

**IN THE HIGH COURT OF FIJI**  
**AT LAUTOKA**  
**CRIMINAL JURISDICTION**

**Criminal Appeal. No. HAA 12 of 2024**

**BETWEEN** : **ASIF ISMAIL** **APPELLANT**

**A N D** : **STATE** **RESPONDENT**

**Counsel** : Mr. I. Khan with Mr. S. Heritage for the Appellant.  
: Ms. S. Swastika for the Respondent.

**Date of Hearing** : 26 September, 2024

**Date of Judgment** : 27 September, 2024

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**JUDGMENT**

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**BACKGROUND INFORMATION**

[1] The appellant is charged in the Magistrate's Court at Lautoka with one count of grievous harm contrary to section 258 of the Crimes Act 2009.

[2] It was alleged that the appellant with another on the 16<sup>th</sup> day of October, 2015 at Lautoka in the Western Division, unlawfully and maliciously did grievous harm to Lalesh Kumar Deo.

[3] The appellant pleaded not guilty and the matter went to trial. On 27<sup>th</sup> December, 2017 the Magistrate's Court found the appellant guilty, convicted and sentenced him. The appellant appealed to the High Court whereby the High Court set aside the conviction and ordered a retrial before another Magistrate. The High Court inter alia also made the following orders in HAM 89 of 2020:

*“In the interest of fairness to the Applicant, the Senior Court Officer of the Magistrates Court at Lautoka is hereby directed to open a new file for the Applicant in respect of the matter which is pending under Criminal Case No. 681 of 2015.”*

[4] In the Magistrate's Court the file was handled by Resident Magistrate Ms. Juita before it was transferred to the current Resident Magistrate Mr. Qalinauci. On 8<sup>th</sup> August, 2023 the matter proceeded to hearing after calling two witnesses the prosecution closed its case. On 3<sup>rd</sup> October, 2023 the court ruled that the accused had a case to answer and he was put to his defence.

[5] On 13<sup>th</sup> October, 2023 the defence counsel informed the court that the accused will give evidence and call another witness. On 1<sup>st</sup> December, 2023 for the first time the learned Magistrate was informed by the defence counsel that there was a High Court order for the court registry to open a new file.

[6] The matter was assigned a date for defence case which was 9<sup>th</sup> February, 2024, a day before this date on the 8<sup>th</sup> the defence counsel filed a notice of motion with supporting affidavit seeking orders that the learned Magistrate RM Mr. Qalinauci recuse himself from hearing the matter on grounds of actual bias/perception of bias/ reasonable apprehension of

bias due to non-compliance with the High Court order dated 17<sup>th</sup> March, 2020.

[7] On 28<sup>th</sup> March, 2024 the learned Magistrate dismissed the application for recusal. Being aggrieved by the refusal, the appellant through his counsel filed an amended petition of appeal against the ruling to the High Court upon the following grounds:

- 1) *That the Learned Trial Magistrate's decision to proceed with the trial with the old file constituted a contempt of Court contrary in view of Honourable Justice Sharma's Order made on the 17<sup>th</sup> day of March, 2020 and as such there has been a substantial miscarriage of justice.*
- 2) *That the Learned Trial Magistrate erred in law and in fact in summarily dismissing the Petitioner's application for recusal without taking into consideration the Order of the High Court dated 17<sup>th</sup> March 2020 by Honourable Justice Sunil Sharma and legal authorities that were placed before the Court.*
- 3) *That the Learned Trial Magistrate erred in law and in fact in not considering the High Court Order dated 17<sup>th</sup> March 2020 of Honourable Justice Sunil Sharma that a new file/action number be assigned and as such there has been a substantial miscarriage of justice.*
- 4) *That the Learned Trial Magistrate erred in law and in fact in not exercising his discretion judicially and misdirected himself on the question of perception of bias/actual bias and as such there has been a substantial miscarriage of justice.*

5) *That the Learned Magistrate erred in law and in fact in not taking into consideration Section 15 (1) of the Fiji Constitution and entitling him a fair trial and Honourable Justice Sharma's Order stating "In the interest of fairness to the applicant when the Learned Judge directed the Senior Court Officer of the Magistrates Court at Lautoka to open a new file for the applicant in respect of the matter and the failure to do so as such there has been a substantial miscarriage of justice.*

[8] The appellant's counsel relied on his written submissions in support of the grounds of appeal filed and his response to the preliminary objection raised by the state counsel. The preliminary objection raised is that the appeal filed by the appellant is an interlocutory appeal hence this court ought not to hear the appeal until the appellant is sentenced by the Magistrate's Court.

[9] The objection by the state counsel is misconceived since the appellant has filed an appeal against the order of the Magistrate's Court dated 28<sup>th</sup> March, 2024 dismissing his application for recusal, section 246 (1) and (7) of the Criminal Procedure Act allows the appellant to file this appeal.

[10] In the present situation the appellant has not been convicted by the Magistrate's Court, the substantive matter is pending defence case. The current appeal emanates from a miscellaneous application filed by the appellant in the Magistrate's Court which this court has the jurisdiction to consider.

[11] Besides filing of submissions both counsel also made oral submissions during the hearing for which this court is grateful.

## **DETERMINATION**

- [12] All the grounds of appeal can be dealt with together since they are interrelated. The primary contention is that the appellant will not be able to get a fair trial since there has been a non-compliance with the order of the High Court that a new file with a new action number was supposed to have been opened which was not done.
- [13] The observation by the appellant is that the old file is being passed on from one Resident Magistrate to another and the current Resident Magistrate is no exception. It has been observed that the old file contains transcripts and submissions and other relevant information from earlier trial which is prejudicial to the appellant.
- [14] Unfortunately, counsel was unable to point to the prejudice and the unfairness caused to the appellant as a result of the failure by the Senior Court Officer to comply with the High Court order to open a new file. It is also observed that the learned Magistrate in fairness to the appellant had invited the defence counsel to compare the transcript of Magistrate Kasturiratne and his no case to answer ruling with the trial transcript. This approach by the learned Magistrate was to alleviate any concerns about the correctness of the evidence adduced and any perceived bias on his part (see paragraph 58 of the Magistrate's Court ruling dated 28<sup>th</sup> March, 2024).

## **LAW**

- [15] The test for a recusal application is two tiered:
- a) The court must first ascertain all the circumstances which have a bearing on the suggestion that the Resident Magistrate was biased;

- b) It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same that the tribunal was biased.

[16] The leading case in Fiji is the Supreme Court's judgment in *Amina Begum Koya v The State* [1998] FJSC 2. The court noted that there were two schools of thought. In *R v Gough* [1993] AC 646, the House of Lords had held that the test to be applied was whether there was "a real danger or real likelihood, in the sense of possibility, of bias".

[17] On the other hand, in *Webb v The Queen* [1994] HCA 30, the High Court of Australia had held that the test to be applied was whether "a fair-minded but informed observer might reasonably apprehend or suspect that the judge had prejudged or might prejudice the case". The Supreme Court in *Koya's case* was of the view that there was little, if any, practical difference between the two tests.

[18] In an application of this nature mere speculation is not good enough there has to be some cogency on what the appellant argues to be bias on the part of the learned Magistrate. Firstly the High Court order is an administrative one which is directed to the Senior Court Officer to open a new file only and not to allocate a new file number as incorrectly mentioned by the appellant's counsel in his third ground of appeal. Secondly, the appellant's counsel did not point to the specific circumstances that would lead a fair minded and informed observer to conclude that there was a real possibility, or a real danger, that the learned Magistrate was biased.

- [19] According to the court records it was only on 1<sup>st</sup> December, 2023 after the Magistrate’s Court had ruled that the appellant had a case to answer that the defence counsel informed the learned Magistrate about the High Court order dated 17<sup>th</sup> March, 2020. All along the defence counsel knew of the High Court order but he did not bring it to the attention of the learned Magistrate reeks of acquiesce and waiver by the defence. The appellant is now relying on the High Court order as a means to derail the entire trial in which they have actively participated. The defence only raised the issue of bias when it was for the defence to open its case. This attitude from defence does not augur well for the justice system.
- [20] In *Anand Abhay Raj vs. The State*, [2014] FJSC 12; CAV0003.2014 (20 August 2014) the Supreme Court made the following pertinent observations at paragraphs 34 and 35 that it was important for issues affecting a party to the proceedings be raised in a timely manner so that the court is assisted and rectification can be ideally attended to:

[34] *At trial, defence counsel could have raised with the judge the proper direction to the assessors. In Abdul Khair Mohammad Islam [1997] 1 Cr. App. R. 22 Buxton LJ said:*

*“We are told that before speeches, and very usefully and properly, in accordance with the practice repeatedly urged by this Court, counsel discussed with the judge any particular directions that he should give to the jury. It was apparently agreed that he should remind the jury of the particular, and limited, nature and effect of the complaint evidence. In the event, however, no such direction was given. At the end of the summing-up neither counsel reminded the judge of that omission.”*

*[35] The raising of direction matters in this way is a useful trial function and in following it, counsel assist in achieving a fair trial. In doing so they act in their client's interest. The appellate courts will not look favourably on cases where counsel have held their seats, hoping for an appeal point, when issues in directions should have been raised with the judge. We do not believe this was intended in this case.*

- [21] The appellant has been represented by counsel throughout the trial in the Magistrate's Court and no objection was taken about the conduct of the learned Magistrate or the trial in general or any iota of unfairness on the accused by the learned Magistrate.
- [22] The appellant's counsel and/ or the appellant ought to understand that each case has its own peculiar facts, what happened on a previous occasion before another judicial officer cannot *per se* be an instrument to taint an entirely new trial. I accept there was a High Court order made which was not brought to the attention of the learned Magistrate until after the defence was called upon to open its case.
- [23] Furthermore, the appellant's counsel has not been able to point to any specific facts/issues/evidence from the earlier proceedings which were relied upon by the learned Magistrate against the appellant in his no case to answer ruling and how it has compromised the defence case. The copy record does not give any such indication hence the appellant's contention that he has not received a fair trial lack merits.
- [24] The learned Magistrate had clearly explained his position and his obligation as a judicial officer in his ruling at paragraphs 51, 57 to 59



(pages 21 and 22) of the copy record which is reproduced for completeness:

51. *I didn't have the opportunity to go through the court file because the court file was brought to court and handed over to me on the day of the hearing on 8/8/23. When I presided over the matter on the hearing day the defence didn't raise the issue before the commencement of the hearing (trial de novo). The issue was only raised after the court found that the accused had a case to answer and he was put to his defence.*
  
57. *The High Court order dated 17/3/20 was directed to the Senior Court Officer of the Magistrate Court registry. While preparing my No Case to Answer Ruling, I didn't sight the previous trial proceedings that was heard by Magistrate Kasturiratne. The witnesses that was heard by Magistrate Kasturiratne were three witnesses (including a medical doctor) and the witnesses that were called and testified before me were 2 witnesses. The medical report was tendered by consent.*
  
58. *I had given a copy of my No Case to Answer ruling to the defence. The defence should have a copy of the No Case to Answer ruling that was delivered by Magistrate Kasturiratne. The trial transcript from my trial is available and the defence is at liberty to compare the trial transcript of Magistrate Kasturiratne and No Case to Answer ruling with my trial transcript and my No Case to Answer ruling.*
  
59. *I have a duty as the Magistrate hearing the matter is to ensure that the accused must have a fair trial. The accused right to have*

*a fair trial is protected under the supreme law of our country which is the Constitution.*

- [25] The reasons given by the learned Magistrate not to recuse himself are acceptable, reasonable and in compliance with the rules of fairness and procedure.
- [26] In my considered judgment the allegation of bias stems from an unsubstantiated assumption by the appellant which has nothing to do with the conduct of the trial or the evidence adduced. The appellant ought to understand that fairness is an important component in the attainment of justice on the evidence adduced and the application of the law.
- [27] The legal profession is based on honesty, integrity and professionalism, the judicial oath requires a judicial officer to rise over all challenges in ensuring that justice is served. In this case, there is nothing to suggest that there has been any dereliction by the learned Magistrate of his duties in doing what he is expected and entrusted to do.
- [28] The allegation that the learned Magistrate was biased due to non-compliance of an administrative direction from the High Court which was not brought to the attention of the learned Magistrate in a timely manner by the defence counsel is far-fetched and unjustified.
- [29] All litigants and witnesses are equal before the law, each case has its own facts and circumstances and any decision of a court is based on a considered judgment. The judicial oath of a judicial officer plays an integral part in upholding fairness and in reaching a just outcome. It is obvious to me that the last minute recusal application in the Magistrate's

Court is a desperate attempt by the appellant to thwart the trial completely.

[30] There is no error made by the learned Magistrate or any substantial miscarriage of justice caused to the appellant when the learned Magistrate refused to recuse himself from continuing with the trial. The appeal is dismissed due to lack of merits.

[31] The substantive matter is a 2015 allegation which needs to be dealt with as soon as possible. The Magistrate's Court is hereby directed to urgently assign a hearing date and proceed with the defence case.

### **ORDERS**

- a). The appeal against the order of the Magistrate's Court dated 28<sup>th</sup> March, 2024 is dismissed due to lack of merits;
- b). The Magistrate's Court is directed to urgently assign a hearing date and proceed with the defence case on a priority basis.

  
**Sunil Sharma**  
Judge



**At Lautoka**

27 September, 2024

### **Solicitors**

**Messrs Iqbal Khan & Associates for the Appellant.**

**Office of the Director of Public Prosecutions for the Respondent.**