LAND TRANSPORT AUTHORITY v RAJESHWAR PRASAD

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

21 February, 6 March 2003

[2003] FJHC 94

Criminal law — appeals — grounds of appeal — failure to hear case — fair trial — Criminal Procedure Code ss 199, 203, 221 — Land Transport Act s 94.

Rajesh Prasad (Appellant) was charged with Illegal Parking. The Appellant appeals against the charge on the grounds that the magistrate erred in failing to hear the case; he erred not to proceed with a formal proof hearing; he erred in refusing a short adjournment to allow the prosecutor to call witnesses; he erred in recording the hearing which was to be in the absence of the Accused person.

Held — (1) The law provides for a short procedure in recording evidence in a trial under the Traffic Act or for minor offences. It does not provide that the calling of witnesses may be dispensed with. An Accused person who has been summoned to attend court but fails to appear may be deemed to have consented to have the trial held in his absence irrespective of the seriousness of the charge. The seriousness of the charge is a relevant factor for the judge or magistrate to consider when deciding whether to issue a bench warrant and adjourn or to proceed in the Accused's absence. There is therefore a power to proceed in the Accused's absence. This procedure is often referred to as formal proof. Grounds 1 and 2 of the appeal must therefore fail.

(2) A formal proof hearing was contemplated because of the Accused's absence on 11 July. The hearing did not contemplate the calling of witnesses. The learned magistrate should have stood the case down to allow the prosecution to call its one witness. There would have been no prejudice to the Respondent because he had appeared expecting a hearing on that day. By refusing an adjournment, there was prejudice to the prosecution because the charge was dismissed. The learned magistrate erred in refusing a short adjournment to allow the prosecution to call its witness. Grounds 3 and 4 therefore succeed. The dismal of charge is quashed and the case remitted to the Magistrates' Court for trial.

Appeal allowed in part.

Cases referred to

GSA Industries Pty Ltd v NT Gas Ltd (1990) 24 NSWLR 710; *Maxwell v Keun* [1928] 1 KB 645; *Rajesh Chand & Shailesh Kumar v State* Crim App No AAU 56 of 1999S; *State v Semisi Wainiqolo* Crim App No HAA 117 of 1997, considered.

Maxwell v Keun [1928] 1 KB 645, cited.

A. Neelta for the Land Transport Authority.

G. O'Driscoll for the Respondent.

Shameem J. The Respondent was charged in the Suva Magistrates' Court, with the following offence:

Statement of Offence

ILLEGAL PARKING: Contrary to Regulation 20 (1) (2) and 87 of Land Transport (Traffic) Regulation 2000.

Particulars of Offence

Rajeshwar Prasad on the 13th day of September 2001 at Suva in the Central Division being the driver of a vehicle at Rodwell Road caused the vehicle to be parked illegally where park is prohibited by the sign.

The case was first called on 23 April 2002. The prosecutor and the Respondent were present. The matter was adjourned to 31 May for mention. On that day both parties were present, a not guilty plea was taken and the case adjourned to 11 July 2002 for mention apparently for the purpose of disclosure.

On the 11 July the prosecutor was present. The Respondent did not appear and a hearing date was set for the 30 September 2002. On the 30 September, the prosecutor appeared. The Respondent was present with counsel. The court record for that day reads as follows:

30th September 2002

For Prosecution: Mr Reddy

Accused: Present Mr O'Driscoll

MR REDDY: I ask for another date. Matter was for Formal Proof.

MR O'DRISCOLL: We're ready to proceed. If they satisfy Section 202(1)(2) it's OK.

MR REDDY: Ask for case to be stood down till midday.

MR O'DRISCOLL: I object to it. I've other matters to attend to.

COURT: No good cause shown as required under Section 202(1) (2) of the CPC (Amendment) Act 1988, and the Defence Counsel objected to the matter to be stood down.

I order that the request for this matter to be stood down be rejected.

And in the absence of the Complainant, Booking officer, I further order that the charge be dismissed Section 198 CPC.

28 days to appeal.

sgd: A Katonivualiku

Resident Magistrate

The Appellant appeals against the charge. The grounds of appeal are that (in summary):

(1) The learned magistrate erred in failing to hear the case on the 30th of September 2002.

(2) The learned magistrate erred in that he did not proceed with a "formal proof" hearing.

(3) The learned magistrate erred in refusing a short adjournment to allow the prosecutor to call witnesses.

(4) The learned magistrate erred in recording that the hearing on the 30 September was to be in the absence of the accused person.

In her submissions, counsel for the Appellant said that the normal practice in the Magistrates' Courts when the Accused is not present at a hearing, is to allow the prosecution to proceed to formally proving the case by tendering the affidavit of the booking officer (in this case at 6 of the court record). Thus, she said, at a hearing date for formal proof, the booking officer is not summoned, the prosecutor being armed with his sworn affidavit. This, she said is admissible in evidence pursuant to s 94 of the Land Transport Act. For these reasons, the prosecution did not have its witness ready on the 30 September, but was prepared to have the matter formally proved. She said that the learned Magistrate must have known this on the 30 September, and his decision not to allow an adjournment so that the booking officer could give evidence in person was unfair. Finally counsel said that the dismissal of the charge on the basis that the prosecution was not ready was an error of law.

Counsel for the Respondent said that the learned magistrate had adjourned to 30 September 2002, not for formal proof but for hearing. As such the prosecution's lack of readiness was difficult to understand. He said that the affidavit of the booking officer was not tendered in his presence, and that the prosecution should have been ready for hearing on the 30 September. Finally, he said that in the decision to adjourn a hearing, the seriousness of the charge was a relevant factor. Here, he said, the charge was a trivial one and the decision to refuse an adjournment and to dismiss the charge was therefore justified.

The grounds of appeal

The first two grounds of appeal suggest that the learned magistrate should have proceeded with formal proof despite the presence of the Respondent on the 30 September 2002.

Section 94 of the Land Transport Act provides:

> In any proceedings, a certificate signed by the Clerk of the court or an authorised officer of the Authority that the fixed penalty was or was not paid shall, unless the contrary is provided, be conclusive evidence of the matters stated in the certificate.

The document tendered in the Magistrates' Court (which counsel said he never saw) at of the record is entitled "Formal Proof". It is sub-titled "Evidence Sheet, s 199, 203, 221 of the CPC Cap. 21". Under the details of the case is the sworn affidavit of the booking officer. It reads, under "facts": "on the above date, time and place whilst on traffic duty, stop checked and booked driver of DL549 for illegally parking motor vehicle where parking is prohibited by sign, warned him for prosecution and served TIN". Under the signature of the booking officer and Commissioner for Oaths or Justice of Peace, there is a section entitled "Sentence by Court" to be signed by the resident magistrate. This section was filled in, but appears to have been crossed out.

Section 199 of the Criminal Procedure Code provides:

> Notwithstanding the provisions of section 189, if an accused person charged with any offence punishable with imprisonment for a term not exceeding six months and/or a fine not exceeding one hundred dollars does not appear at the time and place appointed in and by the summons, or by any bond for his appearance that he may have entered into, and his personal attendance has not been dispensed with under section 88, the court may, on proof of the proper service of the summons a reasonable time before, or on production of the bond, as the case may be, proceed to hear and determine the case in the absence of the accused or may adjourn the case and issue a warrant for the arrest of the accused in accordance with the provisions of section 90.

Section 203 provides:

> (1) If at the time or place to which the hearing or further hearing is adjourned, the Accused person does not appear before the court which has made the order of adjournment, such court may, unless the Accused person is charged with felony, proceed with the hearing or further hearing as if the Accused were present, and if the complainant does not appear the court may dismiss the charge with or without costs as the court shall think fit.
>
> (2) If the Accused person who has not appeared as aforesaid is charged with felony, or if the court, in its discretion, refrains from convicting the Accused in his absence, the court shall issue a warrant for the apprehension of the Accused person and cause him to be brought before the court.

Section 221 of the Code provides for an abbreviated procedure in recording evidence in a trial under the Traffic Act or for minor offences. It does not provide that the calling of witnesses may be dispensed with.

The Criminal Procedure Code provides for trials in the absence of the accused, where the accused has been summoned or ordered to attend court, and he fails to attend. This is consistent with s 28(1)(h)(i) of the Constitution, although the constitution does not differentiate between a felony and a misdemeanour, nor does it require that the accused be charged with an offence with a maximum sentence of less than 6 months and/or a fine not exceeding one hundred dollars. In principle therefore, an accused person who has been summoned to attend court but who fails to appear, may be deemed to have consented to have the trial held in his absence *irrespective of the seriousness of the charge*. However the seriousness of the charge would clearly be a relevant factor for the judge or magistrate to consider when deciding whether to issue a bench warrant and adjourn, or to proceed in the accused's absence.

There is therefore a power to proceed in the accused's absence. This procedure is often referred to as "formal proof".

The learned magistrate did not record the words "formal proof" when he adjourned to the 30th of September. Nevertheless such a hearing was clearly contemplated. First the accused was absent on the mention date. Second, at some stage, and it appears in the absence of counsel for the Respondent, the prosecutor tendered the "formal proof" evidence sheet thus putting the court on notice that the hearing on the 30th of September would be formally proved by the tendering of the certificate only. This case is not an appropriate vehicle for considering the admissibility of the formal proof affidavit. That must be considered in another case after the hearing of full argument on that point. For the purpose of this case, it is sufficient to say that the prosecution clearly did not expect a full hearing on the 30th of September, that they intended to proceed by way of documentary evidence only and that the learned magistrate knew this because the hearing date was fixed in the absence of the accused and the relevant certificate tendered *before* the 30 September.

On the 30 September however, the Respondent appeared with counsel, and asked for a hearing. Clearly the formal proof procedure would not have been appropriate. On a not guilty plea, the accused was entitled to cross-examine the prosecution's witnesses, and to call witnesses of his own. A formal proof procedure which did not involve the calling of witnesses would not allow this. The magistrate therefore could not have proceeded to a formal proof hearing on the 30 September because the accused was present.

Grounds 1 and 2 of the grounds of appeal must therefore fail. The learned magistrate, to give effect to the accused's right to a fair trial, and his right to challenge and adduce evidence, could not have proceeded to a formal proof trial without witnesses. These grounds fail.

The next ground of appeal is that the learned magistrate erred in refusing an adjournment. In *Rajesh Chand & Shailesh Kumar v State* Crim App No AAU0056 of 1999S, the Court of Appeal set aside acquittals on the ground that a refusal of an adjournment was not made judicially. At 4 the Court said:—

> The principles upon which an appellate court should act wen reviewing a decision by a judge or magistrate to grant or refuse an adjournment are well-settled. The judge or magistrate has a discretion as to the proper mode and time of trying an action. The exercise of that discretion should be interfered with by an appellate court only in exceptional cases. If it appears that the result of the order made in the court below is to defeat the rights of the parties altogether or to do an injustice to one or other of the parties, the appellate court has a duty to review such an order. Where the refusal of an adjournment would seriously prejudice a party, the application should be granted. If not

granted, an appellate court will intervene if the discretion has not been exercised judicially or where its exercise was based on a wrong principle or resulted in an injustice: *Maxwell v Keun* (1928) 1 KB 645; *GSA Industries Pty Ltd v NT Gas Ltd* 24 NSWLR 710.

As I have said, in this case a formal proof hearing was contemplated because of the accused's absence on the 11 July. The hearing did not contemplate the calling of witnesses. In the circumstances the learned magistrate should have stood the case down to allow the prosecution to call its one witness. There would have been no prejudice to the Respondent because he had appeared expecting a hearing on that day. By refusing an adjournment, there was prejudice to the prosecution because the charge was dismissed.

I find therefore that the learned magistrate erred in refusing a short adjournment to allow the prosecution to call its witness. Grounds 3 and 4 therefore succeed. The dismal of charge is quashed and the case remitted to the Magistrates' Court for trial.

Finally, I note that in any event, a dismissal of a charge under s 198 of the Criminal Procedure Code is not a bar to subsequent prosecution on the same charge. I dealt with this point in *Ministry of Labour v Merchant Bank of Fiji* Crim App No HAA0011 of 2002, relying on the decision of Pain J in *State v Semisi Wainiqolo* CA HAA00117 of 1997. Even if this appeal had failed, it was open to the appellant to lay a fresh charge on the same facts, provided there were no statutory time-limits prohibiting the filing of such a charge.

Summary

This appeal succeeds on the ground that the learned magistrate erred in refusing the prosecution an adjournment to call its witness to give evidence. The matter is remitted to the Magistrate's Court for re-hearing.

Appeal allowed in part.