IN THE SUPREME COURT OF FIJI

Appellate Jurisdiction

000285

Criminal Appeal No. 17 of 1980

Between:

The Director of Public Prosecutions Appellant

and

Robert Tweedie McCahill Respondent

Mr. Dyfed Williams for the Appellant
Mr. S.M. Koya for the Respondent

JUDGMENT

This is an appeal by the Director of Public Prosecutions against an order made in the Suva Magistrate's Court on the 29th October 1979 whereby the case against the respondent was dismissed for what has been described as want of prosecution.

The respondent had been charged with thirteen counts of alleged infringements of the United Kingdom Copyright Act 1956 which has been applied to Fiji by virtue of the Copyright (Fiji) Order 1961 and one count of alleged conspiracy to commit a misdemeanour under section 421 of the Penal Code.

The principal contention for the appellant is that the learned trial Magistrate acted prematurely and unreasonably and without jurisdiction in dismissing the case against the

respondent for want of prosecution. It is contended that the learned trial Magistrate had no power to dismiss the case on such a ground.

The circumstances giving rise to the order under appeal are set out in a Decision given by the learned trial Magistrate on 11th January 1980 when dealing with an ex parte application by the Director of Public Prosecutions in which the Director sought unsuccessfully to have the case against the respondent reinstated. For the purpose of this appeal it will be sufficient I think if I quoted from the relevant portions of that Decision:

> "This case first came before the Court on 7.5.79 when pleas to each of the 14 counts were taken and the matter adjourned to 4.6.79 for mention only. On 4.6.79 the matter was set for hearing in Court 2 on 9.7.79. On 9.7.79 the matter was adjourned at the request of the Defence and Prosecution jointly because of proceedings in the Supreme Court which could have affected this matter. The case was then set down for mention only on 27.8.79. On that date as the civil case in the Supreme Court was still continuing Defence Counsel asked for and was given a further adjournment and the case set for mention only on 24.9.79. On 24.9.79 the Prosecution asked for and was given a hearing date on 29.10.79, i.e., some five weeks ahead. On 24.9.79 no indication was given to the Court that the Prosecution was encountering any difficulties of any kind. However, on 29.10.79 when the parties were again before the Court Mr. Raza for the Prosecution advised the Court that he was unable to proceed because the exhibits which he said were the core of the matter had to be further prepared. He said that the Prosecution had spoken to the Defence and Defence had no objection to a further adjournment.
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> On my saying that this matter had been pending for months and I didn't feel that a further adjournment should be granted Mr. Raza asked for an adjournment so that he could further consider the matter. At that stage I told Mr. Raza that I had in mind dismissing the

case for want of prosecution and would do so if he was not able to proceed. Mr. Raza said he was not able to proceed and said he would leave the matter to the Court. I then dismissed the case for want of prosecution."

...

"The Director submits that the position on 29.10.79 was that all the parties were present as envisaged by Section 191 of the Criminal Procedure Code and the Court should have proceeded to hear the case under the provisions of that section. And that is exactly what the Court wished to do. It wished to hear the evidence against the Accused and it asked the prosecutor to proceed. He said he couldn't. On being told that if he didn't proceed there would be no adjournment and that the case could be dismissed for want of prosecution, in other words, the Accused would be acquitted, he said he would leave it to the Court. The Court then required finality in the proceedings and acquitted the Accused by dismissing the case. The Court, was therefore, applying Section 191 Criminal Procedure Code."

It seems clear that what the learned trial Magistrate had purported to do in effect was to acquit the respondent of all counts in the charge without a trial on the merits. With respect I do not think in the circumstances disclosed he was empowered to do so. In my opinion his power of acquittal without a hearing of evidence can only arise under section 192(2)(b)(i) of the Criminal Procedure Code. This power is of course only limited to a situation where the prosecutor seeks to withdraw a case from the Court.

In the case of Rapana v. Police (1979) Butterworths Current Law 653 (noted in Commonwealth Law Bulletin Volume 6 Number 1 pages 67/68) to which reference was made by counsel for appellant it was held that a Court exercising summary

jurisdiction had no power to dismiss a case for want of prosecution. It was said in that case that the options open to the Court in the circumstances similar to the present case were:-

(a) to adjourn;

(b) to dismiss the information absolutely;

(c) to dismiss the information without prejudice; and

(d) to give the opportunity to the complainant to apply for leave to withdraw the information.

It seems to me that the most the learned trial Magistrate could have done in the circumstances in which he felt he had found himself was to dismiss the charge against the respondent absolutely. The effect of such an order would be to terminate all judicial proceedings in the matter without any other legal consequence (R. v. Pressick (1978) Crim.L.R. 377). It is not as such an order of acquittal with all that the term implies.

For the reasons given I am satisfied that the learned trial Magistrate acted beyond his powers when he purported to acquit the respondent on the ground of want of prosecution of the case on the part of the prosecutor.

Looking at all the circumstances of this case which culminated in the order of the learned trial Magistrate I do not think that at that point it would have been justifiable for any Court to dismiss the case against the respondent absolutely.

The order made by the Court took everyone by surprise (including the defence) there being no prior warning or notice to the prosecution of what the Court would do if the prosecution failed to proceed with the case. By its nature an order to dismiss a case absolutely would be an extreme one and therefore should only be taken after due and clear warning has been given of the consequences of failure to proceed with the case on the assigned date for the hearing. In my opinion the appellant had every reason in this case to feel aggrieved by the order of the learned trial Magistrate.

I will allow the appeal. The Order dismissing the case against the respondent for want of prosecution is set aside. The case is to continue in the Suva Magistrate's Court according to law.

T.U. Tuivaga

(T.U. Tuivaga)
Chief Justice

Suva,

13th June 1980.