IN THE HIGH COURT OF FIJI

AT SUVA

CRIMINAL JURISDICTION

CRIMINAL CASE NO. HAC 128 OF 2011S

STATE

vs

1. VALAME TURAGANIKELI

2. NACANIELI VUKILECA

Counsels	:	**Mr. Y Prasad for State**
		Accused No. 1 In Person
		Accused No. 2 In Person, but tried in Absentia
Hearings	:	**1 and 28 August, 2017**
Ruling	:	**2 February, 2018**

RULING ON WHETHER OR NOT THE HIGH COURT CAN PASS SENTENCE ON AN EXTENDED JURISDICTION MATTER.

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1. On 22 November 2010, both Accuseds appeared in the Nausori Magistrate Court on the following charge:

Statement of Offence

***AGGRAVATED ROBBERY**: Contrary to section 311 (1)(b) of the Crimes Act 2009.*

Particulars of Offence:

***VALAME TURAGANIKELI, NACANIELI VUKILECA** and others, on the 15th day of November, 2010 at Nausori in the Central Division, robbed **JAG RAM** of cash $200.00, three wrist watches valued at $190.00, two mobile phones valued at*

*$314.00, one school bag valued at $20.00, one gold bracelet valued at $100.00 and one Adidas Canvass valued at $85.00, all to the value of $1049.00, and immediately before such robbery, used personal violence on the said **JAG RAM** with cane knives, pinch bars and stones.*

2. On 13 May 2011, because the charge was an indictable offence, the Nausori Magistrate Court, transferred the matter to the High Court. In the High Court on 20 May 2011, because the value of the property allegedly stolen was small (i.e. $1049.00), the matter was transferred to the Magistrate Court for trial, pursuant to section 4(2) of the Criminal Procedure Act 2009. The Magistrate Court was thus given extended jurisdiction to try the matter. The prosecution and Mr. Valame Turaganikeli (Accused No. 1) did not object. Mr. Nacanieli Vukileca (Accused No. 2) did not attend court on 20 May 2011 and a bench warrant was issued against him.

3. On 3 June 2011, both Accuseds appeared in the Nausori Magistrate Court. The trial did not start until approximately 6 years later on 25 April 2017. A perusal of the court record saw various reasons why the trial did not start until 2017. Part of the problem was the non-attendance of both Accuseds. There was also no determined effort to bring the case to a conclusion until 2017. Be that as it may, the charge was read and explained to both Accuseds on 7 January 2013. Both Accuseds said they understood the charge. They pleaded not guilty to the same. In other words, they denied the allegation against them.

4. The case then dragged on because of the non-attendance of either Accuseds. For accused No. 2, the record showed he last attended on 25 July 2013 and then did not attend in 2014, 2015, 2016 and 2017. On 25 April 2017, Accused No. 1 was present, Accused No. 2 was not present. Because Accused No. 2 had been on the run the previous 4 years, the court tried him in absentia in accordance with section 14 (2)(h)(i) of the 2013 Constitution. A voir dire was conducted on the admissibility of both accused's alleged confessions to the police in their caution interview statements. Six witnesses were called by the prosecution. Accused No. 1 gave sworn evidence and called no witness. It would appear that Accused No. 2 was taken to have chosen to remain silent, given his non-attendance.

5. On 27 April 2017, the learned trial Magistrate declared both Accuseds' police caution interview statements as admissible evidence, and the same may be tendered as evidence by the prosecution in the trial proper. The voir dire ruling contained 4 pages. The trial proper continued on 27 April 2017. The prosecution called an additional four witnesses, which included the complainant (PW9) and his son (PW 10). The prosecution then closed its case. The court ruled that both Accuseds had a case to answer. Accused No. 1 choose to remain silent and called no witness. It would appear that Accused No. 2 was deemed to have chosen to remain silent, given his non-attendance. The case was adjourned to 4 May 2017 for judgment.

6. On 4 May 2017, the court delivered it's written judgment. In 5 pages, the court found that the prosecution had proven its case against both Accuseds beyond a reasonable doubt. It found both Accuseds guilty as charged and convicted them accordingly. The court found that both Accuseds voluntarily and out of their own free will admitted the offence to the police when caution interviewed on 19 November 2010.

7. On 17 May 2017, the prosecution applied to the Magistrate Court that, the matter be transferred to the High Court for Sentencing. The prosecution, in support of its application, submitted that serious violence was used on the complainant when the offence was committed. They said, the complainant suffered serious injuries during the offending. Accused No. 1 had nothing to say in reply. He was also not ready for his plea in mitigation. Accused No. 2, it would appear, because of his non-appearance, was deemed to have chosen to remain silent. The Magistrate Court granted the prosecution's application and transferred the matter to the High Court for sentencing. It noted the serious violence used on the complainant (Mr. Jag Ram), that is, a cane knife was used on Mr. Ram's head to cause serious injuries, resulting in him being hospitalized.

8. On 23 June 2017, the matter was called in the High Court. Accused No. 1 was present, while Accused No. 2 was not present. A bench warrant was issued against Accused No. 2. The matter was called again on 1 August 2017. Representation was the same as before. The court raised with the parties the issue of whether or not, the Magistrate Court, acting with an extended jurisdiction granted under section 4(2) of the Criminal Procedure Act 2009, had the power to refer the matter to the High Court for sentencing. The court called for the parties' written submissions.

On 28 August 2017, the prosecution filed its submission. It submitted, the High Court had the power to sentence in this matter. On 27 October 2017, Accused No. 1 filed his written submission. He said, the High Court does not have the power to sentence in this matter. Accused No. 2 was being tried in absentia in accordance with section 14(2)(h)(i) of the 2013 Constitution. He was deemed to have chosen to remain silent.

9. The answer to the above issue lies in looking at and examining the intention of Parliament as written down in the Criminal Procedure Act 2009. We begin first by examining section 190 of the Criminal Procedure Act 2009, which reads as follows:

> ***(1) "...Where –***
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> ***(a) A person over the age of 18 years is convicted by a magistrate for an offence; and***
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> ***(b) The magistrate is of the opinion (whether by reason of the nature of the offence, the circumstances surrounding its commission or the previous history of the accused person) that the circumstances of the case are such that greater punishment should be imposed in respect of the offence than the magistrate has power to impose- the magistrate may, by order, transfer the person to the High Court for sentencing.....***
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> ***(3) The High Court shall enquire into the circumstances of the case and may deal with the person in any manner in which the person could be dealt with if the person had been convicted by the High Court.***
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> ***(4) A person transferred to the High Court under this section has the same right of appeal to the Court of Appeal as if the person had been convicted and sentenced by the High Court.***
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> ***(5) The High Court, after hearing submissions by the prosecution, may remit the person transferred for sentence in custody or on bail to the Magistrates Court which originally transferred the person to the High Court and the person shall then be dealt with by the Magistrate Court, and the person has the same right of appeal as if no transfer to the High Court had occurred.."***

10. Next, we will examine section 4(1),(2) and (3) of the Criminal Procedure Act 2009, which reads as follows:

> ***(1) "...Subject to the other provisions of this Act –***
>
> ***(a) Any indictable offence under the Crime Act 2009 shall be tried by the High Court;***
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> ***(b) Any indictable offence triable summarily under the Crime Act 2009 shall be tried by the High Court or a Magistrates Court, at the election of the accused person; and***
>
> ***(c) Any summary offence shall be tried by a Magistrates Court***
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> ***(2) Notwithstanding the provision of sub-section (1), a judge of the High Court may, by order under his or her hand and the seal of the High Court, in any particular case or class of cases, invest a magistrate with jurisdiction to try any offence which, in the absence of such order, would be beyond the magistrate's jurisdiction.***
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> ***(3) A magistrate hearing a case in accordance with an Order made under sub-section (2) may not impose a sentence in excess of the sentencing powers of the magistrate as provided for under this Act..."***

11. We also need to examine section 7(1) and (2) of the Criminal Procedure Act 2009, which reads as follows:

> ***(1) "... A magistrate may, in the cases in which such sentences are authorized by law, pass the following sentences, namely –***
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> ***(a) Imprisonment for a term not exceeding 10 years; or***
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> ***(b) Fine not exceeding 150 penalty units.***
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> ***(2) A magistrate may impose consecutive sentences upon a person convicted of more than one offence in a trial, but in no case shall an offender be sentenced to imprisonment for a longer period than 14 years...."***

12. Looking at the above sections in its context, it would appear that the legislature had not changed the name and the constitution of the Magistrate Court, as established by the Magistrate Court Act 1944, nor the name and constitution of the High Court, as established by the High Court Act 1875. Both courts remained so, despite the Magistrate Court been given the power to try indictable

offences, within the terms of section 4(2) of the Criminal Procedure Act 2009. Section 4(2) above-mentioned did not make the magistrate nor the Magistrate Court, a High Court judge or the High Court. Thus, although the Magistrate Court was given the power to try indictable offences, it was still a Magistrate Court, not a High Court. Support for this construction, can easily be obtained from the effect of section 4(3) of the Criminal Procedure Act 2009. Although the Magistrate Court is trying indictable offences by virtue of section 4(2) of the Criminal Procedure Act 2009, it still remained a Magistrate Court in its sentencing powers. If the legislature wanted it to be a High Court, it would plainly said so.

13. The sentencing powers of a magistrate and that of the Magistrate Court is expressed in section 7(1) and (2) of the Criminal Procedure Act 2009. Per count a magistrate can only pass a sentence up to 10 years imprisonment, and on two counts made consecutive to each other, a magistrate can only pass a maximum sentence of 14 years imprisonment. This had created a problem for magistrate who try indictable offences within the terms of section 4(2) of the Criminal Procedure Act 2009, when confronted with disturbing facts that call for sentences beyond 10 years imprisonment (per count) or 14 years imprisonment (on two or more counts made consecutive to each other). It is submitted that this was the reason why the legislature enacted section 190 of the Criminal Procedure Act 2009.

14. In **Nawalu** v **State**, Criminal Appeal No. CAV 0012 of 2012, the Supreme Court of Fiji, had set the tariff for a spate of aggravated robberies a sentence between 10 to 16 years imprisonment. In **Wallace Wise** v **State**, Criminal Appeal No. CAV 0004 of 2015, the Supreme Court of Fiji, had set the tariff for a single case of aggravated robbery a sentence between 8 to 16 years imprisonment. The above binding authorities created a dilemma for Magistrates trying indictable aggravated robbery charges in the Magistrate Courts, within the terms of section 4(2) of the Criminal Procedure Act 2009. In my view, it was for the above reasons that the legislature created section 190 of the Criminal Procedure Act 2009. It enabled Magistrates to transfer cases to the High Court for sentencing if they think the facts warranted the same. In the context of this case, the learned Magistrate was justified in transferring this case to the High Court for sentencing, because the complainant and his son were violently attacked in their house in the early morning of 15 November 2010 at Nausori in the Central Division, during an aggravated robbery. Aggravated robbery cases

involving serious aggravating factors that were exhibited in this case deserved to be sent up to the High Court for sentencing. This included cases where the Magistrate is of the view that the accused should be treated as a habitual offender in accordance with Part III of the Sentencing and Penalties Act 2009.

15. Given the above, I hold that a Resident Magistrate or the Magistrate Court, had the power to transfer indictable cases tried in the Magistrate Court, pursuant to section 4(2) of the Criminal Procedure Act 2009, to the High Court for sentencing. The Legislature had given the above power to the Magistrate or the Magistrate Court via section 190 of the Criminal Procedure Act 2009. Having said the above, I will now take Accused No. 1's plea in mitigation. Accused No. 2 continues to be tried in absentia.

Salesi Temo
JUDGE

Solicitor for the State : **Office of the Director of Public Prosecution, Suva.**
Solicitor for the Accused No. 1: **In Person**
Solicitor for the Accused No. 2: **In Person, but tried in Absentia**