## POST & TELECOMMUNICATIONS LTD v KRISHNA BROTHERS (Civ App 0001 of 2003)

HIGH COURT — CIVIL JURISDICTION

PATHIK J

27 April 2004

**Practice and procedure — proceedings — transfer of proceedings — forum — whether transfer of case proper — bias — whether refusal to adjourn case vexatious, vindictive, and bias — whether there was failure to find negligence, judgment against weight of evidence and contents of judgment — Criminal Procedure Code s 154(1).**

This action was instituted at Labasa Magistrates Court on 23 September 1997. After various adjournments, the action was not heard and on 8 December 1999, the case was transferred to the Taveuni Magistrates Court. The matter was again called for hearing and after several adjournments, Mr Sarju Prasad appeared on instructions from Gibson & Co and made an application to transfer the case to Labasa. The application was refused and the case proceeded to hearing.In June 2001, the Appellant filed an appeal against the decision of the magistrate.

Because no deposit was made after the Appellant was ordered to pay by the court and a notice of discontinuance of appeal was filed, the appeal was dismissed.

In August 2002, the magistrate delivered his judgment inclusive of costs against both Defendants.

The grounds of appeal were addressed on (a) the transfer of case from Labasa to Taveuni; (b) allegation of bias in the magistrate failing to disqualify himself from hearing the case; (c) refusal to adjourn the case on application as being vexatious, vindictive and bias against the magistrate; (d) not a "reasoned judgment"; (e) no finding of negligence; (f) judgment for various amounts not supported by evidence; (g) the judgment was against the weight of the evidence tendered.

**Held** — (1) There was no merit on the ground of transfer of the case in light of the fact that the appeal court will not be justified in interfering with the exercise of discretion by the magistrate or lower court unless there was misapplication of the law or the order would result to a miscarriage of justice.

(2) On the issue of bias, there was no proper basis on this ground because the magistrate gave his reasons in arriving at its decision in a manner sufficient to explain the circumstances of the case. Thus, there was no reason for the magistrate not to hear the case.

(3) The case was adjourned by the magistrate as the Appellant's counsel knew that the case was set for hearing and yet he applied for adjournment without proper reasons. Thus, the magistrate exercised his discretion on the matter and using his discretion, the application to transfer was refused. Counsel for the Appellant should have easily taken part in the hearing of the case had he been instructed.

(4) Grounds 4–6 involved failure to find negligence, judgment against weight of evidence and contents of judgment. There were no proper analysis of the evidence required of a magistrate and there were no findings of fact. The judgment of the lower court was unsatisfactory and did not satisfy the requirements of the contents of a judgment and was against the weight of the evidences presented.

Appeal allowed.

**Cases referred to**

*Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646, cited.

*Chandar Pal v Reginam* (1974) 20 FLR 1; *Re Ryan* (1923) 23 SR 354; *Magistrates' Court at Prahran v Murphy* (1997) 2 VR 186; *Mohammed Abdul Razak v R* [1973] 19 FLR 1; *Franklin v Minister of Town and County Planning* [1948] AC 87; [1947] 2 All ER 289; *Plastic Manufacturing (Fiji) Ltd v Ice (Fiji) Ltd* [1984] 30 FLR 103, considered.

*V. P. Ram* for the Appellant

*A. Sen* for the Respondent

**Pathik J.** This is an appeal by the Post & Telecommunications Ltd (the Appellant), the second defendant in the original action against the ruling and decision of the learned magistrate (Mr Maika Nakora) delivered in this action on 20 August 2002 on a number of grounds more particularly stated in the amended grounds of appeal filed herein on 23 September 2003.

**Background history of case**

The background history of the case is briefly as follows (as stated in Mr Sen's written submission at p 1):

(i) This action was instituted at Labasa Magistrates Court on 23 September 1997.

(ii) After various adjournments given to the defendants to file their statement of defence the same was filed by them on 20 April 1998.

(iii) The statement of claim was subsequently amended and the same was filed on 7 June 1999.

(iv) After various adjournments the action was not heard and on 8 December 1999 was transferred to Taveuni Magistrates Court and mentioned on 20 March 2000.

(v) After two further adjournments the matter was listed for hearing on 20 November 2000. The defendants and the solicitors did not appear on that date. The matter was again called on 23 January 2001 for hearing. Again neither the defendants nor the solicitors appeared on hearing date.

(vi) This action was therefore adjourned to 21 May 2001 and on the said date neither the defendants nor the solicitors appeared. However Mr Sarju Prasad appeared on instructions from Gibson & Company and made an application to transfer case to Labasa. This application was refused and the case proceeded to hearing.

(vii) On 21 June 2001, the second defendant filed an appeal against the decision of the magistrate.

The *further facts* are that:

(a) appeal was listed for hearing on 25 March 2002 before Fatiaki J (as he then was). On that day since Mr Ram was not ready, court asked the second defendant (Appellant) to pay sum of $5100 in court within 14 days, failing which the appeal would be dismissed;

(b) no deposit was made; on 12 April 2002 notice of discontinuance of appeal was filed. On 26 April 2002, Pathik J dismissed the appeal and awarded $200 costs to the plaintiff;

(c) then on 20 August 2002 the magistrate delivered his judgment in the sum of $9000 inclusive of costs against both the defendants.

**Summary of grounds of appeal**

I have summarised the grounds of appeal as follows and I shall deal with them in that order:

(1) against *transfer* of case from Labasa to Taveuni;
(2) allegation of *bias* in the magistrate failing to disqualify himself from hearing the case;
(3) against refusal to *adjourn* the case on application as being "vexatious" and alleging "vindictiveness" and "bias" against the magistrate;
(4) not a "*reasoned judgment*";
(5) no *finding* of negligence;
(6) judgment for various amounts not supported by *evidence*, proof or basis of award;
(7) that the finding/judgment is *against the weight of the evidence* tendered.

**Consideration of the appeal**

I have read the record of the proceedings in this case and also the written submissions from both counsel.

In my 47 years in the law, it is a matter of great concern to see that what was a simple straightforward matter turned out to be so messy and confusing with a sheer waste of court's time. I feel hurt that so much of my time is being taken up in dealing with this kind of appeal which should never have seen the light of day had it been handled properly by all concerned. By reading, the record and reading in between the lines there seem to be a lot of non-cooperation among all the "players" in the situation that prevailed. When one sees in the papers before me allegations of bias and ill-motive, rightly or wrongly, against a judicial officer (the magistrate), one wonders what is happening in the northern division of this country. I should not be expected to ascertain where the fault lies and all I can say is that there should be a proper code of conduct governing legal practitioners if one expects dignity of the courts to be maintained. Mud-slinging and insinuations either in court documents or from the bar table will not be and has not been tolerated by me. There must be mutual respect between the bench and the bar.

**Dealing with grounds**

Without wasting too much time and energy on the grounds, I shall very briefly deal with them.

***Ground 1***

This ground deals with the *transfer* of this case.

I see no merit whatsoever on this ground after perusal of the record and the magistrate's statements in this regard.

The Appeal Court will not be justified in interfering with the *exercise of discretion* by the magistrate (lower court) unless there is misapplication of the law, or the order is likely to lead to a miscarriage of justice (*Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646.

In this connection I would refer to the judgment of Jordan CJ in *Re the Will of FB Gilbert* (Deceased) wherein he refers to *Re Ryan* (1923) 23 SR 354 at 357 where it is stated:

> In this connection, however, I am of opinion that as was pointed out by this Court in *Re Ryan* (2), there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of Judges of first instance, the result would be disastrous to the proper

> administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a Judge in Chambers to a Court of Appeal. But an appeal from an exercise of a so-called discretion which is determinative of legal rights stands in a somewhat different position.

***Ground 2***

On the issue of *bias*, I see no proper basis for it. The magistrate has given his reason for acting in the manner he did and this should be sufficient to explain the circumstances in which he dealt with the case.

From the record I see no justification or reason to impute bias or any improper motive on the part of the magistrate.

Imputations of this nature should not be lightly made. Perhaps I should state here as a reminder as to what is "bias" and how it is constituted by reference to extracts from some decided cases.

What is "bias" and its significance has been clearly stated in the judgment of *Lord Thankerton* in *Franklin v Minister of Town and County Planning* [1948] AC 87 at 103–4; [1947] 2 All ER 289 at 296 and it is worth bearing in mind. It is as follows:

> I could wish that the use of the word "*bias*" should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office, or those who are commonly regarded as holding a quasi-judicial office, such as an arbitrator. The reason for this clearly is that, having to adjudicate as between two or more parties, he must come to his adjudication with an independent mind, *without any inclination or bias* towards one side or other in the dispute". [Emphasis mine.]

He goes on to say ibid:

> As Lord Cranworth LC says in *Ranger v Great Western Ry Co (I)*: "A judge ought to be, and is supposed to be, indifferent between the parties. He has, or is supposed to have, no bias inducing him to lean to the one side rather than to the other. In ordinary cases it is a just ground of exception to a judge that he is not indifferent, and the fact that he is himself a party, or interested as a party, affords the strongest proof that he cannot be indifferent".

On the point of test to be applied whether there is bias, I refer to the following quotation from the judgment of Charles JA in the Magistrates Court in *Magistrates' Court at Prahran v Murphy* (1997) 2 VR 186 at 207 quoting from *Webb v R* (1994) 181 CLR 41; 122 ALR 41, where Mason CJ and McHugh J said at CLR 47; ALR 44:

> When it is alleged that a judge has been or might be actuated by bias, this Court has held that the *proper test is whether fair-minded people might reasonably apprehend or suspect that the judge has prejudged or might prejudge the case* … The Court has specifically rejected the real likelihood of bias test. The principle behind the reasonable apprehension or suspicion test is that it is of "fundamental importance" that justice should not only be done, but should manifestly and undoubtedly be seen to be done". [Emphasis added]

Deane J said, at CLR 67–8; ALR 59, that:

> In a series of recent cases, the Court has formulated the test to be applied in this country in determining whether a judicial officer ("a judge") is disqualified by reason of the appearance of bias, as distinct from proved actual bias. That test, as so formulated, is whether, in all the circumstances, a fair-minded lay observer with knowledge of the material objective facts "might entertain a reasonable apprehension

> that [the judge] might not bring an impartial and unprejudiced mind to the resolution of the question" in issue …the test directly reflects its rationale, namely, that it is of fundamental importance that the parties to litigation and the general public have full confidence in the integrity, including the impartiality, of those entrusted with the administration of justice. However, the test is an objective one and the standard to be observed in its application is that of a hypothetical fair-minded and informed lay observer.

This ground is also without merit. There was no need for the magistrate to disqualify himself from hearing the case.

***Ground 3***

The adjournment in this case was refused by the magistrate for the reasons he gave. The case was set down for hearing on the day that the Appellant's counsel made application for adjournment.

As I said earlier the magistrate exercised his discretion in the matter. With the exercise of that discretion which this court considers was properly exercised, the application for transfer was refused. Counsel appearing on behalf of his principal could have easily taken part in the hearing of the case had he been fully instructed. It is important that anyone instructed to appear for another counsel should be given proper instruction to argue the case if the need arises. Here counsel knew that the case was for hearing and yet he applies for adjournment without proper reasons. This practice should actually cease.

On the practice and procedure, on application for adjournment, I refer to the Court of Appeal case of *Plastic Manufacturing (Fiji) Ltd v Ice (Fiji) Ltd* [1984] 30 FLR 103 where the situation was similar to the present case. That case addressed itself to the principles to be applied generally to be considered by the Appellate Court. There it was held:

> An Appellate Court has power to consider an appeal against the refusal of a Judge at first instance to grant an adjournment. Such an appeal is against the exercise of a discretion. Therefore the normal rules governing an appeal against such exercise must be applied. An Appellate Court will not interfere with the trial Judge's decision unless the exercise of the discretion had caused injustice.

This ground is also devoid of merits and it fails.

***Grounds 4–6***

I shall deal with grounds 4, 5 and 6 together. They concern failure to find negligence, judgment against weight of evidence and contents of judgment.

At the outset on these grounds, I refer to a number of decided cases which set out what the requirements and on the writing of judgment as far as Magistrates Court is concerned. The first case is *Mohammed Abdul Razak v R* [1973] 19 FLR 1 which was a dangerous driving case.

There it was *held*, inter alia, as follows:

> A magistrate is not obliged to give his reasons for his acceptance or rejection of the evidence of any particular witness provided that the evidence in question is sufficient to establish the ingredients of the offence.

**An appellate court will only in rare cases disturb the finding of fact of the court below. The Appellant must show that the verdict was unreasonable or cannot be supported having regard to the evidence.**

In that case the magistrate made findings of fact. However, in the present case I do not see any specific findings of facts nor was the evidence analysed as required of a magistrate. All that the magistrate said was that: "I have now

carefully considered all the evidence presented before me and I am satisfied that the plaintiff has proved its case on the balance of probability".

There is no proper evidence of how the sum of $5100 for losses is made up. There is no documentary or supporting evidence of it. Similarly, there is no indication how the sum of $2000 has been allowed. Also there are no details of how the sum of $1900 being expenses in "air fares, hotel expenses etc" is made up.

The second case I refer to is *Chandar Pal v R* [1974] 20 FLR 1 (*Chandar Pal*) which was a case of causing death by dangerous driving, it was held that "*the Magistrate had failed to analyze the evidence and did not give his reasons nor explain in what manner the appellant's driving was dangerous*".

In that case, Grant Ag CJ at 4 of the judgment said:

> The trial Magistrate found that the appellant drove in a dangerous manner, but did not analyse the evidence, give his reasons, nor explain in what manner the appellant's driving was dangerous; and in all the circumstances I have come to the conclusion that the evidence is too unsatisfactory to ground a conviction

The passages cited above are quite pertinent and ought to be borne in mind in writing judgment of the court.

In the present case there are no proper analysis of the evidence. There are no findings of fact. Merely saying *"I am satisfied that the plaintiff has proved its case on the balance of probability"* is not satisfactory enough.

Also, there are no reasons given. In this regard Grant Ag CJ in *Chandar Pal* at 4 said:

> *I would take the opportunity, as the judgment of the lower court in this case is a clear example, of drawing attention to what appears to be a trend on the part of some Magistrates to set out in a judgment a summary of the evidence of the witnesses in the order in which they were called regardless of the fact that this bears no relationship to the sequence of events which is the subject matter of the trial; and a tendency to omit reasons for the decision reached.* [Emphasis added]

The magistrate should not only formulate reasons for his conclusion but the judgment should be expressed accordingly: *Chandar Pal* — at 4.

Finally, on the giving of "*reasons*" I cannot resist the temptation of quoting from *Lord Denning* from his book "*The Road to Justice*" (1955) at p 29, as a clear guide to judicial officers when giving judgments. It is as follows:

> the judge must give his reasons for his decision: for, by so doing, he gives proof that he has heard and considered the evidence and arguments that have been adduced before him on each side: and also that he has not taken extraneous considerations into account. It is of course true that his decision may be correct even though he should give no reason for it or even give a wrong reason: but, in order that a trial should be fair, it is necessary, not only that a correct decision should be reached, but also that it should be seen to be based on reason; and that can only be seen, if the judge himself states his reasons.

He goes on to say:

> Furthermore if his reasons are at fault, then they afford a basis on which the party aggrieved by his decision can appeal to a higher court. No judge is infallible, and every system of justice must provide for an appeal to a higher court to correct the errors of the judge below. The cry of Paul "I appeal unto Caesar" represents a deep-seated human response. But no appeal can properly be determined unless the appellate court knows the reasons for the decision of the lower court. For that purpose, if for no other, the judge who tries the case *must give his reasons*. [Emphasis added.]

The judgment in this case is most unsatisfactory as it did not fulfil the requirements of the contents of a judgment.

In these circumstances, I consider that I should not let the judgment stand and I will not be far out if I were to say that the judgment is against the weight of evidence. I conclude on these grounds with the following passage from the judgment of Grant Ag CJ in *Chandar Pal* which is worth noting as to the contents of a judgment:

> As a general rule, the judgment should commence with a description of the charge, followed by the relevant events and the material evidence set out in correct sequence in narrative form, the identifying number of each pertinent witness being incorporated at the appropriate places, after which the Magistrate should state what witnesses he believes and whose evidence he accepts or rejects, and should proceed to *make his findings of fact*, apply the appropriate law to those facts, and give his *reasoned decision*; bearing in mind throughout the provisions of Section 154(1) of the Criminal Procedure Code. [Emphasis added.]

**Orders**

For these reasons particularly in view of what I have stated on grounds 4–6 I will allow the appeal. It is therefore ordered as follows:

(1) That the judgment of 20 August 2002 including the order for costs is wholly set aside.

(2) That the defendant be allowed to defend the action.

(3) That the action take its normal course and be heard by a different magistrate at Magistrates Court at Labasa unless there is an order of transfer to Taveuni. In due course application to be made to the Magistrates Court for assignment of a date for hearing.

(4) That although the appeal is allowed on certain grounds, the Appellant is ordered to pay costs to plaintiff's solicitors within 21 days the sum of $750 being costs thrown away for failure to attend court in Taveuni at the hearing of the case.

*Appeal allowed.*