IN THE HIGH COURT OF FIJI
APPELLATE JURISDICTION
AT LABASA

CRIMINAL APPEAL: HAA 19 OF 2017

BETWEEN : **WAIQELE SAWMILLS LIMITED**

APPELLANT

AND : **LAND TRANSPORT AUTHORITY**

RESPONDENT

Counsel : **Mr. A. Sen for the Appellant**
No appearance of the Respondent

Date of Hearing : **20 September, 2017**

Date of Judgment : **21 September, 2017**

JUDGMENT

1. The appellant had been issued with a Traffic Infringement Notice on the 31st of May 2016 for permitting a person to drive a vehicle with non-conforming mass plus load, contrary to regulations 80 and 122 of the Land Transport (Vehicle Registration and Construction) Regulations 2000. Consequent to the non-payment of the prescribed penalty by the appellant within the stipulated time period, the matter then proceeded to the Magistrate's Court. The appellant did not appear in the Magistrate Court. Hence, the learned magistrate entered a conviction against the appellant in his absence and imposed a fine of $ 4,000 as stipulated under schedule 2 of the Land Transport (Fees and Penalties) Regulations 2000. The appellant then made an application before the learned magistrate pursuant to Section 172 of the

Criminal Procedure Act, in order to set aside the said conviction entered against him. The learned magistrate in her ruling dated 27th of June 2017, refused that application on the ground of lack of jurisdiction.

2. Aggrieved with said decision, the appellant filed this notice of motion seeking leave to file appeal out of time together with the proposed petition of appeal. The petition of appeal is founded on the following ground, which I reproduce in verbatim as follow;

> *The learned magistrate erred in law and in fact in holding that she did not have a jurisdiction under Section 167, 172 and 174 of the Criminal Procedure Decree (Act) to set aside the conviction when the facts proved that the conviction was entered in absence of the accused who had no control over his absence, the fine imposed was unlawful and the proceedings had breached the constitutional rights of the appellant.*

3. The respondent failed to appear in court as per the notice on the 20th of September 2017. The learned counsel for the appellant informed the court that he would adopt the submissions he made in HAA 15 of 2017 into this proceedings. Having considered the nature of this application, the appellant consented to have the hearing of leave to enlarge the time and the substantive appeal together. Having considered the written submissions filed by the appellant, and the record of the proceedings in the Magistrates Court, I now proceed to deliver my judgment as follows.

4. The ruling of the learned magistrate in refusing the application, made by the appellant pursuant to Section 172 of the Criminal Procedure Act, is founded on the ground that the court is *functus officio* after imposing the sentence. The learned magistrate has found that the court has no jurisdiction to set aside the conviction pursuant to section 172 of the Criminal Procedure Act after the sentence is imposed.

5. Section 172 of the Criminal Procedure Act states;

"If the court convicts the accused person in his or her absence, it may set aside the conviction upon being satisfied that the absence was from causes over which he or she had no control, and that there is an arguable defence on the merits."

6. Accordingly, the appellant can make an application under Section 172 of the Criminal Procedure Act in order to set aside the conviction entered against him in his absence. It appears that the Section 172 of the Criminal Procedure Act is founded on the principle of *"audi alteram partem"*, that the both parties should be given an opportunity to present their cases before the court adjudicate the matter.

7. The right to defend himself in the criminal proceedings has been recognized under the Bill of Right of the Constitution, where section 14 (2) (d) of the Constitution states that;

"Every person charged with an offence has the right;

to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the service of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right"

8. The right to be present at the hearing has also been codified in the Bill of Rights of the Constitution, where Section 14 (2) (h) of the Constitution states that;

"Every person charged with an offence has the right to be present when being tried, unless-

the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend; or

the conduct of the person is such that the continuation of the proceedings in his or her presence is impractical and the court has ordered him or her to be removed and the trial to proceed in his or her absence"

9. To conduct a hearing in the absence of the accused is an exceptional deviation from the right to defend and right of presence at the hearing. Hence, the court is required to exercise this exception with great care. Section 172 of the Criminal Procedure Act has provided a procedural safeguard in order to secure the integrity and fairness of the proceedings that took place in the absence of the accused, who voluntarily choose not to attend to the proceedings. Hence, it is clear that an application under Section 172 of the Criminal Procedure Act is a necessary procedural step in a hearing that took place in the absence of the accused.

10. A judicial officer becomes "*functus officio*" when the judicial officer has discharged all the judicial function pertaining to a particular case. It is a part of the judicial function of the judicial officer to hear an application made under Section 172 of the Criminal Procedure Act, if the judicial officer entered a conviction (and the sentence) against an accused in his or her absence. Therefore, the learned magistrate has jurisdiction to hear this application pursuant to Section 172 of the Criminal Procedure Act.

11. According to Section 172 of the Criminal Procedure Act the learned magistrate needs to determine whether the absence of the appellant was due to a reason which he had no control over it and also whether there is an arguable defence on the merits in order to set aside the conviction entered against the appellant in his absence.

12. In view of these reasons discussed above, I find that the conclusion of the learned magistrate in her ruling dated 27th of June 2017 is founded on misdirected principle of law.

13. As discussed above, the learned Magistrate has not directed her mind to the factual reasons provided by the appellant in this application. She has refused this application on the misdirected conclusion of law pertaining to the issue of jurisdiction. The lower court has not taken into consideration the factual merits of the application made under Section 172 of the Criminal Procedure Act. Therefore, it is not prudent for the appellate court, at this point, to

examine the merits of the said application made by the appellant in the lower court. I accordingly allow the appeal and order a rehearing of this application made under Section 172 of the Criminal Procedure Act.

14. The orders of the court are ;

i) The appellant is granted leave to file his petition of appeal pursuant to Section 248 (2) of the Criminal Procedure Act,

ii) The Appeal is allowed,

iii) The Ruling delivered on 27th of June 2017 is set aside,

iv) A rehearing of this application made under Section 172 of the Criminal Procedure Act is ordered,

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

R.T. Rajasinghe
JUDGE

Solicitor for the Appellant : Office of Messrs Maqbool & Company, Labasa