivered on the 19th of February 2016 and it was adjourned till 2nd of May 2016. Meantime the Appellant has filed his submission in mitigation on the 17th of March 2016.

22. Under such circumstances, the learned Magistrate was entitled to exclude the submission in mitigation filed by the Appellant, if only he satisfied that the Appellant deliberately and manipulatively tried to disregard the directions given by the court or tried to delay the process of the court. However, the record of the proceedings of the Magistrate's court does not indicate that the leaned Magistrate has given the Appellant an opportunity to explain for the delay in filing his submission in mitigation. The Appellant has also not provided any explanation for such delay. Having considered the reasons discussed above, it is my opinion that the proper and appropriate approach that the learned Magistrate should have adopted is to first satisfy whether the Appellant deliberately and manipulatively disregarded the direction given by the court before he excluded the submission in mitigation, which undoubtedly had a probative value in the sentencing. Exclusion of materially important piece of evidence or information on the ground of failure to comply the time limit imposed by the court or rules, must always be done as the only means to ensure the fairness and justice to the proceedings and to the parties involved.

23. In view of the reasons discussed above, it is my considered opinion that the approach adopted by the learned Magistrate to exclude the submission in mitigation filed by the Appellant on the ground of non-compliance of direction given by the court is in contravention of the principle of procedural fairness. Hence, I find this ground of appeal has merit and succeed accordingly.

24. I do not wish to discuss the second ground of appeal against the sentence, as the main matrix of this ground has properly been subsumed in the above discussion.

25. Having concluded that the conviction and the subsequent sentence imposed by the learned Magistrate is wrong in principle and invalid, I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Decree.

26. Justice Waidyarathne in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order for a retrial in a comprehensive manner. His Lordship observed that;

"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it,

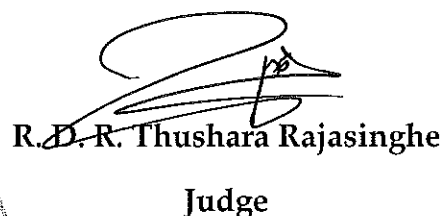
Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellant".

27. The two counts as charged in this instant case stem from an incident that took place in August 2014. The prosecution had not adduced any evidence in court as the Appellant entered his plea of guilt for the first count and plea of not guilty for the second count. The offences of this nature are prevalent in the society. Hence to bring the charges into its conclusion through proper court proceedings

is paramountly important in order to protect the public interest. The Appellant has already been in prison for nearly three months, which could be considered as a mitigatory factor in the event if he is found guilty in a re-trial.

28. Having considered the reasons discussed above, it is my opinion that the interest of justice outweighs any prejudicial impact on the accused if an order of retrial is granted. Hence, I find a re-trial against the Appellant would appropriately serve the interest of justice. I accordingly quash the conviction of the Appellant and set aside the sentence. I further order an immediate re-trial before another Resident Magistrate in the Magistrate's court of Nadi.

29. Thirty (30) days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka
29th of August 2016

Solicitors : Office of Legal Aid Commission
Office of Director of Public Prosecution