IN THE HIGH COURT OF FIJI

AT SUVA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 036 OF 2020S

BETWEEN : AMARJIT SINGH

APPELLANT

AND : THE STATE

RESPONDENT

Counsels : Mr. D. Sharma for Appellant

Ms. S. Tivao for Respondent

Hearing : 13 October, 2020.

Judgment : 23 October, 2020.

JUDGMENT

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1. On 12 November 2015, the appellant (accused) appeared in the Suva Magistrate Court charged with the following offence:

> ***"Statement of Offence***
>
> ***ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Decree Number 44 of 2009.***

Particulars of Offence

AMARJIT SINGH on the 11th day of November 2015, at Samabula in the Central Division, assaulted SONU AHLAWAT, thereby causing her actual bodily harm."

2. The appellant was represented by Ms. K. Chetty. The case was adjourned to 26 November 2015 for plea to be taken. On 26 November 2015, the charge was read and explained to the accused in the presence of his counsel. He said, he understood the same and pleaded not guilty to the charge. In other words, he denied the allegation against him. The case was adjourned to 4th April 2016 for it to be heard. On 4 April 2016, the hearing did not proceed. No reason was provided in the court record. The case was then adjourned to 4 May, 7 June and 18 July 2016 for mentions. On 18 July 2016, the court set 24 November 2016 as the hearing date. This was the second hearing date. On 24 November 2016, the magistrate was not available. The hearing could not proceed, and the matter was adjourned for mention on 20 December 2016.

3. On 20 December 2016, the court set 3 April 2017 as the next hearing date. This was the third hearing date. It was approximately one year from the first hearing set on 4 April 2016. On 3 April 2017, the hearing could not proceed as the magistrate was in a magistrates' meeting. The case was adjourned to 10 May 2017 for mention. On 10 May 2017, the court set 11, 12 and 13 October 2017 as the hearing date. This was the fourth hearing date set. On 11 October 2017, the first day of the trial, the prosecution had difficulties. Only two of its witnesses were present. Others were not present. The defence was ready to proceed. The prosecution wanted to proceed with the two witnesses. The magistrate granted an adjournment to the next day, the 12th of October 2017.

4. On 12 October 2017, the prosecution was ready to proceed. They had a substitute doctor to testify on the alleged complainant's medical report. Defence objected to the substitute doctor. The prosecutor was Corporal Filipe. The appellant was represented by Mr. D. Sharma. According to section 168 (a) of the Criminal Procedure Act 2009, the court should have called for the prosecution to present its case. They were ready to proceed as their witnesses were present. However, from the court record the prosecution then applied for an adjournment to get the substitute doctor's statement. The court allowed the adjournment, despite the defence's objection. The court set the 18, 19 and 20 December 2017 as the next hearing date. This was the 5th hearing date set for the case. All the 5 prosecution's witnesses and 3 defence witnesses were warned to turn up on the hearing date.

5. On 18 December 2017, only the complainant turned up for the hearing. No other prosecution witnesses were present. Corporal Filipe, the previous prosecutor was on leave. Inspector Jiten stood in for him. The prosecutor said, they were not in a position to proceed. Mr. Sharma called for the court to acquit the accused pursuant to section 178 of the Criminal Procedure Act 2009. The prosecution asked for the trial to be vacated. The defence objected and called for the accused to be acquitted. The court then made some comments in the record and said the following "***charge against accused is dismissed. Accused is discharged. File closed***."

6. On 25 June 2018, the appellant was recharged for the same offence again in the Suva Magistrate Court, that is, Criminal Case No. 1055 of 2018. The matter is now pending in the Suva Magistrate Court.

7. The appellant was not happy with how the Magistrate Court handled the court proceeding on 18 December 2017 and was not happy with being recharged for the same offence on 25 June 2018. Their ground of appeal was worded as such:

"…(a) The learned Magistrate erred in law in not acquitting the Appellant on 18th December 2017 after the Prosecution's application for an adjournment was declined by the Court and the Prosecution was unable to proceed further with the hearing and thus unable to prove the charge against the Appellant…"

8. Before discussing the answers to the above problems as contained in the Criminal Procedure Act 2009, it is important to remind ourselves again of the rights of the accused as enshrined in section 14 (2) of the 2013 Fiji Constitution, as it relates to this case. Section 14 (2) reads as follows:

"… (2) Every person charged with an offence has the right—

(a) to be presumed innocent until proven guilty according to law;

(b) to be informed in legible writing, in a language that he or she understands, of the nature of and reasons for the charge;

(c) to be given adequate time and facilities to prepare a defence, including if he or she so requests, a right of access to witness statements;

(d) to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right;

(e) to be informed in advance of the evidence on which the prosecution intends to rely, and to have reasonable access to that evidence;

(f) to a public trial before a court of law, unless the interests of justice otherwise require;

(g) to have the trial begin and conclude without unreasonable delay; …

(k) not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted;

(l) to call witnesses and present evidence, and to challenge evidence presented against him or her; …"

9. What the Magistrate Court did on 18 December 2017, the first day of the hearing, are contained in pages 45 and 46 of the Magistrate Court record. The prosecutor said he was "not in a position to proceed" (page 45). The defence objected to an adjournment when it said "matter cannot be adjourned for another day" (page 46). Defence asked for an acquittal under section 178 of Criminal Procedure Act 2009 (page 46). Prosecution seeks hearing be vacated (page 46). I take that to mean he's applying for an adjournment. Court noted some comments and said "***charges against accused is dismissed. Accused is discharged. File closed***" (page 46). I take the above comments to mean that the court had refused the prosecution's purported application for an adjournment, and on being aware that the prosecution had not offered any evidence in support of the charge and thus had not made a prima facie case against the accused, had dismissed the case against him. To complicate matters, the court also used the phrase "Accused is discharged". The question now becomes: was the dismissal/discharge by the court done under section 169 or section 178 of the Criminal Procedure Act 2009?

10. The answers to the problems encountered above had long ago been answered by the Fiji Court of Appeal on 30 September 1980 in the case of **Robert Tweedle Macahill** v **Reginam**, Criminal Appeal No. 43 of 1980. Mr. S. M. Koya appeared for the Appellant while Mr. A. Gate (former Hon. Chief Justice) appeared for the State. The court was dealing with the Criminal Procedure Code in the 1967 edition of the Laws of Fiji. The relevant sections in the Criminal Procedure Act 2009 are very

similar, but the numbers had changed. In this judgment, I will tally the sections in the 1967 Laws of Fiji edition with the Criminal Procedure Act 2009 sections.

11. What did **Robert Tweedle Macahill** v **Reginam** (supra) say? The Fiji Court of Appeal said:

> ***"…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(now section 168 (a) of the Criminal Procedure Act 2009 [CPA 2009]) 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 (now 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 the 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(now section 168 (a) of the CPA 2009) applied and the mandatory direction to proceed with the case applied.***
>
> ***The case might have been disposed of under section 192 (now 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 (now 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 (now section 169 of the CPA 2009). That being so, the case must then proceed by virtue of section 191 (now section 168 (a) of the CPA 2009). Section 199 applied (now section 177 of the CPA 2009). 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 applies 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 (now section 178 of the CPA 2009). If witnesses are called then sections 201 (now section 179 of the CPA 2009) and 202 (now section 180 of the CPA 2009) apply and judgment will be given under section 206 (now section 183 of the 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."

12. On 9 May 2012, in **The State** v **Eliki Mototabua**, Criminal Appeal Case No. CAV 0005 of 2009, the Honorable Chief Justice Anthony Gates (as he then was) approved of the authority of **Robert Tweedle Macahill** v **Reginam** (supra), in paragraph 23 of his Lordship's judgment. On how to approach the situation encountered by the learned magistrate in this case on the date of hearing on 18 December 2017, his Lordship said the following in paragraph 26 of his judgment:

"[26] In Director of Public Prosecutions v Vikash Sharma and 3 Others, HAA0011 of 1994S, 1st November 1994, Pain J set out the simple steps to be followed:

"For clarity I record the formal steps that should be taken by a Magistrate in this situation. These rulings by him must be formally noted in the record.

(i) The application for an adjournment is refused:
(ii) The hearing then proceeds by the Magistrate calling upon the Defendants to plead (if they have not already done so) and then calling upon the prosecutor to begin;
(iii) If no evidence is called by the Prosecutor, then the Defendant or Defendants can be acquitted under Section 210 (now section 178 of the Criminal Procedure Act 2009) of the Criminal Procedure Code."

[See too Director of Public Prosecutions v Neumi Kalou & Anor. [1996] 42 Fiji LR 126 and the full discussion of the cases in Ministry of Labour (supra).]"

13. How should the above authorities be applied to the facts of this case? To answer the above question, we will have to examine the full court record on 18 December 2017, and examine how the prosecutor, the defence counsel and the court reacted to what unfolded in front of them. The court record recorded the following:

"18/12/17

Prosecution ; Inspector Jiten

Accused : Present Mr. Sharma

Court Clerks : Bulou, Divek

Prosecution - complainant present

Stood down

Sgd: D. Prakash
Resident Magistrate
18/12/17

18/12/17 ***Later at 10.45 am***

Prosecution : Inspector Jiten

Accused : Present Mr. Sharma

Court Clerks : Bulou, Divek

1. ***Complainant is present***
2. ***No other witness present.***

Investigating Officer and Charging Officer not present.
Request for Bench Warrant for 3 witnesses – Iliesa, Viliame, Makereta.

Prosecution not in a position to proceed.
Medical report not ready.
Complainant wants to make further representation to DPP.

Mr. Sharma:
Last time matter was set for hearing. Prosecution did not proceed. Doctor had migrated. No other medical report available. Matter cannot be adjourned for another day. Section 178 client be acquitted. Adjournment granted last occasion. No formal application to substitute new documents. No interviews and no disclosures.

Ready for 3 days trial if Prosecution not ready, to acquit Accused.

Prosecution:
If Bench Warrant issued, trial can be started on the next day, nothing on file to show the issues raised on last occasion. Corporal Filipe on leave, file February 2018.

Prosecution seeks hearing be vacated. Defence states ready to proceed and matter should proceed. If Prosecution cannot proceed, client should be acquitted.

<u>Court:</u>
2015 matter set for 3 days trial, did not proceed on last occasion as doctor who conducted medical exam has migrated and Prosecution sought time to file proper application for another doctor to give evidence, nothing has been done, only Complainant present, 3 other witnesses not present despite being warned by Court on the last occasion.

Charges against Accused is dismissed.
Accused is discharged.
File closed.

Sgd: D. Prakash
<u>Resident Magistrate</u>
18/12/17"

14. On 12 October 2017, Corporal Filipe was the prosecutor, the appellant (accused) and his counsel, Mr. D. Sharma, were present in court. The court set the 18, 19 and 20 December 2017 as the trial date for the case. This was the 5th hearing set for this case. The four previous hearings had been aborted for various reasons. On 18 December 2017, the prosecutor Inspector Jiten and the complainant were present in court. The accused and his lawyer Mr. D. Sharma were present. In terms of the requirement of section 168 (a) of the Criminal Procedure Act 2009, the court shall proceed to hear the case. The appellant had already pleaded not guilty to the charge on 26 May 2015. The burden of proof being on the prosecution, it was mandatory for them to offer some evidence, that is, call their witnesses. The court record showed that they were not in a position to proceed, because other witnesses

were not present and the complainant's medical report was not ready. Two options were open to the prosecution, either apply for an adjournment under section 170 of the Criminal Procedure Act 2009, or a withdrawal of the charge under section 169 of the above 2009 Act.

15. According to the record, the option of withdrawing the charge under section 169 of the Criminal Procedure Act 2009 was not exercised by the prosecutor. The record showed that the prosecutor asked for the trial to start on the next day and later asked for the trial to be vacated. It was not unreasonable to draw an inference from the above comments that the prosecution was asking for an adjournment. The defence said they were ready to proceed and they said, the matter should proceed to a hearing, and if prosecution cannot proceed, his client should be acquitted. How did the court react to what was unfolding in front of her? We had noted at the top of page 10 hereof how the court reacted. Ideally, the court should have followed the three steps identified by His Lordship Justice Pain in **Director of Public Prosecution** v **Vikash Sharma** (supra) in paragraph 12 hereof. Firstly, the court should have ruled on the purported application for an adjournment. Obviously, from the court's comments, that was denied. Secondly, since the appellant had already pleaded not guilty to the charge on 26 November 2015, the court should have formally called for the prosecution to begin by calling their witness. It appeared from the record that the court was aware of the prosecution's earlier position that it was "not in position to proceed", as its other witnesses were not present, even though they were previously warned by the court to attend. In addition, the court was aware of the prosecution's difficulties with the doctor who had migrated and the substitute doctor. The court was also aware that the case was a 2015 matter and it did not proceed when the trial was last set in October 2017.'

16. It appeared from the above matters that the court had constructively held that the prosecution was incapable of making a prima facie case against the accused. It was therefore proceeding to judgment in accordance with the requirements of section 178 of the Criminal Procedure Act 2009. As stated in **Robert Tweedle Macahill** v **Reginam** (supra), in paragraph 11 hereof, "***if the accused does not admit the truth of the charge, the court shall proceed to hear the witnesses for the prosecution and other evidence (if any)."*** (Section 177 (1) of Criminal Procedure Act 2009). "***Whether evidence is called for the prosecution or not, the court must proceed to judgment under section 178 of the Criminal Procedure Act 2009." "The code is thus complete and there is no failure to provide for case where the prosecution does not call evidence***." On the authority of **Robert Tweedle Macahill** v **Reginam** (supra), on 18 December 2017, the hearing day, the court was obliged to hear the prosecution's case, the burden of proof being on them. No evidence was called by the prosecution. No withdrawal application was made. An adjournment was denied. The court rightfully dismissed the charge against the accused. Where the court erred was that under section 178 of the Criminal Procedure Act 2009, when a court dismisses a charge against an accused, it was mandatory for it to follow up with the phrase "***and shall acquit the accused***." When the court wrote "***Accused is discharged***", obviously it erred because there was no withdrawal application by the prosecution under section 169 of the Criminal Procedure Act 2009.

17. Given the above, I grant the appellant leave to appeal out of time. I also allow his appeal. I hold that the learned Magistrate erred in law in not acquitting the appellant on 18 December 2017 after the prosecution's application for an adjournment was declined by the court and the prosecution was unable to proceed further with the hearing and thus unable to prove the charge against the appellant. Pursuant to section 256 (2) (a) of the Criminal Procedure Act 2009, I vary the learned

Magistrate's decision of 18 December 2017 to read as follows: the prosecution's purported application for an adjournment is denied; the prosecution having offered no evidence against the accused on the charge before the court, the case against the accused is dismissed and he is acquitted accordingly.

Salesi Temo
JUDGE

Solicitor for Appellant : R. Patel Lawyers, Suva.
Solicitor for Respondent : Office of the Director of Public Prosecution, Suva.