

IN THE HIGH COURT OF FIJI AT SUVA

In the matter of an appeal under section
151(1) of the Criminal Procedure Act
2009.

NAIPOTE VERE

Appellant

CASE NO: HAA. 17 of 2017
[MC Nausori, Crim. Case No. 701 of 2014] Vs.

STATE

Respondent

Counsel : Appellant in Person
Ms. J. Fatiaki for Respondent

Hearing on : 10th July, 2017

Judgment on: 30th August, 2017

JUDGMENT

1. The appellant is the defence counsel who represents the accused in MC Nausori, Crim. Case No. 701 of 2014.
2. According to the appellant, he did not appear for the accused in the aforementioned case on 27/02/2017 because he had to appear before the Magistrates Court at Taveuni. The Appellant wrote a letter on 21/02/17 to the Senior Court Officer of the Nausori Magistrates Court informing that he will be appearing before the Taveuni Magistrates Court on 27/02/17 and requested the case to be adjourned to a date in the first week of April 2017. On 27/02/17, the

Learned Magistrate granted an adjournment but ordered the Appellant to pay costs in the sum of \$200 to the prosecution and \$200 to court under section 150(4)(c) of the Criminal Procedure Act.

3. Being aggrieved by the aforementioned order made by the Learned Magistrate, the appellant had filed this appeal under section 151(1) of the Criminal Procedure Act. The amended grounds of appeal are as follows;

1. *That the learned trial magistrate erred in law and fact in making the order for the Appellant to pay costs in his absence although she made the order and adjourned the Accused's case to Tuesday 19/4/2017.*
2. *That the learned trial magistrate erred in law and fact in failing to hear the Appellant's side of the story before making the order. She should have waited for the Appellant to appear on Tuesday 19/4/2017, hear his side of the story and decide to make an order for costs against the Appellant.*
3. *That the learned trial magistrate erred in law and fact in not giving the Appellant the right to a fair trial provided for under section 15(1) of the Constitution before making the order for the Appellant to pay costs outlined in ground of appeal number 1.*
4. *That the learned trial magistrate erred in law and fact in not accepting the letter of the Appellant to adjourn the case against the accused when previously the learned magistrate had adjourned cases against the accused in Nausori Criminal cases No. 701, 573, 699 and 603 of 2014 after the Appellant had written letters seeking adjournment when engaged in other court.*

4. However, in his submissions the appellant has not addressed the above grounds of appeal individually. The appellant had made submissions mainly on the following two issues;

- a) The Learned Magistrate failed to give him a hearing before making the order for costs against him; and

- b) The Learned Magistrate was unfair to him in ordering him to pay costs.

5. Upon perusing the magistrates court case record, I find that the appellant had failed to appear for the said case on four occasions including on 27/02/2017. On

19/08/15 the case was adjourned to 28/09/15 for the defence to file 'written objections to cautioned interview'. The journal entry for 28/09/15 indicates that the accused had appeared in person and had informed that her counsel is in Taveuni. On the next date which is 25/01/16, both the accused and the appellant were absent and according to the letter annexed as 'B' with the appellant's written submission, the reason for the appellant's absence is that he had to appear before the Chief Magistrate. When the accused was produced before the Learned Magistrate on 12/02/16 on bench warrant, the accused had informed the court that the reason for her absence on 25/01/16 is that her lawyer had told her to come in May.

6. The date 27/02/17 was fixed as the hearing date on 22/02/16 where both the appellant and the accused were present in court. Then the appellant failed to appear on 27/02/17 after sending a letter dated 21/02/17 as mentioned above. According to the appellant's own admission this was the second occasion he sought an adjournment by writing a letter to the court registry. In my view, seeking adjournments by writing letters to the court registry is a practice that should be strongly condemned. If what the accused had informed the Learned Magistrate on 12/02/16 is correct, not only that the appellant had decided not to appear in court on 25/01/16 after sending a letter seeking an adjournment, he had also instructed the accused not to appear in court on that day.
7. Therefore, according to the case record, it appears that the Magistrates Court had been inconvenienced on several occasions due to the conduct of the appellant.
8. However, the fact remains that the order against the appellant for costs was made by the Learned Magistrate in the absence of the appellant and thereby without giving him an opportunity to show cause as to why such order should not be made.
9. The State submits that giving an opportunity to be heard on the awarding of costs although desirable is not mandatory. I am unable to agree with this contention. *Audi alteram partem* or "listen to the other side" is a fundamental principle of

natural justice. In this case, the Learned Magistrate should have given an opportunity to the appellant to show cause before making the order of costs against him.

10. In essence, the appellant had raised the same issue in the first three grounds of appeal and that is the failure of the Learned Magistrate to comply with the aforementioned legal principle. The appellant had not made submissions on the fourth ground of appeal where he alleges that the Learned Magistrate erred in law and fact in not accepting his letter to adjourn the case. This ground is devoid of merit and is frivolous.
11. I would allow the appeal based on the aforementioned failure of the Learned Magistrate and set aside the order for costs made against the appellant on 27/02/17. The Learned Magistrate should grant sufficient time for the appellant to show cause as to why costs should not be awarded against him before making a fresh order in terms of section 150(4) of the Criminal Procedure Act.

Orders of the Court;

- i) Appeal allowed;
- ii) Order for costs made in Magistrate Court at Nausori, Crim. Case No. 701 of 2014 on 27/02/17 is set aside; and
- iii) The Learned Magistrate is directed to grant sufficient time for the appellant to show cause as to why costs should not be awarded against the appellant before making a fresh order in terms of section 150(4) of the Criminal Procedure Act.




Vincent S. Perera
JUDGE

Solicitor for the Appellant : Naipote Vere & Associates.
Solicitor for the State : Office of the Director of Public Prosecutions, Suva.