IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO. HAA 29 OF 2020

BETWEEN : **STATE**

APPELLANT

A N D : **1. FAYNOLD KABOLO**

2. MEKERE PUN

3. JORDON POLO

RESPONDENTS

Counsel : ***Ms. P.K. Lata for the Appellant***
: ***Ms. V. Diroiroi for the Respondent.***

Date of Hearing : ***05th of November, 2020***
Date of Judgement : ***24th of November, 2020***

JUDGMENT

Background

1. This is an appeal by the DPP (Director of Public Prosecutions) against an order of Acquittal made by the Magistrates' Court of Nadi.

2. The Respondents were charged in the Magistrates' Court of Nadi with the following offence;

COUNT 1

Statement of offence

Fail to Comply with Orders: Contrary to Section 69 (1) (c) of the Public Health Act and Regulation 2 of the Public Health (infectious Diseases) Regulation 2020.

Particulars of Offence

Faynold Kabolo, Mekere Pun and Jordon Polo on the 12th day of April, 2020 at Nadi in the Western Division without lawful excuse fail to comply with orders of the Prime Minister by breaching the curfew hours from 8pm to 5am, an order deemed necessary for the protection of the public health from an infectious disease namely Novel Corona Virus.

3. The Respondents have pleaded guilty to the said charge at the first opportunity and the summary of facts were filed and read over. The accused admitted the said summary of facts unequivocally.

4. The learned Magistrate then has proceeded to convict the accused. Though the paragraph 4 of the impugned sentence state that the learned Magistrate did not proceed to record convictions, the case record indicates it otherwise. Then the Learned Magistrate has proceeded to acquit the accused on the basis that the charge is *void ab initio* (void from the beginning).

5. Being dissatisfied of the said ruling the Prosecution has appealed to this Court on the following grounds;

   i) That the learned Magistrate erred in law when he held that the charge was *void ab initio*; and

   ii) The learned Magistrate erred in law when he acquitted the Respondents on the basis that the charge is *void ab initio* without allowing the Prosecution to make the necessary amendments to charge as stipulated under section 182 (1) of the Criminal Procedure Act, 2009.

6. The first issue though it is not a ground of appeal, would be whether a Learned Magistrate could proceed to enter an acquittal having convicted the accused first. It is apparent that the Learned Magistrate has not quashed the previously entered conviction in dealing with the accused. It is arguably possible to quash a conviction due to a fatal mistake of fact or law. However, firstly it should be stated that without quashing the so entered conviction, a Magistrate is functus in deciding the validity of the charge.

7. The second issue would be whether the charge is void *ab initio*? On the face of it, it is apparent that there is a defect in the charge. However, were the accused mislead or prejudiced by the said mistake? This very pertinent issue has been rightly considered by the learned Magistrate in paragraph 21 of his sentence, quoting his lordship Gounder J. in the case of **State v David Charles Jenkins** HAR 002 of 2011. Has the Learned Magistrate applied the law accordingly?

8. The accused were arrested on the 12th of April 2020. The Permanent Secretary for Health and Medical Services had ordered pursuant to section 69 (3) of the Public Health Act, a curfew island wide. Therefore, the law was there proscribing the said act committed by the accused. It is beyond contention that there was a valid law. The charge states of orders of the Prime Minister. The appropriate authority to impose such orders is the Minister of Health or his Secretary on his orders. The only issue is that it was not properly stated in the charge. If there was no valid law, the charge would have been *void ab initio*. Every person in a country is supposed to know the law of the country, hence it is presumed that the accused knew that they have violated the law. As there was a valid law and the Respondents were not mislead by the said mistake in the charge, the charge could not be held to be *void ab initio.*

9. The second ground urged by the Appellant is that the learned Magistrate was wrong in acquitting the accused without allowing the Prosecution to amend the charge. The Appellant cites section 182 of the Criminal Procedure Act, in support. Section 182 of the Criminal Procedure Act states that;

> *182.- (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective (either in substance or in form), the court may make such order for the alteration of the charge, either by–*
>
> *(a) amendment of the charge; or*
>
> *(b) by the substitution or addition of a new charge–*
>
> *as the court thinks necessary to meet the circumstances of the case.*
>
> *(2) Where a charge is altered under sub-section (1)–*
>
> *(a) the court shall call upon the accused person to plead to the altered charge; and*

(b) the accused may demand that the witnesses or any of them be recalled and give their evidence afresh or be further cross examined by the accused or his lawyer and, in such last mentioned event, the prosecution shall have the right to re-examine any witness on matters arising out of the further cross-examination.

(3) Variance between the charge and the evidence produced in support of it with respect to–

(a) the date or time at which the alleged offence was committed; or

(b) the description, value or ownership of any property or thing the subject of the charge–

is not material and the charge need not be amended for such variation.

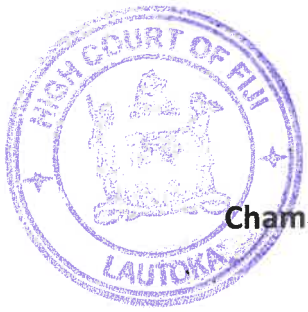
(4) Where the variation is with respect to the date or time at which the alleged offence was committed the court shall determine that the proceedings have in fact been instituted within the time (if any) limited by law for their institution, and shall make any appropriate order to enforce the applicable time limits.

(5) Where an alteration of a charge is made under sub-section (1) or there is a variance between the charge and the evidence as described in sub-section (3), the court shall, if it is of the opinion that the accused has been misled or deceived, adjourn the trial for such period as may be reasonably necessary.

10. Therefore, it is amply evident and should be noted that learned Magistrate had a discretion to amend only up to the conclusion of the Prosecution case and not thereafter. Though I do not agree that the charge was *void ab initio*, assuming if the charge was *void ab initio* the learned Magistrate would have no choice but to acquit the accused. Therefore I regret that I cannot agree with the contention of the Appellants on the said issue.

11. All in all, since the Appellant has succeeded on the merits of this appeal, I allow the appeal and quash the order of acquittal entered by the learned Magistrate of Nadi.

12. While permitting the Appellant to amend the charge, I order a retrial to be held before the Magistrates' Court of Nadi against the Respondents.



Chamath S. Morais
Judge

At Lautoka
24th of November, 2020

Solicitors: *Office of the Director of Public Prosecutions, Lautoka, for the Appellant*
Legal Aid Commission, Lautoka, for the Respondents