DIRECTOR OF PUBLIC PROSECUTIONS

v.

NEUMI KALOU &
ROPATE WAIROGO

[HIGH COURT, 1996 (Scott J) 16 July]

Appellate Jurisdiction

Crime: procedure- Magistrates' Courts- request by prosecution for adjournment of trial- need for merits of application to be considered- consequences of refusal. Criminal Procedure Code (Cap. 21) Sections 198, 203 & 210.

After the complainant failed to appear the prosecutor sought an adjournment which was refused. The High Court explained that the consequences of a refusal in such circumstances would usually result in acquittal and that this consideration must be borne in mind by a magistrate to whom an application for an adjournment was made.

Cases cited:

DPP v Vikash Sharma (HAA 0011/94)
Maxwell v. Keun [1928] 1 KB 645
R v. Cox [1960] VR 665
R v. Horseferry Road JJ Ex p. Wilson Unrep. D.C. 28 Jan 1987).
R v. Slough JJ Ex p. Richardson [1981] CLY 1716
Re M (An Infant) [1968] 1 WLR 1897
Robert Tweedie Macahill v Reginam (FCA 43/80 - FCA Reps. 80/265)
State v Kelemedi Lagi 42 FLR 71

Appeal against acquittals by the Magistrates' Court.

K. Wilkinson for the Appellant
No appearance by the 1st Respondent
2nd Respondent in Person

Scott J:

On 1 March 1995 the two Respondents were charged with burglary. The Chief Magistrate adjourned the matter for trial on 21 April. On 21 April neither Respondent appeared and bench warrants were issued. On 24 April the 1st Respondent having been arrested the matter was set down for trial on 22 May. On 22 May although all parties were ready to proceed the Chief Magistrate (for no recorded reason) adjourned the matter for trial on 21 June. Bail was extended. On 21 June neither Respondent appeared and bench warrants were issued. On 22 June the first Respondent appeared, was fined and bailed. The matter was adjourned to 22 July. On 22 July all parties were again present. The Resident

Magistrate (S. Temo Esq) adjourned the matter to 7 September for "final hearing". On 7 September the proceedings are recorded as follows:-

A

"7 September 1995

For Prosecution : Inspector Prasad
Accused No. 1 : Present
Accused No. 2 : Present

B *Prosecution cannot proceed because:*

1. *The complainant has not been summoned.*

Accused's reply:

1. *Matter to proceed.*

C

Court:

1. *Today was a Final Hearing.*

2. *Both accused are present.*
Prosecution is not ready to proceed.
D *Complainant has not been summoned.*

3. *This Court has given the prosecution 2 months to prepare itself. Still they are not ready.*

4. *Case against the accused are dismissed on the ground that there is*
E *no evidence tendered to support the charge. Both accused are therefore acquitted. Section 210 Criminal Procedure Code.*

(Sgd) S Temo
Resident Magistrate"

On 4 October the DPP filed this appeal. The only ground advanced is that the
F Resident Magistrate erred in law in refusing the prosecution's application for an adjournment (on 7 September).

Although there is only this single ground of appeal the appeal raises another question which has been the subject of different approaches by this Court. The question is: where, on the date fixed for trial in a Magistrates' Court the Prosecution
G is unable to proceed eg. because Prosecution witnesses have not arrived and an application for an adjournment is refused should the Resident Magistrate dismiss the charge under the provisions of sections 198(1) or 203 of the Criminal Procedure Code (Cap.21) or should he acquit the accused under the provisions of s.210?

The two decisions of this Court which on their face cannot be reconciled are DPP v Vikash Sharma (HAA 0011/94) and State v Kelemedi Lagi 42 FLR 71. Apart from the need to resolve the uncertainty which flows from the different approaches

taken by these two decisions the question is also of considerable importance both to Magistrates and the DPP since acquittal operates to prevent the accused being again charged whereas dismissal does not (see s.201(3)). It is unfortunate that in neither of the above cases did counsel for the Director draw the Court's attention to Robert Tweedie Macahill v Reginam (FCA 43/80 - FCA Reps. 80/265) where the correct procedure was explained.

Macahill is quite clear: where the complainant appears ss.198 and 203 can have no application. In such circumstances where an adjournment is refused the Code is mandatory: "the Court shall proceed to hear the case" (s.200). Assuming that no successful application is made under s.201 (and following refusal of an adjournment it is hard to envisage circumstances in which such an application could be successful) then, if no evidence is called the Court must proceed to judgment under s.210. In other words, a Resident Magistrate considering an application for an adjournment by the Prosecution needs to be aware that where the Prosecution is unable to proceed following refusal of the request the result will almost inevitably be acquittal which, as has been seen, is a much more dramatic consequence to the Prosecution then dismissal.

It is now possible to return to the actual ground of appeal namely the Resident Magistrate's refusal to grant an adjournment.

According to the Record no formal application for an adjournment was made by the Prosecution and no formal adjudication following such an application is recorded either. This is a breach of the procedural requirements set out in Macahill where the Fiji Court of Appeal said "(for the avoidance of doubt) it is essential that the presiding magistrate state explicitly the decision which he is pronouncing, either by referring to the particular statutory provision or by using the precise terms described by these statute". The need to follow the required steps was also pointed out in DPP v Vikash Sharma. (supra). That the Magistrate did however consider that an implied application for an adjournment was being made and that he thought himself to be ruling on that application is clear from the relevant part of the record already set out.

In support of his argument Mr. Wilkinson referred to an affidavit filed by the DPP on 27 June. This was an affidavit made by Inspector Prasad who prosecuted on 7 September. The filing of this affidavit, though innocent, was not proper. Evidence supplementing the record of the Magistrates' Court should not be adduced without the leave of the High Court (see s.320 of the Code). In the event, however, the affidavit only added to the record the fact that the Resident Magistrate's note "the complainant has not been summoned" was misleading: the complainant had in fact been summoned but the summons could not be served because of his sudden departure from Suva. I do not think that the contents of the Affidavit significantly affect the issue before me.

The power to adjourn before or during the hearing of a case is to be found in s.202 of the Code. As pointed out in Macahill the grant or refusal of an

adjournment is a matter of law involving the exercise of judicial discretion. Although an appellate court will be slow to interfere with the exercise of this
A discretion it will do so if it appears that the result of the order made below is to defeat the rights of the parties altogether ..... to do that which ..... would be an injustice to one or other of the parties" (See Maxwell v. Keun [1928] 1 KB 645, 653 CA; R v. Slough JJ Ex p. Richardson [1981] CLY 1716 and In Re M (An Infant) [1968] 1 WLR 1897 DC).

B A trial Magistrate exercising his discretion to grant or refuse an adjournment is not confined to considering the interests of the accused person but is entitled to have regard to the overall interests of justice (See R v. Cox [1960] VR 665) and where there have been previous adjournments then each application calls for a fresh exercise of the discretion (R v. Horseferry Road JJ Ex p. Wilson Unrep. D.C. 28 Jan 1987).

C As has been seen the Resident Magistrate's first reason for not allowing the hearing to be adjourned was that "today was a final hearing" but as Mr. Wilkinson pointed out the only reason that there had been previous adjournments was that either the Respondents had failed to appear or the Court, for its own reasons had put off the trial. It seems therefore that the failure of the Respondents to appear previously on their trial date was being used as a ground for penalising the
D Prosecution on this occasion. As a matter of record the Prosecution had neither requested nor been the cause of any previous adjournment.

I am not sure what precisely "final hearing" means. If it means that on a particular day a decision is taken that in no circumstances will a later fixture be vacated then it appears to be rather a draconian decision to take. What if, for example,
E ill health or act of God were to intervene? The fact that a decision was taken on 20 July to designate 7 September as a "final hearing" which could under no circumstances be vacated seems to breach the principle that each application for an adjournment must be treated on its own merits.

Now that it is established beyond doubt that the refusal of a request for an
F adjournment by the Prosecution will almost inevitably result in acquittal, Resident Magistrates should carefully weigh up whether it is in the public interest that a prosecution should be discontinued in this way, particularly where a very serious offence such as burglary is involved. There is nothing to show that the Resident Magistrate took these considerations into account.

While I sympathise with the Resident Magistrate's wish to get on with the business
G of the Court I am of the view that the application for adjournment by the Prosecution should in this case have been granted. The appeal is therefore allowed.

There is a final matter. I believe the Resident Magistrate's decision was at least partly arrived at in the knowledge which everyone shares that there are far too many adjournments in the Magistrates' Courts. These are a waste of time and money. One effective means of discouraging adjournments is the use of orders

for costs but strangely s.158 of the Code does not include provision for awards for costs thrown away although such awards do seem to make a fleeting appearance in s.203(1). Provision for the more flexible use of costs orders could, in my opinion usefully be considered by the Fiji Law Reform Commission in its current review of the Code.

(Appeal allowed; acquittals set aside.)