IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 40 OF 2017

BETWEEN: **THE STATE**

Appellant

A N D: **TANIELA TOKALAU**

Respondent

Counsel: Mr. J. Fatiaki for Appellant
Ms. A. Prakash for Respondent

Date of Hearing: 24th January 2018

Date of Judgment: 05th June 2018

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the order made by the learned Magistrate in the Magistrate's Court of Suva, on the 12th of September 2017, refusing the application made by the Appellant for an adjournment of the hearing.

2. The Respondent had been charged in the Magistrate's Court of Suva for one count of Assault Causing Actual Bodily Harm, contrary to Section 275 of the Crimes Act. The particulars of the offence are that:

"Taniela Tokalau, on the 26th day of February 2016, at Lami in the Central Division, assaulted Adi Vasiti Vilisi Rabua, thereby causing her actual bodily harm."

3. The Respondent was first produced in the Magistrate's Court on the 7th of March 2016. The Respondent and the Complainant are husband and wife. Hence, the learned Magistrate had issued an Interim Domestic Violence Restraining Order against the Respondent pursuant to Section 24 of the Domestic Violence Act. The matter was then adjourned till 8th of March 2016 for the Respondent to produce his sureties to the Court.

4. Subsequent to several adjournments, the matter was finally set down for the hearing on 21st and 22nd of November 2016. On the said hearing date, all the four witnesses of the prosecution were present in court. However, the learned Magistrate had vacated the hearing on the ground that she had another hearing to proceed with on that date. Hence, the hearing was vacated and the matter was adjourned till 20th of December 2016 for the purpose of fixing a new hearing date. On the 20th of December 2016, the prosecution has appeared in court without the case file. Hence, the matter had adjourned till 17th of January 2017. Once again the matter had adjourned on the 17th of January 2017 till 27th of February 2017, on the ground that the learned Magistrate was on leave. On the 27th of February 2017, the matter was fixed for the hearing on the 11th and 12th of November 2017. The case was then called again on the 17th of May 2017, where both parties had informed the court that they have no pre-trial issues and ready to proceed with the hearing.

5. On the date of the hearing, that was on the 11th of November 2017, the prosecution had made an application to vacate the hearing on the ground that the Complainant could not be located. The prosecution had further submitted that the court could dismiss this matter pursuant to Section 171 of the Criminal Procedure Code on the ground of non-appearance of the Complainant. This application was refused by the learned Magistrate. The learned Magistrate had then stood down the matter till 11.30 a.m. for the prosecution to inform their position about the hearing.

6. At 11.30 a.m. the prosecution had informed the court that the Complainant was in Yasawa Island and she was not summoned to appear in court. The learned Magistrate then refused the application for adjournment on the following grounds, *inter alia*:

i) The hearing date had been fixed almost seven months ago,
ii) On the 17th of May 2017, both parties had informed the court that they have no issues for the hearing to proceed,
iii) The matter was initiated in 2016,
iv) There is no good reason to grant an adjournment pursuant to Section 170 of the Criminal Procedure Act.

7. Having refused the adjournment, the learned Magistrate had invited the prosecution to present their evidence. The prosecution had not presented any evidence. Accordingly, the learned Magistrate had dismissed this action and acquitted the Respondent on the ground of no case to answer pursuant to Section 178 of the Criminal Procedure Act.

8. Being aggrieved with the said decision of the learned Magistrate, the Appellant files this Petition of Appeal on the following ground that:

> *"The learned Magistrate erred when he failed to exercise his discretion judiciously in refusing the prosecutor's application for an adjournment".*

9. This appeal was first mentioned in the High Court on the 7th of November 2017. On the 29th of November 2017, the Appellant and the Respondent were directed to file their respective written submissions, which they filed as per the directions. Subsequently, the learned counsel for the Appellant and the Respondent made their respective oral submissions on the 24th of January 2018. Having carefully considered the record of the proceedings in the Magistrate's Court and the respective written and oral submissions of the parties, I now proceed to pronounce the judgment as follows.

The Law and Analysis

10. According to Section 170 (1) of the Criminal Procedure Act, the Magistrate must not allow any adjournment of a hearing other than from day to day consecutively until the conclusion of the hearing. However, the Magistrate is allowed to adjourn the hearing for another date if he finds there is a good reason to do so.

11. Section 170 (1) and (2) of the Criminal Procedure Act states that:

> *i) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.*
>
> *ii) For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.*

12. The Fiji Court of Appeal in **Macahill v R [1980] FJCA 1; Criminal Appeal No 43 of 1980 (30 September 1980)** has discussed the scope of judicial discretion of granting adjournment in a comprehensive manner, where The Fiji Court of Appeal held that:

> *"We proceed now to deal with the first question, namely, was the learned Magistrate correct in refusing to grant the adjournment sought. Such a refusal is a matter of law. The granting of an adjournment is always the exercise of a judicial discretion. Although the Court of Appeal is slow to interfere with the exercise of that discretion, yet, as is said by Atkin L.J in **Maxwell v. Keun** (1928 1 K.B. 645, 653 CA)":*
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> ***"I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the***

Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

Similar orders, overruling a judgment denying an adjournment, were made ***in re M*** *(1968) 1. W.L.R. 1897;* ***Priddle v. Fisher*** *(1968) 1 W.L.R. 1478; and Royal v. Prescott Clarke (1966) 1 W.L.R. 788. where it was held that:*

13. Accordingly, the appellate court should not intervene with the discretion exercised by the lower court in granting adjournment, unless it appears that the order has defeated the rights of the parties altogether.

14. Pain J in **State v Nabainivalu [1997] FJHC 230; Haa0039d.97s (4 September 1997)** has outlined the factors that should be taken into consideration in exercising the judicial discretion of granting an adjournment, where Pain J held that:

"The consideration of an application for an adjournment involves the exercise of a judicial discretion. Relevant considerations would include, for instance, the reason for the application, the history of the prosecution (including previous adjournments), the conduct of the parties, the nature of the charge, the need for a charge to be heard within a reasonable time and whether the ability of the State to prosecute or the defendant to present a defence will be materially affected or defeated by the granting or refusal of the adjournment."

15. Justice Goundar in **State v Agape Fishing Enterprises [2008] FJHC 19; HAA 011.2008 (15 February 2008)** has held that:

'The granting of an adjournment is a matter of discretion. The discretion must be exercised judicially so that the rights of the parties are not defeated and that no injustice are done to one or other of the parties (see,

McCahill v State, Criminal Appeal No. 43 of 1980; Chand v State, Criminal Appeal No. AAU0056 of 1999S)."

16. In view of the above judicial precedents, the discretion given to the Magistrate in granting adjournment must be exercised judicially in order to protect the rights of parties. Hence, the court must take into consideration overall interest of justice if it contemplates in granting an adjournment pursuant to Section 170 of the Criminal Procedure Act.

17. Accordingly, in order to determine "the good cause" as stipulated under Section 170 (1) and (2) of the Criminal Procedure Act, the court could consider the following factors, though they are not exhaustive, *inter alia*:

i) The grounds for the application for an adjournment,
ii) The conduct of the parties during the proceedings,
iii) The nature of the charge,
iv) The need for a charge to be heard within a reasonable time,
v) Whether the ability of the State to prosecute or the Defence to present a defence will be materially affected or defeated.

18. In this case, the Respondent is charged with an offence that involves domestic violence as described under the Domestic Violence Act ***(vide Section 2 and 3 of the Domestic Violence Act)***. The Respondent was alleged that he has assaulted the Complainant, who is the wife of the Respondent on the 26th of February 2016. The learned Magistrate had issued an Interim Domestic Violence Restraining Order against the Respondent on the 7th of March 2016 in order to protect the safety and the wellbeing of the Complainant pursuant to Section 24 (1) of the Domestic Violence Act. Section 24 (1) of the Domestic Violence Act states that:

i) Subject to subsection (3) but notwithstanding any other provision in this Decree -

a) where a person stands charged before a Court with an offence which is a domestic violence offence, the Court must -

(i) make an interim domestic violence restraining order under this Decree against the defendant for the safety and wellbeing of the person against whom the offence appears to have been committed; and

(ii) make an order directing the defendant to appear at the further hearing of the matter on a date and at a location fixed by the Court.

b) where a person -

(i) pleads guilty to, or is found guilty of, an offence which is a domestic violence offence; or

(ii) the Court intends to stay or terminate the proceedings

the Court must make a domestic violence restraining order under this Decree for the safety and wellbeing of the person against whom the offence or alleged offence was committed;

19. Accordingly, the court must make an Interim Domestic Violence Restraining Order against the accused when he is produced before the court for an offence which falls under the Domestic Violence Act. The definition of the interim order has stipulated under Section 2 of the Domestic Violence Act, where it states that:

> *""Interim order" in relation to an order made under this Decree means an order that deals with a substantive matter in issue in proceedings on an interim basis pending further hearing of that particular matter."*

20. In view of the Section 24 (1) (b), the court has to make a Domestic Violence Restraining Order at the conclusion of the case if it satisfies that such an order is required to protect the safety and well-being of the Complainant.

21. In this case, the learned Magistrate has not considered to make a Domestic Violence Restraining Order against the Respondent, when he terminated the proceeding under Section 178 of the Criminal Procedure Act, which, I find, has materially prejudiced the rights of the Complainant.

22. The Prosecution has provided two conflicting versions, when the prosecutor made this application for the adjournment. Initially, the prosecution had informed the court that the Complainant could not be located. Subsequently, the prosecution has informed the court that the Complainant was in Yasawa Island and she was not summoned to appear in court.

23. It is obvious, that the prosecution has not performed their obligatory duties in order to properly summon the Complainant. Such failures of the prosecution, specially in a busy court house, undoubtedly make the learned Magistrate frustrated. However, the lackluster performance by the prosecution in discharging their obligatory duties is not the only consideration that the learned Magistrate has to take into consideration in refusing an application for an adjournment pursuant to Section 170 of the Criminal Procedure Act.

24. The Complainant was not summoned; hence, she was not aware about the hearing on the 12th of September 2017. According to the record of the proceedings in the Magistrate's Court, the Complainant was present on the 21st of November 2016, when the matter was first taken up for the hearing. However, the hearing, on the 21st of November 2016, had been vacated on the ground that the learned Magistrate was engaged in another hearing on that date. This reflects that the Complainant had the intention to come and present her case in the court, if she is properly summoned.

25. The non-appearance of the Complainant was mainly due to the fault of the prosecutor, who has failed to properly summon the Complainant. The learned Magistrate should have taken into consideration, whether the Complainant was properly given an opportunity to present her case in order to protect her rights and also to assure her safety and wellbeing.

26. The overall interest of justice includes not only the rights of the accused, and the proper and speedy conclusion of the trial, but also includes the rights of the Complainant.

27. In view of the reasons discussed above, the failure of the learned Magistrate to properly take into consideration the rights and interest of the Complainant, who was not aware

about the hearing on the 12th of September 2017, has prejudiced the rights of the Complainant, thus defeating the overall interest of justice in this case.

28. In conclusion, I make the following orders:

i) The Appeal is allowed,

ii) The order of acquittal is quashed,

iii) The case is remitted to the Magistrate Court for the trial.

29. An interim Domestic Violence Restraining Order with Standard Non-Molestation condition is made against the Respondent. This order will remain in force until the hearing of the substantive matter is concluded and the trial court makes appropriate orders pursuant to Section 24 (1) of the Domestic Violence Act.

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

R.D.R.T. Rajasinghe
Judge

At Suva
06th June 2018

Solicitors
Office of the Director of Public Prosecutions for the Appellant.
Office of the Legal Aid Commission for the Respondent.