

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NOs. HAA 25 and 26 of 2020

BETWEEN : **THE STATE**

APPELLANT

A N D : **IAN WILSON and PITA NAINOKA**

RESPONDENTS

Counsel : Mr. A. Singh for the Appellant.
: Both Respondents not present.

Date of Hearing : 09 December, 2020
Date of Judgment : 30 December, 2020

JUDGMENT

BACKGROUND INFORMATION

1. Both the respondents have been charged with others for the offences of aggravated robbery contrary to section 311(1) (a) of the Crimes Act. Their files were remitted to the Magistrate's Court at Nadi to be tried under the extended jurisdiction of the High Court.

2. The respondents have separate files, however, the issue of appeal is common to both files hence it is only prudent that one ruling be delivered for both files.
3. On 13th January 2017 the first respondent Ian Wilson (who is the second accused in the Magistrate's Court matter) had pleaded not guilty to the charge. Since the other accused persons were not present in court a bench warrant was issued against them by the learned Magistrate.
4. On 24th June 2017 a bench warrant was also issued against the first accused. The execution of the bench warrants against the other accused persons was pending for some time.
5. On 27th February 2020, the matter was called before the Magistrate's Court at Nadi for mention to check on the status of the pending bench warrants. The prosecution was to have given a report on the pending bench warrants.
6. The report was not available so the state counsel asked for more time, the request of the state counsel was refused by the learned Magistrate and the office of the Director of Public Prosecutions was ordered to pay the sum of \$100.00 as costs to the first respondent who was present in court.
7. A similar situation had also arisen in the file of Pita Nainoka the second respondent. The other accused was not present in the Magistrate's Court at Nadi so a bench warrant was issued. On 27th February, 2020 the matter was called before the Magistrate's Court for mention to check on the whereabouts of the other accused person and for a report on the bench warrant issued.

8. The state counsel appeared in court without the file and was unable to assist the court. The office of the Director of Public Prosecutions was ordered to pay the sum of \$100.00 cost to the second respondent for the expenses incurred by him in coming to court.
9. The state being dissatisfied with the order made by the learned Magistrate filed a late appeal in this court. This court after hearing the application for leave to appeal out of time granted the application.
10. The appellant complied with the orders of the court and filed their petition of appeal, during the hearing state counsel relied on the following ground of appeal. The state counsel filed written submissions and also made oral submissions during the hearing for which this court is grateful. The respondents were served by the appellant but they did not appear in court during the hearing.

APPEAL

11. The appellant relies on the following ground of appeal in respect of both the files.

GROUND OF APPEAL

The learned Magistrate breached the principles of natural justice by awarding costs without hearing any submissions from the state counsel.

12. The state counsel submitted that the learned Magistrate had imposed the sum of \$100.00 costs in each file under section 150(4) of the Criminal Procedure Act without hearing the state counsel which was contrary to the principles of natural justice.

Section 150(4) of the Criminal Procedure Act states that:

A judge or magistrate may make any other order as to costs as may be required in the circumstances to -

- a) *defray the costs incurred by any party as a result of an adjournment sought by another party;*
- b) *recompense any party for any costs arising from any conduct by any other party which delays a trial or requires the expenditure of monies as a result of the conduct of that party during a trial;*
- c) *penalize a lawyer for any improper action during a trial, and in such a case the order may be that the lawyer pay the costs personally; and*
- d) *otherwise meet the interests of justice in any case.*

13. The above section empowers a court to order the payment of costs against a party upon the exercise of its discretion. From the information in the file and upon perusal of the court proceedings in the Magistrate's Court the state counsel was not ready in both files.
14. The matters were for mention on the day and most of the accused persons were absent from court. In my judgment the learned Magistrate ought to have exercised her discretion with care by allowing the state counsel an opportunity to explain why an order for costs ought not to be made against the appellant.
15. The failure by the learned Magistrate to hear the state counsel borders on unfairness and interferes with the principles of natural justice. Although the state counsel was not ready to assist the court, and understandably the bench warrants had been pending for a long time it was only fair that the state counsel was heard before such a punitive order was made.
16. For the above reasons the appeal is allowed. Before I leave I accept that there was inaction of the part of the state counsel to assist the court who should have been better prepared in one file and not forgotten the other file before coming to court.

17. It was not an acceptable situation created by counsel which must be avoided at all times bearing in mind that the business of the court ought not to be hindered by unprepared counsel. I can also understand the ire of the learned Magistrate since the bench warrants were pending from 2017 and nothing seemed to be done about it by the prosecution to make any progress in the files. The learned Magistrate was left with no choice in the circumstances, I hope counsel in future live up to their responsibility and such situations are not repeated which not only clogs the court diary but delays matters.
18. It is noted that the substantive matter had been remitted to the Magistrate's Court to be tried under the extended jurisdiction of the High Court, since the appeal was from an interlocutory order this court has the jurisdiction to hear such an appeal (*The State-vs- Karim Rahmat Ali Khan, AAU 069 of 2013 (28 November, 2019)*).

ORDERS

- a) The appeal against order for costs is allowed.
- b) The order for costs imposed by the Magistrate's Court is set aside.
- c) 30 days to appeal to the Court of Appeal.



Sunil Sharma
Judge

At Lautoka

30 December, 2020

Solicitors

Office of the Director of Public Prosecutions for the Appellant.

No appearance by the Respondents.