IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 004 OF 2017S

BETWEEN **THE STATE**

APPELLANT

AND **TUI STONE**

RESPONDENT

Counsels	:	**Ms. J. Fatiaki for Appellant**
		Ms. A. Ali for Respondent
Hearing	:	**29 May, 2017**
Judgment	:	**29 December, 2017**

JUDGMENT

1. On 30 May 2016, at the Navua Magistrate Court, in the presence of his counsel, the following charge was put to the respondent (accused):

FIRST COUNT

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to Section 5(a) of the Illicit Drugs Control Act 2004.

Particulars of Offence

TUI STONE, on the 1st day of March, 2012 at Pacific Harbour, Navua, in the Central Division, without lawful authority, cultivated 54 plants of Cannabis Sativa, an Illicit Drug weighing a total 2,308 grams.

SECOND COUNT

Statement of Offence

UNLAWFUL CULTIVATION OF ILLICIT DRUGS: Contrary to Section 5(a) of the Illicit Drugs Control Act, 2004.

Particulars of Offence

***TUI STONE**, on the 1st day of March, 2012 at Pacific Harbour, Navua in the Central Division, without lawful authority, was found in possession of Illicit drugs namely Cannabis Sativa weighing 29.4 grams.*

2. The charge was read and explained to the respondent and it appeared he understood the same. He pleaded not guilty to both counts. In other words, he denied the allegations against him. The prosecution indicated to the court that they had 6 witnessed to call, 4 were police officers and 2 civilians, one of them a government analyst. The court then set the 1st and 2nd December 2016 as the trial date. In other words, approximately 7 months was given to the parties to prepare themselves for trial. This was enough time for trial preparation.

3. To understand what eventually occurred in this case, a brief history of the case need to be examined. The respondent first appeared in the Navua Magistrate Court on 3 March 2012. The matter then went through approximately 4 years 9 months of mentions and pre-trial conferences before the trial date on 1st December 2016. The matter went through various prosecutions, defence counsels and Resident Magistrates. When looking at the court record, there was no determined effort to bring the case to a conclusion. A very simple case, and it's resolution could easily have taken 5 working days.

4. Six trial dates were previously arranged, but for various reasons, they were vacated. The seventh trial date was the 1st and 2nd December 2016. The learned trial Magistrate took over from various learned Magistrates before her. She was obviously under a load of pressure to bring the case to a conclusion – not unusual in the Magistrate Courts, the judicial workhorse in the judiciary. Unfortunately, in her haste, she fell into an error that many learned Magistrates had done previously on many occasions before her. I was one of them when I was a Magistrate. I will start with the leading authority on this matter, that is, **Robert Tweedle Macahill** v **Reginam**, Criminal Appeal No. 43 of 1980, Fiji Court of Appeal.

5. In **Robert Tweedle Macahill** (supra), the appellant was charged in the Suva Magistrate Court with 13 offences under the Copyright Act, 1976, (United Kingdom) and one count of conspiracy under section 21 of the Penal Code. The case was first called in court on 7 May 1979. The charges were put to the appellant and he pleaded not guilty to all the charges. The case was then adjourned for mention on 4 June 1979. On 4 June 1979, the case was set to be heard from 9 July 1979. On 9 July 1979, the prosecution was not ready, and they applied for an adjournment. The trial was vacated and the case was set for mention on 27 August 1979, and again on 24 September 1979. On 24 September 1979, the case was set for trial on 29 October 1979. Note in **Robert Tweedle Macahill** (supra), from first call on 7 May 1979 to trial date on 29 October 1979, it took 5 months 22 days; whereas in the present case, from first call on 3 March 2012 to trial date on 1 December 2016, it took 4 years 9 months.

6. On 29 October 1979, this was what occurred in the Suva Magistrate Court:

> ***When the case was called on 29th October, counsel for the prosecution asked for an adjournment as***
>
> ***"...The exhibits are the core of the matter and they have to be further prepared..."***
>
> ***The Court was informed that the defence had no objection to an adjournment. The appellant was present at the hearing on that date.***
>
> ***The learned Magistrate stated that he did not feel that an adjournment should be granted as the case had been going on for months; and no mention of exhibits had been made when the fixture was made on 24th September. Counsel for the prosecution then asked for an adjournment so that he might give the matter further consideration. The record then proceeds:***
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> | | |
> |---|---|
> | ***"Court:*** | ***Not prepared to grant adjournment;*** |
> | ***Prosecution Counsel:*** | ***Leave to Court*** |
> | ***Court:*** | ***Dismissed for want of prosecution if prosecution not able to go on.*** |
> | ***Prosecution Counsel:*** | ***Leave to Court.*** |
> | ***Court:*** | ***Dismissed for want of prosecution."*** |

Note how the learned Magistrate in **Robert Tweedle Macahill** (supra) appeared frustrated with the prosecution's lack of preparation, and note a similar reaction in the present case,

when the prosecution was not ready to proceed, as the government analyst was not present at the hearing on 1 December 2016.

7. The Court of Appeal then responded as follows:

"...There are, in our opinion, two questions namely:

(a) Was the learned Magistrate right when he refused the application for adjournment? And,

(b) If so, what was the effect, if any, of the order made?

For the answer to these questions, the relevant provisions of the Code of Criminal Procedure must be examined. The Magistrate's Court is a creature of statute. It has no inherent jurisdiction and so is confined to its statutory powers.

Section 191 (section 168 of Criminal Procedure Act 2009, read as "CPA 2009" hereafter) deals with the case where, as in this instance, all parties are before the Court. There is a mandatory direction that "the Court shall proceed to hear the case". This direction is, of course, subject to the power of adjournment contained in section 193 (section 170 of CPA 2009). The course taken in the present case was that the charges had been read and pleas of not guilty had been taken in accordance with the provisions in that behalf. The case was then adjourned. Subsequent adjournments followed and hearing was fixed to take place on October 29, 1979. All parties were then present. An application for adjournment was made and refused. Hence section 191 (section 168 of CPA 2009) applied and the mandatory direction to proceed with the case applied.

The case might have been disposed of under section 192 (section 169 of CPA 2009) which ought to be set out in full. It reads:

(1) "The prosecutor may with the consent of the court at any time before a final order is passed, in any case under this part, withdraw the complaint.

(2) On any withdrawal as aforesaid –

(a) Where the withdrawal is made after the accused person is called upon to made his defence, the court shall acquit the accused;

(b) Where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section 200 (section 178 of CPA 2009) of this Code, in its discretion make one or other of the following orders:-

(i) An order acquitting the accused;

(ii) An order discharging the accused.

(3) An order discharging the accused under paragraph (b) (ii) of the last preceding subsection shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts."

However, no application was made under section 192 (section 169 of CPA 2009). That being so the case must then proceed by virtue of section 191 (section 168 of CPA 2009). Section 199 (section 177 of CPA 2009) applied. The relevant part reads:

> *"If the accused person does not admit the truth of the charge, the court shall proceed to hear the witnesses for the prosecution and other evidence (if any)."*

This section overcomes a difficulty expressed at the Bar because it applied not only to the actual hearing of witnesses but also, by the use of the term "(if any)", it covers the situation where no witness is called. Whether evidence is called for the prosecution or not the Court must proceed to judgment under section 200 (section 178 of CPA 2009). If witnesses are called then sections 201 (section 179 of CPA 2009) and 202 (section 180 of CPA 2009) apply and judgment will be given under section 206 (section 183 of CPA 2009). The Code is thus complete and there is no failure to provide for the case where the prosecution does not call evidence.

We have dealt, at some length, with the relevant statutory provisions applicable. It is essential that the presiding magistrate ought to state explicitly the decision which he is pronouncing, either by referring to the particular statutory provision, or, by using the precise terms prescribed by the statute. Such a procedure would have avoided the doubts raised and consequent argument on the effect of the order made. There is no statutory provision for dismissing for want of prosecution. We find it unnecessary to discuss this topic any further and hope that the Courts concerned will give this due attention in the future.

8. The Court of Appeal abovementioned remarks are as binding to the Magistrate Court ever since it was decided on 30 September 1980, that is, 37 years ago. I have updated the relevant sections to match those in the Criminal Procedure Act 2009. The procedure in disposing off criminal cases in the Magistrates Court are the same as it was in 1980. It is prudent for Resident Magistrates to follow the Court of Appeal's remarks to the letter, to assist appellate courts in understanding their actions, especially when it comes to noting their actions in the record. In this case, the court had "to read between the lines" to understand the learned Magistrate's actions.

9. I have read the court record and the learned Magistrate's ruling, dated 2 December 2016, on how she approached the trial on 1st and 2nd December 2016. On 1 December 2016, 5 prosecution witnesses were present. Only the government analyst was not present. The prosecutor, the accused and his counsel were present. Pursuant to section 168 of the Criminal Procedure Act 2009, it was mandatory for the court to hear the case. However, this power to proceed was subject to its adjournment powers in section 170 of the Criminal Procedure Act 2009. The court adjourned the hearing to 2 December 2016. All witness were warned to turn up the next day. On 2 December 2016, the prosecution applied for the case to be part heard. All its witnesses were present, except the government analyst. According to section 168 of the Criminal Procedure Act 2009, the court was bound to hear the witnesses present.

10. Section 177 (1) of the Criminal Procedure Act 2009 then came into play. The court must proceed to hear the five prosecution witnesses present. Then the defence may cross-examine the witness. Then the prosecution will re-examine. The above procedure was not complied with. The record does not speak of it. Furthermore, there was no record in the court record that the prosecution had conceded that it cannot make a prima facie case to entitle the court to proceed to judgment under section 178 of the Criminal Procedure Act 2009. In the record, the learned Magistrate recorded, "... No case to answer. The accused is acquitted. File is closed..." In my view, after carefully looking at the court record, the learned Magistrate did not follow the proper procedure, and did not record the same properly in the record, to show that she proceeded properly to an acquittal. In my view, in acquitting the respondent, she did not follow the proper procedure, and as a result, she erred, as a matter of law. Her decision was tainted, and null and void.

11. Because of the above, on 31 August 2017, I granted the State leave to appeal out of time, and I granted the remedy they sought in their petition of appeal, that is, "This Honourable Court set aside the order of Acquittal by the Learned Magistrate and remit the matter to the Navua Magistrate Court to fix a new hearing date for this matter." I now formally set aside the respondent's acquittal in the Navua Magistrate Court on 2 December 2016, and order a re-trial before another Resident Magistrate in the Navua Magistrate Court. This case is to be given top priority as it is a 2012 matter. On the government analyst not attending, a bench warrant should be executed, and the witness held in custody, until she or he had completed

her/his evidence. The government analyst's attitude in not obeying the witness summons and/or bench warrant, should not be tolerated.

12. In summary, the State is granted leave to appeal out of time, and they succeed in their appeal. Case adjourned to the Navua Magistrate Court on 15 January 2018 at 9.30 am for mention to set a hearing date as soon as possible.

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JUDGE

Solicitor for Appellant : Office of the Director of Public Prosecution, Suva.
Solicitor for Respondent : Interalia Consultancy, Suva