MITIELI KALOUDIGIBECI v STATE

HIGH COURT — APPELLATE JURISDICTION

SHAMEEM J

6, 9 October 2003

[2003] FJHC 144

Criminal law — appeals — appeal against sentence — Shop-breaking, Entering and Larceny — whether guilty plea equivocal — whether magistrate should have stayed proceedings on basis of unreasonable delay — Criminal Procedure Code s 202(7) — Penal Code Act s 300(a).

Appellant was convicted and was sentenced to 18 months' imprisonment on each count of Shop-Breaking, Entering and Larceny. He appealed against sentence, saying that he had pleaded guilty and the properties had been recovered. The learned magistrate said that the appellant's application to consult a lawyer on the date of trial was refused because he had been given ample time to instruct a lawyer. He later waived his right to counsel.

Held — (1) The plea of guilty was equivocal and should have been set aside, and the trial should have proceeded on the basis of a not guilty plea. Guilty pleas undoubtedly save court time and resources, but they must not be accepted when they are equivocal. Justice must not be sacrificed for expediency. The convictions and sentence are therefore nullities.

(2) There is no statutory provision in the Criminal Procedure Code giving the Magistrates' Court powers to rule on an application for a stay of criminal proceedings on the ground of delay or an abuse of the process. Nor does the Magistrates' Court have any inherent jurisdiction to entertain any such application. Any party wishing to make an application for stay of a criminal trial must make it in the High Court.

Appeal allowed.

Cases referred to

Elizabeth Rice v Syed Muktar Shah Crim App No HAA 2 of 1997; *Fuller v Field & State of South Australia* (1994) 72 A Crim R 592; *Grassby v R* (1989) 168 CLR 1, cited.

R v Horseferry Road Magistrates' Court; Ex parte Bennett [1994] 1 AC 42; *State v Josefa Nata* AAU 10 of 1995S; *Taylor v Attorney-General* [1975] 2 NZLR 675, considered.

A. K. Singh for the Appellant.

P. Bulamainaivalu for the State.

Shameem J. The Appellant was charged, on the 19th of February 2001, with the following offences:

FIRST COUNT

Statement of Offence

SHOP BREAKING ENTERING AND LARCENY: Contrary to Section 300(a) of the Penal Code Act 17.

Particulars of Offence

MITIELI KALOUDIGIBECI and SUSAU DOMINIKO on the 16th day of February, 2001 at Nausori in the Central Division, broke and entered into the Taras Supermarket and stole therein assorted cigarettes valued $367.50 and $177.40 cash to the total value of $544.90 the property of MAHENDRA PATEL s/o Dullabh Bhai.

SECOND COUNT

Statement of Offence

SHOP BREAKING ENTERING AND LARCENY: Contrary to Section 300(a) of the Penal Code Act 17.

Particulars of Offence

MITIELI KALOUDIGIBECI and SUSAU DOMINIKO on the 16th day of February, 2001 at Nausori in the Central Division, broke and entered into the Vallabh Bhai Shop and stole from therein assorted cigarettes valued at $259.89, 25 imitation necklace valued at $25.00, 4 bags valued at $78.85, 2 wellasite gel valued at $29.00 and $8.00 cash to the total value of $400.74, the property of HASMUKH LAL s/o Vallabh Bhai.

He was sentenced to 18 months imprisonment on each count, on the 5th of June 2003. He appealed against sentence, saying that he had pleaded guilty and the properties had been recovered. However, on the 17th of September 2003, he filed, through his solicitors, an amended petition of appeal which added the following grounds of appeal:

1. That the appellant's guilty plea was ambiguous or involuntary.
2. That the learned Magistrate should have stayed the proceeding on the basis of unreasonable delay.
3. That the learned Magistrate erred in law when he failed to grant the Appellant the adjournment to seek his legal counsel.
4. That the learned Magistrate erred in law regarding the principal of sentencing or that the sentence had been excessive.

The history of the case

At the first call, the Appellant pleaded not guilty. He was advised to seek legal representation. The matter was adjourned to the 27th of March 2001 when the Appellant was again told to seek legal aid. On the next mention date, the 24th of April 2001 the Appellant failed to appear, apparently because he had been told by the clerk and the prosecutor that his case would be called on another day. On the 11th of July 2001 the case was called before Mr Nadakuitavuki and Mr Rokotinaviti. No explanation is given for this anomaly, but one magistrate adjourned to the 4th of September 2001 for mention and the other to the 12th of September 2001. On the 12th of September the Appellant was present and the case was adjourned for the first hearing date, 10th of October 2001. On that day the Appellant did not appear at first but later appeared saying that he had been locked up at the Lautoka Police Station. The hearing did not proceed and the case was adjourned to the 13th of November 2001. Another hearing date was then set for the 13th of March 2002. On that date neither the Appellant nor his Co-accused appeared. A bench warrant was issued. It remained unexecuted until the 13th of January 2003 when he was arrested in Nausori. The learned Magistrate found that the Suva Court had remanded him on the 13th of March 2002 and that he had tried to come to court. The bench warrant was cancelled.

On the 25th of February 2003 the 2nd Accused was discharged when the prosecution withdrew the charges against him. A new hearing date was set for the 29th of May 2003. On that day, the record read as follows:

> Disclosure being received confirmed. The accused had been asked to seek legal aid on 11/7/2002 but to date no lawyer is available. The Court cannot wait this far for the accused to get a solicitor or legal aid. It must proceed with hearing.

The Appellant then said he had lost the witness statements given to him in 2002. He asked for time to look at them again. His request was granted and the case was stood down until 12.30 pm. When the Appellant appeared, he told the court that he wished to change his plea and that he wished to do so "on his own free will".

The charge was read and explained to him. He pleaded guilty on both counts, and said he did not require legal representation.

The facts were read. They were that on the 16th of February 2001 at 12 pm the complainants who rented shops at Ross Street, locked their shops and went home. At about 11 pm, the landlord noticed the rear door of one of the shops open and informed the police. The police arrived with an army officer. They saw a person inside the shop and surrounded the building with other soldiers. They arrested the Appellant and took him to the police station. He was interviewed and charged. The complainants identified their property at the police station. The Appellant agreed to these facts. He also admitted 16 previous convictions dating from 1990. The offences include those of Burglary, Larceny and Robbery with Violence.

In mitigation, the Appellant said that he was 32 years and was married with two children. He is a farmer. He then said:

> It was not clear to me of what exactly happen but upon reading the statement before the proceeding I then realise that I was caught inside the shop by the army officer. I went to see the landlord son but by that time the soldiers arrived. I was frightened. I was inside the shop with soldiers armed. I returned from prison in 2001. I was then arrested again in 2001. All items returned. Have pleaded guilty. Promise not to commit another offence. Concurrent sentence. Have planted in the village.

Sentence was delivered on the 5th of June 2003. The learned magistrate said that the Appellant's application to consult a lawyer on the date of trial was refused because he had been given ample time to instruct a lawyer. He later waived his right to counsel.

He said that the facts disclosed that the police found the Appellant in the shop of the complainant with the stolen items. He was arrested and interviewed. He said that there was a need to pass a deterrent sentence. He referred to the plea of guilty, remorse and the recovery of the items as mitigating factors. His starting point was 3 years' imprisonment. The end result was 18 months' imprisonment on each count, to be served concurrently with each other.

The plea

There is no doubt at all, that on the 19th of February 2001, the Appellant was advised to get legal representation. He was told again on the 27th of March 2001. Two years later, when the parties were finally ready to proceed with the trial, the Appellant was still unrepresented. The right to counsel is qualified by the balancing of the rights of the prosecution, the witnesses and the public interest. It must also be considered with the right to a trial within a reasonable time. In this case the Appellant had been given ample time to find a lawyer. He was in custody for some portion of that time, but that was only in March 2003. He was told of his right to counsel and he failed to instruct a lawyer either of his own choice, or from the Legal Aid Commission. The learned magistrate quite correctly concluded that the hearing could not be adjourned any longer. He did not err in proceeding to trial.

However, in the case of all unrepresented accused person, there is a special burden on the court to ensure that the accused understands what he is pleading guilty to. The offence in this case was Shop-breaking, Entering and Larceny. The facts should have disclosed evidence of a breaking into a shop, an entering and a larceny within the shop. The facts outlined by the prosecution did not disclose the breaking and entering. Although one could deduce from the facts that the back door must have been broken into because the shop-owners had locked up before leaving the premises, the facts did not disclose that the Appellant had

broken into the shops. Further, in mitigation he seems to have denied any wrongdoing. He said that he had gone to the shop to meet the landlord's son, when he was surprised by the soldiers and policemen. If his story is true, then there is no admission of a Breaking, nor of an Entry, nor of a Larceny. Indeed the facts do not disclose that the stolen items were found on him at all. The learned magistrate said in his sentencing remarks that he was found with the goods on him but the facts did not disclose this.

In the circumstances, the plea of guilty should have been set aside, and the trial should have proceeded on the basis of a not guilty plea. Guilty pleas undoubtedly save court time and resources, but they must not be accepted when they are equivocal. Justice must not be sacrificed for expediency.

I find that the pleas of guilty in this case were not unequivocal. The convictions and sentence are therefore nullities. Ground 1 succeeds.

Delay

Although the appeal succeeds on ground 1, I also deal with ground 2, which is that the Magistrate should have stayed the proceedings on the basis of unreasonable delay.

I find this ground to be a little surprising because counsel's submissions in respect of ground 1, was that the case should be remitted to the Magistrate's Court for a re-hearing. However, the issue raises important matters of law and fact, and I consider that I should deal with it, although my findings are obiter dicta.

There is no statutory provision in the Criminal Procedure Code giving the Magistrates' Court powers to rule on an application for a stay of criminal proceedings on the ground of delay or an abuse of the process. Nor does the Magistrates' Court have any inherent jurisdiction to entertain any such application. Any party wishing to make an application for stay of a criminal trial must make it in the High Court.

In England, the House of Lords in *R v Horseferry Road Magistrates' Court; Ex parte Bennet* [1994] 1 AC 42, said that magistrates had the power to stay criminal proceedings for abuse of process but that such power should be strictly confined to matters relating to the fairness of the trial including delay or the unfair manipulation of court procedures. Further a better course of action for the magistrates is to adjourn the case to allow the applicant to apply in the High Court for stay. The power to stay summary trial on the ground of abuse of process is a power to be exercised by the magistrates in the most exceptional circumstances (Archbold 2003, para 4-50).

Of course England is not a "Code" country. Fiji's magistracy is governed and regulated by the Magistrates Court Act, the Criminal Procedure Code and the Penal Code. As such, while some powers might be implied from the statutory bestowal of other powers, the Magistrates' Courts have no inherent jurisdiction.

State counsel referred me to a decision of the Supreme Court of South Australia, *Fuller and Cumming v Field and South Australia* (1994) 72 A Crim R 592, in which the decision in *Horseferry Road Magistrates' Court, Ex parte Bennet* was discussed. The court was asked to consider whether a committing magistrate had powers to stay committal proceedings on the ground that the accused had not been able to obtain legal representation. Relying on the decision of the High Court of Australia in *Grassby v R* (1989) 168 CLR 1, the court held that a magistrate could only proceed in accordance with his or her statutory powers, and that there was no inherent power to stay proceedings or terminate

them in any other way. The court (in *Fuller and Cumming*) followed *Grassby* and decided not to adopt the decision in *Horseferry Road Magistrates' Court*. Dawson J in *Grassby* said at 16:

> But it is undoubtedly the general responsibility of a superior Court of unlimited jurisdiction for the administration of justice which gives rise to its inherent power. In the discharge of that responsibility it exercises the full plenitude of judicial power. It is in that way that the Supreme Court of New South Wales exercises an inherent jurisdiction. Although conferred by statute, its powers are identified by reference to the unlimited powers of the courts at Westminster. On the other hand, the Magistrates' Court is an inferior court with a limited jurisdiction which does not involve any general responsibility for the administration of justice beyond the confines of its constitution. It is unable to draw upon the will of undefined powers which is available to the Supreme Court.

Similar views were expressed in relation to the Fiji magistracy by Townsley J in *Elizabeth Rice v Syed Muktar Shah* Crim App No HAA0002 of 1997 (on inherent powers to cite for contempt of court) and by the Fiji Court of Appeal in *State v Josefa Nata* AAU0010 of 1995S (on inherent powers to suppress the names of accused persons). In the latter case, the Court of Appeal found that the Magistrates' Courts did have powers to order name suppression, but said that those powers were derived from the English Contempt of Court Act 1981, and that the Act was part of the law and practice for the time being observed in England.

In the course of their judgment, their Lordships referred to the decision of the New Zealand Court of Appeal in *Taylor v Attorney-General* [1975] 2 NZLR 675, and referred to the following passage (per Richmond J) with approval:

> But when one speaks of the "inherent jurisdiction" of the Court to make orders of the kind now in question the problem really becomes one of powers ancillary to the exercise by the Courts of their jurisdiction in the primary sense just described. Many such ancillary powers are conferred by statute or rules of Court, but in so far as they are not conferred then they can only exist because they are necessary to enable the Courts to act effectively within their jurisdiction in the primary sense.

Taylor was about the powers of the New Zealand Supreme Court (now the High Court) to prohibit publication of anything which might lead to the identification of a Security Service witness. Nevertheless the Fiji Court of Appeal decided that any court has the inherent power to exclude the public, but that this power is not to be exercised to spare the feelings of any of the parties. In relation to the Magistrates' Courts in Fiji, s 46 of the Magistrates' Court Act provides that in default of any rules or legislation, jurisdiction regarding the practice and procedure of the courts shall be exercised "in substantial conformity with the law for the time being observed in England in the county courts and courts of summary procedure". The Contempt of Court Act 1981, was part of that law in England, and it therefore applied in Fiji to give the magistrates jurisdiction to suppress the names of accused persons.

This decision does not purport to find an inherent jurisdiction in the Magistrates' Courts beyond powers (if necessary taken from the practice of the English summary courts) to make orders in the course of exercising their primary jurisdiction. The exclusion of the public in the course of trial is a necessary power, as is the power to order name suppression. In no way, can a power to stay criminal proceedings permanently, be considered a necessary power, essential to allow the magistrates to conduct trials or sentencing hearings. Nor can such a power be implied from the exercise of a magistrate's statutory powers.

Clearly, the decision of the High Court of Australia is more consistent with the statutory framework of the Fiji justice system, than the decision in Horseferry Road Magistrates' Court. I therefore consider that the Magistrates' Courts in Fiji have no powers to stay criminal proceedings on the grounds of delay or abuse of the process.

In this appeal, no application for stay had been made, and as I have found, the learned magistrate in any event could not have ordered a stay.

Both counsel, in their submissions referred to s 202 of the Criminal Procedure Code and said that the magistrate ought not to have entertained any adjournments beyond the 12-month time limit. Section 202(7) provides:

> A case must not be adjourned to a date later than 12 months after the summons was served on the accused unless the magistrate, for good cause, which is to be stated on the record, considers that such an adjournment to be required in the interests of justice.

Clearly this amendment was intended to prevent unreasonable delay in the hearing of criminal cases. However what is "good cause" is obviously a matter which must be considered judicially, and after weighing up public interest factors as well as the accused's rights. In this case, the Appellant failed to appear in court on more than one occasion, for reasons often beyond his control. I do not consider that the learned magistrate erred in adjourning the hearing date to ensure his presence in the circumstances. The reasons for each adjournment are recorded, and do constitute "good cause".

Result

The hearing was a nullity because the Appellant's pleas were equivocal. The appeal succeeds, the convictions and sentences are quashed. The offences are dated February 2001. Counsel for the Appellant requests a rehearing on the basis of a not guilty plea. Although a 2–year delay in proceeding to trial is generally undesirable, the seriousness of the offences, and the value of the goods allegedly stolen justifies a retrial.

The appeal succeeds. Convictions are quashed and a trial de novo ordered.

Appeal allowed.