

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[CRIMINAL JURISDICTION]

HIGH COURT CRIMINAL APPEAL CASE NO.: HAA 02 OF 2019

BETWEEN : SHAMEEM MOHAMMED

Appellant

AND : STATE

Respondent

Counsel : Mr Mark Anthony for the Appellant
Mr Niudamu For the State

Date of hearing : 26 June 2019

Date of Judgment : 20 September 2019

JUDGMENT

1. The Appellant filed his petition of appeal on 11 January 2019 against the conviction and sentence in the Nadi Magistrate's Court Criminal Case no 712 of 2013.

2. The respondent filed submission on 27 March 2019. Later the Appellant filed submissions on 10 June 2019 with additional grounds of appeal. On 19 March 2019 the Respondent sought time to respond to the additional grounds of appeal and the additional submissions were filed by the Respondent on 25 July 2019.
3. It must be noted that it is procedurally incorrect to file additional appeal grounds once the Respondent's submissions are filed without leave of the Court. If the Appellant intends to file additional appeal grounds leave must be sought from the court and the additional appeal grounds must be filed by way of a petition. Instead the Appellant submitted totally new appeal grounds in his written submissions without even seeking leave of the Court.
4. Be that as it may, I will now consider the background of this case.
5. The Appellant was charged for one count of obtaining property by deception contrary to section 317(1) of the Crimes Act in Criminal Case No 712 of 2013.
6. The Appellant did not appear on 05 October 2017 when it was set down for hearing. The learned Magistrate then decided to proceed with the hearing in absence of the Appellant as he was present in Court on the previous court date when the case was fixed for hearing.
7. The Appellant appeared in Court subsequently on 08 November 2017 when the case was pending for judgment. After several adjournments the judgement was delivered on 27 April 2018 when the Appellant was present. Subsequently the case was adjourned for mitigation and sentence.
8. On 18 May 2018 the counsel who appeared for the Appellant in the Magistrate's Court informed the Court that an appeal is filed, and the case was adjourned till 12 September 2018.

9. On 02 November 2018 the counsel informed the Court that the appeal could not be maintained as the sentence was not delivered. The counsel made an application to vacate the judgment. The learned Magistrate refused to set aside the judgement and adjourned the case for sentence. I have perused the judgment of that appeal No HAA 28 of 2018 and it appears that the appeal had been dismissed due to want of jurisdiction.
10. The Appellant did not file mitigation and on 21 December 2018 the sentence was delivered in absence of the Appellant. However, it is recorded in the minutes that the Appellant's sister tendered a medical report to the Court and the Court did not accept it as it was not properly endorsed with the stamp of the medical practitioner. The Appellant was sentenced for 24 months imprisonment on 21 December 2018.
11. Thereafter the Appellant filed the present appeal on 11 January 2019.
12. I will now consider the law which relates to the matter under consideration.
13. Section 171 (1)(a) of the Criminal Procedure Act provides that:

“ If at the time or place to which the hearing or further hearing is adjourned the accused person does not appear before the court which has made the order of adjournment the court may (unless the accused is charged with an indictable offence) proceed with hearing or further hearing as if the accused was present.”
14. It appears that the learned Magistrate proceeded with the hearing as the Appellant failed to appear on the day of the hearing. The Appellant had appeared on the previous court date and it is clear that he had knowledge that the case would be taken up for hearing on 05 October 2017. Apart from having knowledge of the next trial date, the Court has to consider whether he chose not to attend Court for the hearing before the Court decides to proceed under section 171.

15. The following paragraphs of *Tulava v State* [2018] FJHC 1057; HAA37.2018 (29 October 2018) would be pertinent to note at this juncture;

“17. However, Section 171 (1) of the Criminal Procedure Act should be read in the spirit of the constitutional provision [14 (2) (h)]. Accordingly, two requirements must be satisfied before an accused person can be tried *in absentia*. Firstly the court must be satisfied that the accused has been served *with a summons or similar process requiring his attendance at the trial*. Secondly, the court must be satisfied that the accused had *chosen not to attend*.

18. The Appellant was present when the case was fixed for trial and therefore he is deemed to have been served *with a summons or similar process requiring his attendance at the trial*.

19. When the word ‘*satisfy*’ comes into play, the law requires the court to be satisfied as to the fact concerned on the basis of evidence. In this case, the court should have been satisfied that the accused had chosen not to attend court. The court must have some evidence (police report /affidavit from a warrant officer) before it so that the court could be satisfied that the accused had deliberately chosen not to attend court. There is none in this case. The Learned Magistrate decided on his own motion to proceed to trial *in absentia* without any application from the prosecution and evidence that the accused had chosen not to attend. The trial conducted in the absence of the Appellant has no legal validity and therefore the judgment and sentence ought to be set aside.”

16. In the present case, it does not appear that the learned Magistrate decided to proceed to trial in absence of the Appellant after being satisfied that the Appellant had chosen not to attend. On 14 June 2017 when the case was called for hearing the prosecution had informed Court that they wish to consider whether or not to proceed with the matter. Thereafter the hearing was vacated,

and the case was adjourned to 05 October 2017 to allow the prosecution to consider their position with regard to maintaining the case.

17. On 05 October 2017 nothing is mentioned about the position of the prosecution about maintaining the matter, but the learned magistrate decided to proceed to hearing *in absentia* when the Appellant did not appear in Court. Nothing suggests that the Court was satisfied that the Appellant deliberately chose not to attend Court. Further it appears that the Appellant appeared in Court on the next court date and thereafter. The learned Magistrate delivered the judgement on 27 April 2018 after several adjournments, and the Appellant was convicted.

18. When the Court has proceeded to hear a case in absence of the Accused, section 172 of the Criminal Procedure Act provides for the setting aside of the conviction as follows;

“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.”

19. Justice Aluthge made the following observations in *Tulawa v State* (supra) in respect of making an application under section 172 to set aside a conviction;

23. It appears that there had been a reasonable basis for an arguable defence if he were given an opportunity to participate in the trial and defend. He could have made an application under Section 172 of the Criminal Procedure Act to get his conviction set aside by satisfying the two tests in the section that (i) the absence was from causes over which he had no control and (ii) there is an arguable defence on merits, if he was made aware of the legal position.

24. There is no indication in the Court Record that the unrepresented Appellant was given an opportunity when he appeared in court

before the sentence to explain the reasons as to why he failed to attend court and whether he had an arguable defence.

25. It appears that even if it is held that the trial *in absentia* had proceeded on a valid legal basis, the judgment entered cannot stand because the Learned Magistrate had failed to ensure fair trial guarantees at the trial held in the absence of the Appellant.

20. However, in the present case the Appellant had been represented by a counsel. Yet there is no indication that the Court allowed the defence to make an application to set aside the conviction pursuant to section 172. Instead the Court adjourned the case for mitigation and for sentence.

21. On 02 November 2018 the defence counsel made an application to vacate the judgment and to re-hear the case. Nevertheless, the learned Magistrate refused the application. It does not appear that the learned Magistrate determined the issue of setting aside the conviction based on following two tests enshrined in section 172, when she refused the application;

- i) That the absence was from causes over which he had no control and;
- ii) That there is an arguable defence on merits.

22. In *Vakamudulau v State* [2018] FJHC 271; HAA45.2017 (12 April 2018) Justice Rajasinghe held that;

“An accused has no right to make an appeal to the High Court, against a conviction, entered in his absence, on the ground that his absence was due to a reason which he had no control. The High Court has no jurisdiction, pursuant to Section 246 of the Criminal Procedure Act to determine whether the absence of the accused in the hearing of the Magistrate’s Court was due to reason which he had no control. It is the jurisdiction of the learned Magistrate, under Section 172 of the Criminal Procedure Act, to hear and determine this issue, making the determination of the guilt of the accused a finality.

23. But in the present case, in my opinion, the issue of want of jurisdiction does not arise as the learned Magistrate failed to make the determination under section 172 having regard to the two tests, when the defence counsel made the application to set aside the conviction. In the circumstances I am not satisfied that the Appellant was afforded a fair trial at the Magistrate's Court.
24. In any event I will now consider the grounds of appeal in this case. The Respondent conceded the 3rd ground of appeal; that the learned Magistrate erred in law and in fact by misdirecting herself on the law of obtaining property by deception and concluding that it was the appellant that had by deception, dishonestly obtained two bullocks from the complainant.
25. Therefore, I will first consider the third ground of appeal. The Appellant contends that there was no deceptive or dishonest conduct as there was an agreement to pay the money for the bullocks on a future date.
26. The Respondent agrees that there can be no deception as to a promise to act in the future. To support their position the Respondent quoted the decisions in *Singh v State* [2019] FJHC 299; HAA028.2018 (9 April 2019) and *Jona Robanakadavu v State* (HAA 29/2017). Therefore, the Respondent also seek that the conviction be quashed and the sentence be set aside.
27. Upon perusal of the judgment of the learned Magistrate it is evident that the complainant and the Appellant had come into an agreement to pay money for the bullocks on a later date. When the Appellant had failed to pay the money as promised, the complainant had lodged a report. The learned Magistrate has decided that the Appellant had falsely pretended to repay the complainant. However, it is not clear as to how the learned Magistrate came into that conclusion without any evidence to that effect. It must be noted that mere failure to pay an agreed amount does not amount to deception without any other evidence to establish deception.

28. Given the above, I agree with the submissions of the Respondent. It is my considered opinion that the conviction cannot stand as the evidence does not validate a conviction for obtaining property by deception.

29. In that backdrop I do not consider it necessary to look into the other grounds of appeal.

30. Accordingly, the appeal is allowed. The conviction is quashed and the sentence of Nadi Magistrate's Court criminal case no 712 of 2013 is set aside.



A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above the printed name.

Rangajeeva Wimalasena

Acting Judge

Solicitors

Solicitors for the State : Office of the Director of Public Prosecutions

Solicitors for the Accused: AC law