

INOKE CUMUTANAVANUA v STATE

HIGH COURT — APPELLATE JURISDICTION

5 SHAMEEM J

22, 28 March 2002

[2002] FJHC 9

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Criminal law — plea — appeal against conviction — proceeding without counsel — plea was null — Constitution s 28(1) — Criminal Procedure Code s 320(1) — Penal Code Act 17 ss 259, 262.

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Appellant was convicted and was sentenced for the offence of Larceny by a police officer committed in the course of employment. He alleged that his plea was a nullity because of lack of legal representation. Appellant sought appeal against the conviction and sentence.

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Held — The Chief Magistrate did not err in proceeding without counsel because the Appellant was given a reasonable opportunity to obtain legal representation. The plea was a nullity because of lack of legal representation, which led to a miscarriage of justice. Appeal allowed.

Cases referred to

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Bailey v Whangarei District Court [1995] 2 HRNZ 275; *Griffiths v R* (1932) 23 Cr App Rep 153; *R v Blandford Justices; Ex parte G (an infant)* (1976) 1 QB 82; *R v Lee* [1984] 1 WLR 578; *R v Perry & Harvey* (1909) 2 Cr App Rep 89; *Robinson v R* (1985) CLR 448, considered.

Tevita Fa for the Appellant

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Timoci Romanu for the Respondent

Judgment

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Shameem J. On 14th August 2001, the Appellant, who was second accused in the Magistrates' Court, pleaded guilty to the following charge:

Statement of Offence

LARCENY: Contrary to section 259 and 262 of the Penal Code, Act 17.

Particulars of Offence

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INOKE CUMUTANAVANUA, on the 12th day of July 2001 at Suva in the Central Division, stole a Dumbell (weights) valued at \$80.00, the property of late John Maurice Swifte Granville Scott.

There were two other Accused persons, both of whom also pleaded guilty on counts 1 and 3 to Larceny of a dumbbell and seven compact discs respectively. The Appellant was sentenced to 12 months' imprisonment.

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He now appeals against conviction and sentence. His grounds of appeal are as follows:

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- (i) The circumstances prevailing in the Magistrates' Court when he was asked for his plea did not allow him the free choice to deny the allegation which was put to him.
- (ii) When he came to his full sense it was too late as he had been sentenced to 12 months' imprisonment.

(iii) He had denied the charge to the police in his cautioned interview statement and his charge statement.

(iv) The sentence in the circumstances was excessive.

5 When the appeal was first listed for hearing, counsel for the Appellant sought leave to adduce further evidence in the form of the affidavit of the Appellant, counsel for the State initially objected, but withdrew objections on the final hearing date on 22nd March 2002. On that date I heard both the application to adduce further evidence and the substantive appeal. In the course of the hearing I granted leave to adduce the evidence of Inoke Cumutanavanua.

10 Section 320(1) of the Criminal Procedure Code, provides that:

In dealing with an appeal from a Magistrates Court, the High Court, if it thinks additional evidence is necessary, may either take such evidence itself or direct it to be taken by a magistrates court,...

15 The Code does not provide guidance for the way in which this discretion should be exercised. In England, the issue, in respect of appeals to the Court of Appeal, is government by s 23 of the Criminal Appeal Act 1968, which provides for additional evidence being accepted if it is “necessary or expedient in the interest of justice”. The discretion prior to that enactment was conferred by the
20 Criminal Appeal Act 1966, and by a very wide provision (similar to our s 320) in section, it was held in *R v Perry and Harvey* (1909) 2 Cr App Rep 89 (per Walton J) that where the fact that the further evidence was not led in the lower court was because of the mistaken conduct of the case, and where justice required the adducing of further evidence, it would be admitted.

25 The principles which emerge from the earlier cases, are first whether the evidence is relevant to the appeal, second whether the evidence is credible and admissible, and third whether there was a good reason for the failure to adduce the evidence in the lower court. Although it is unusual to allow fresh evidence after a guilty plea, it may be permitted if it is relevant to the question of whether
30 or not the plea was unequivocal and or otherwise a nullity. That was the basis for allowing the additional evidence in *R v Lee* [1984] 1 WLR 578; a decision made however on a construction of the 1968 Act.

Turning therefore to the case before me, the Appellant’s affidavit seeks to explain the circumstances in which he pleaded guilty in the Magistrates’ Court,
35 and refers to his charge statement which he says, discloses a defence. He annexes both caution and charge statements to his affidavit.

His affidavit states that on the 6th of August 2001 he had expressed his wish to be represented by Mr Raza, but that the Chief Magistrate declined to wait for Mr Raza. He further states that he was intimidated by the approach of the
40 Chief Magistrate who had succeeded in “terrifying” counsel for the other two accused to the extent that she withdrew from representing them. At paragraph 12 he states:

45 *Under such pressure, by the time I realized, I had pleaded guilty to the offence. All I wanted was to have Mr. Raza as my lawyer. I wanted to defence my case because I couldn't be stealing if it was given to me.*

In his annexed charge statement, the Appellant is alleged to have said to the police:

50 *I wish to say here that on 11/7/01 at about 1400 hours whilst on duty at 375 Princess Road, I had personally asked Mareca, the Acting Director of Red Cross, when they were cleaning up the house of late Mr Scott for the weight and Mareca had approved me to*

take it. I also asked Mareca for the electric heater and tea stuff and she also approved, but I only too the weight and not the heater. I have returned the item and I am very sorry for what I did.

- This is an appeal against conviction on a guilty plea. Such an appeal is only permitted if the plea was a nullity because it is equivocal or because the facts did not disclose the offence. The additional evidence is therefore highly relevant, because the Appellant provides information which if believed, might lead to a determination that the plea was equivocal. The State does not dispute the evidence and I therefore treat it as being credible.
- 10 Further, the Appellant's lack of representation in the Magistrates Court is a good reason for the failure to refer to the charge statement at the hearing in the lower court.

- The Appellant therefore satisfied me that the additional evidence is relevant, credible and admissible. For these reasons the affidavit was treated as additional evidence under s 320 of the Criminal Procedure Code.

The Grounds of Appeal

- The first ground of appeal is that the Appellant was not given a free choice to deny the allegation when the charge was put to him.
- 20 There is no dispute that the Appellant was unrepresented during the entire proceedings. Counsel for the State said that the case was first called on the 17th of July 2001 and that the Appellant was given a whole month to find counsel. He further submitted that the Appellant, who was a police officer, knew his rights and was not prejudiced by lack of counsel.
- 25 Counsel for the Appellant referred to the fact that counsel for the Legal Aid Commission inexplicably withdrew from the case, a few minutes after announcing that she was appearing for the first and third accused, and that this was a result of fear caused by the Chief Magistrate's conduct in court. He further submitted that facts did not disclose a highly relevant piece of information contained in the Appellant's charge statement, that is, that the Appellant had an honest belief that he had permission to take the dumbbell, and that if he had been represented by counsel, a guilty plea would never have been entered.

- 30 The court record does not include the proceedings for the 12th of July. The first recorded appearance for all accused, was on the 6th of August, when the Appellant said (having pleaded not guilty):

Not ready to proceed. I have not seen a solicitor. I need to see a solicitor. I didn't see a solicitor for the two weeks because he is away overseas ie Mr Raza.

The Chief Magistrate then ruled as follows:

- 40 (1) Adjourned 13/08/01 hearing.
(2) All the Accused are to look for a solicitor who could work within the court's schedule.
(3) All Accused are advised not to hire a defence lawyer who is too busy to attend the hearing.
- 45 (4) All Accused are released on a \$100 cash bail, which is to be organised before 4 pm today, otherwise for accused who could not get his cash bail, will have to be remanded in custody.

- All Accused then appeared on 13 August 2001 (on bail). The prosecution said they were ready to proceed. Counsel for the 1st and 3rd Accused sought leave to withdraw. There are on reasons given on the court record. She was granted leave. The charges were then put to the accused and they all pleaded guilty. The

facts were then read. The facts were that the three accused were special constables directed to guard the house of John Maurice Swifte Granville Scott after his alleged murder, at 375 Princess Road on 1/7/2001. On 12th July the Appellant, after going off duty, took the dumbbells, valued at \$80 and took them
5 to his quarters.

Upon investigation he voluntarily gave the dumbbells to the police. The prosecutor did not refer to the statements made to the police other than to say:

10 *All the accused were interviewed and they admitted stealing the items. They were subsequently charged.*

The facts were admitted by the Appellant, who said in mitigation:

- 29 years old
- Single
- Suspended from the police force
- 15 — 1st offender
- Pleaded guilty
- I apologized to the complainant in court
- Property recovered
- 20 — I wanted to have the dumbbell for training
- I've been in the police force for 7 years

He was then sentenced to 12 months' imprisonment, the Chief Magistrate taking a strong view about police officers stealing from crime scenes they were supposed to guard.

25 The issues relevant to this ground of appeal are: Was the Chief Magistrate right to proceed with the guilty plea hearing in the absence of counsel? And, was the Appellant prejudiced by the lack of legal representation to the extent that the plea is rendered a nullity?

Section 28(1) of the Constitution provides that:

30 *Every person charged with an offence has the right:*

- (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 choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.*

35 This right, which can be found in most jurisdictions with constitutional or legislative Bills of Rights, is always given a purposive construction. The purpose of providing for this right, is to ensure a fair trial. The right is not an absolute right, and must be balanced against the right to trial within a reasonable time, and the rights of other co-defendants. In New Zealand, in respect of the right to
40 counsel provisions in section 24 of the Bill of Right Act, Cartwright J said in *Bailey v Whangarei District Court* (1995) 2 HRNZ 275 that the right to legally aided counsel did *not include a right to counsel of one's choice*. At 284–5 she said:

45 *It is in the interests of all legally aided accused to ensure that counsel appointed are not overburdened with work, and that less experienced counsel gain experience in appropriate cases. There is too, the question of the best use of limited financial resources. There is too, the question of the best use of limited financial resources. Were the accused to have a true right of choice, that choice could not logically be limited to counsel who practiced in the immediate locality. Accused who were legally aided and
50 who had freedom to choose legal representation could arguably select counsel from a distance even when appropriately qualified counsel were available locally ... It follows*

that in the interests of all accused who obtain legal aid, some restrictions are not only pragmatic but may well be essential if financial resources are to be evenly spread among them.

In *Robinson v The Queen* (1985) CLR 448, the Appellant was left unrepresented
5 in the middle of his murder trial, because he had not paid counsel. He was offered
counsel on legal aid but he refused to accept him. On appeal to the Privy Council,
he argued that he had been prejudiced by lack of legal representation. The appeal
was dismissed, the majority saying that although legal representation was crucial,
the right to counsel was not an absolute right, and that a judge was not always
10 required to adjourn trials to allow legal representation to be obtained. Other
availability of witnesses. The appeal was dismissed on the ground that there had
been no miscarriage of justice.

In the case before me, the Appellant asked to be represented by counsel who
was unavailable. No one knew when he would be available. The Appellant had
15 not instructed Mr Raza, and there was no indication that the instructions would
be accepted. The Chief Magistrate adjourned the hearing for 1 week to allow the
Appellants to brief another counsel. He did not brief counsel, although he had
been on bail between the 6th and the 14th of August. To this day, the Appellant
has not obtained the services of Mr Raza, some 7 months after the guilty plea.
20 The right to counsel of one's choice, must be balanced with the need to dispose
of the business of the courts, the interests of the co-defendants and availability of
witnesses. In this case the prosecution needed an early hearing date because the
complainant, Piers Scott was due to leave the country.

In all the circumstances, having given the Appellant an opportunity to brief
25 counsel, I do not consider that the Chief Magistrate erred in proceeding in the
absence of counsel. However, having decided to proceed without legal
representation, there was an added burden on the court to ensure that the
Appellant was not prejudiced by his lack of representation.

Having accepted the additional evidence of the caution statement and charge
30 statement, I find that the Appellant told the police that he had been given
permission to take the dumbbells. Although he had not said this in his caution
interview, his statement at charge raises a possible defence that the Appellant was
not action fraudulently. If the Appellant had been represented by counsel, counsel
would either have advised the Appellant to enter a Not Guilty plea, or discussed
35 the issue with him to see if the Appellant wished to maintain his position on this
issue. Further, the prosecution's outline of facts does not disclose this possible
defence. The charge statement did not feature in the outline of facts and was not
presented for the court to peruse.

In the circumstances I am left with a real and substantial doubt as to whether
40 the Appellant was given a fair hearing, and whether his plea of guilty was
unequivocal.

State counsel submitted to me that the Appellant must have known that he had
a possible defence because he was a police officer, and that his plea must have
been unequivocal because he accepted the facts.

45 I do not share his views. First the Appellant is a special constable, not an
experienced criminal investigator. Second, the defence of an honest claim of right
is neither an uncomplicated nor a common defence. I accept counsel for the
Appellant's submission that the proceedings would have gone quite differently,
had the Appellant been represented by counsel. Further, I find that the
50 prosecution failed to outline facts which accurately represented the Appellant's
statement to the police.

In *Griffiths* 23 Cr Ap R 153, a plea of guilty to bigamy was set aside on appeal on the basis that he had a defence on the facts and the plea was not unequivocal. In *R v Blandford JJ Ex P G* (1976) 1 QBD 82, the Applicant was charged with Larceny of jewellery. In her police statements she had said that that she had only
5 intended to borrow the jewellery. She was unrepresented and pleaded guilty. Although her statement was read out to the justices, she was convicted. On appeal, it was held (per Widgery J at 90) that where a defendant was unrepresented and pleaded guilty, the magistrates ought to accept the plea provisionally until they hear the facts to see if there is some undisclosed matter
10 which might render the unequivocal plea of guilty a misleading one. The conviction was held to be a nullity.

I therefore find that although proceeding without counsel, was not wrong in principle circumstances of this case, the Appellant was in fact prejudiced because a defence to which he had possible recourse, was not disclosed in the course of
15 the proceedings. If it had been disclosed in the course of the proceedings. If it had been disclosed, and proper legal advice taken, a not guilty plea would have been entered and the matter would have proceeded to trial.

This ground of appeal succeeds. Grounds (ii) and (iii) are really an extension of ground (i). Further grounds of appeal were 28th December 2001. They are as
20 follows:

- (1) The learned trial magistrate erred in law and in fact when he issued directives 2 and 3 on 6/8/2001 as appearing on the court record.
- (2) The learned trial magistrate erred in law and in fact when he failed on
25 13/8/2001 to inquire with the Appellant whether he had seen a solicitor as he wanted on 6/8/2001.

As I have already said, the Chief Magistrate did not err in proceeding without counsel. The Appellant was given a reasonable opportunity to obtain legal representation. However the lack of legal representation led to a miscarriage of justice, and it is on this basis that I have found that the plea was a nullity.
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These grounds are therefore unsuccessful.

Conclusion

This appeal is allowed on the basis that the plea was equivocal because of lack of legal representation.

I note that the Appellant is serving his sentence extramurally and that he had
35 served a substantial length of it. Nevertheless, the offence of Larceny by a police officer allegedly committed in the course of employment, is a serious one. It warrants a retrial. I therefore quash the conviction and sentence, and order that a re-trial be conducted on a not guilty plea.

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Appeal allowed.

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