

IN THE SUPREME COURT OF FIJI AT SUVA
APPELLATE JURISDICTION

CAV 0012 of 2019
[On Appeal from Court of Appeal
No. AAU 0041 of 2015]

BETWEEN: **EREMASI TASOVA**

Petitioner - Original Appeal

AND: **OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS**
("The State")

(Respondent - Original Appeal)

AND: **FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION**
("FICAC")

Interested Party

Coram: The Hon. Mr. Justice Kamal Kumar
President of the Supreme Court
The Hon. Madam Justice Farzana Jameel,
Judge of the Supreme Court
The Hon. Madam Justice Anjala Wati,
Judge of the Supreme Court

Counsel: Mr. F. Fesaitu for the Petitioner
Ms. P. Madanavosa for the Respondent
Mr. R. Aslam for the Interested Party

Date of the Review: 26th September, 2022

REVIEW OF JUDGMENT
(Review of Judgment pursuant to section 98 (7)
of the Constitution of the Republic of Fiji)

INTRODUCTION

1. The Petitioner was charged with:-

- i. Two (2) counts of Aggravated Robbery pursuant to section 311(1)(a) of Crimes Act 2009 with two other persons, namely Laisenia Vuluma and Jolame Vunituraga;
- ii. One (1) count of theft of a motor vehicle contrary to section 291(1) of Crimes Act 2009, with persons named in paragraph 1(i);
- iii. One (1) count of resisting arrest contrary to section 277 (b) of the Crimes Act 2009.

The above offences were charged together in same charge / information due to the offences being founded on the same facts or being part of a series of offences of the same or similar nature. Section 59 (1) Criminal Procedure Act 2009.

2. Whilst the two other persons named in paragraph 1(i) pleaded guilty to charges of Aggravated Robbery and Theft of car, the Petitioner pleaded not guilty to all the counts, including the count of resisting arrest.
3. The Learned Magistrate after plea being taken transferred the case to High Court.
4. The High Court sentenced Laisenia Vuluma and Jolame Vunituraga and conducted trial in respect to the Petitioner.
5. On conclusion of trial, the assessors found the Petitioner guilty of all charges.
6. On 22nd July 2014, the Petitioner was sentenced as follows:-

- “i) 1st count of Aggravated Robbery 12 years imprisonment with non-parole period of 10 years*
- ii) 2nd count of Aggravated Robbery 12 years imprisonment with non-parole period of 10 years*
- iii) 3rd count of Theft of a Motor Vehicle 9 months*
- iv) 4th count of Resisting Arrest 6 months.*

Accused sentence to run concurrently with one non-parole period of 10 years.”

7. The Petitioner with other accused persons appealed the High Court decision to Court of Appeal which appeal was dismissed.

8. On 21 May 2019, the Petitioner, Eremasi Tasova filed Notice of Application for Leave to Appeal Court of Appeal decision of 19 December 2018.
9. On 08 July 2020, it was brought to the Petitioner's attention that he needs to file Application seeking enlargement of time to appeal.
10. On 28 July 2019, the Petitioner filed Application for Enlargement of time to Appeal.
11. The Application for Enlargement of Time was heard on 25 August 2022, by Honourable Justice Anthony Gates, Honourable Justice Priyantha Jayawardena and Honourable Justice Madan Lokur (**hereinafter called "The Panel"**). The lead Judgment was written by Honourable Justice Madan Lokur with other members agreeing to his reasons and conclusion.
12. The Panel extended time for filing the Appeal and determined two grounds of appeal pressed by the Counsel for the Petitioner against several grounds of appeal filed by the Petitioner.

REVIEW

13. The Two grounds of appeal are as follows:-

Ground 1

THAT the learned Trial Judge erred in law and in depriving the Appellant of his right to a fair trial by not remitting the charge of resisting arrest to be tried in the Magistrate Court since it was a summary offence triable only in the Magistrate Court. Failure to do so resulted in a miscarriage of justice in the circumstances of the case and the Appellant.

Ground 2

THAT the time the Appellant spent in custody [whilst in remand] was not been deducted and thereby is an error of law on which sentence was passed.

Ground 1

14. The Panel in reliance upon section 4(1) of the Criminal Procedure Act 2009 allowed this ground of appeal and make the following order:-

"Special leave to appeal against his conviction on the fourth count is granted to the petitioner and it is held that the conviction of the petitioner on this count by the High Court was without jurisdiction and is therefore set aside."

15. It is this order that created confusion amongst High Court Judges and Magistrates alike which triggered section 98 (7) of the Constitution of the Republic of Fiji ("**the Constitution**")
16. In the circumstances, this Court on its own motion, has initiated the review process.
17. Section 98 (7) of the Constitution provides as follows:-

"The Supreme Court may review any Judgment, pronouncement or order made by it."
18. This Court fully endorses and adopts the following comment made by the Supreme Court in **Dromudole v State** CAV 13 of 2013 (7 October 2013):-

The nature of the review. *The third hurdle which Dromudole must overcome is that the current application is an application for a review. Such an application will always present an applicant with difficulties. It has been said that a decision of a final appellate court is one of great sanctity. It should not be disturbed save in exceptional circumstances. That is not to say that an application for a review of a previous judgment of the Supreme Court can never be granted, but it does mean that only compelling reasons will justify taking that course. (Paragraph 13)*
19. It must be noted that Fiji Independent Commission Against Corruption (FICAC) which has power to investigate and prosecute for various offences including any offence under Crimes Act 2009 (s12A-FICAC Act 2007), on 15 September 2022 filed an application for Review of Judgment delivered on 25 August 2022.
20. Upon notice being served on the Office of Director of Public Prosecutions and Legal Aid Commission (on behalf of the Petitioner). Counsel from ODPP, LAC and FICAC appeared on 21 September 2022 and were granted leave to file submission by 23 September, 2022.
21. This Court acknowledges the contribution made by FICAC, ODPP and LAC in making legal submissions.
22. It is apparent from the Panel's decision that, it failed to analyse section 4(1) of Criminal Procedural Act 2009 (**CPA**) by ignoring the opening words of Section 4 (1) and adequately consider provisions of the Constitution and **other provisions of CPA** before coming to the conclusion in respect of this ground. The Panel's failure to do makes this case fall into the category of exceptional circumstances.
23. Section 100 (3) of the Constitution provides as follows:-

*“100(3) The **High Court has unlimited original jurisdiction to hear and determine any** civil or **criminal proceedings** under any law and such other original jurisdiction as is conferred on it under this Constitution or any written law”.*

(Emphasis added)

24. For effective and efficient management of criminal cases jurisdiction is bestowed upon Magistrates to hear indictable offence triable summarily elected by the accused and summary offences as provided for in section 4(1) of CPA.
25. It is prudent to look at relevant provisions of CPA with operative words highlighted in bold.
26. Section 4(1) of Criminal Procedural Act 2009 provides as follows:-
 - “4(1) **Subject to the other provisions of this Act** –
 - a) Any indictable offence under the Crimes Act 2009 shall be tried by the High Court;
 - b) Any indictable offence triable summarily under the Crimes Act 2009 shall be tried by the High Court or a Magistrate Court, at the election of the accused person; and
 - c) Any summary offence shall be tried by a Magistrate Court.”
27. There is no doubt the offence of resisting arrest is a summary offence (**s277 (b) of CPA**).
28. It is apparent that the Panel gave no regard to the operative words being **“subject to the other provisions of this Act”**, contained in section 4(1) of CPA.
29. The Panel looked at section 4(1)(c) in isolation in arriving at its conclusion.
30. The other relevant provisions which this Court sees section 4(1) to be subject to are sections 188 and 191 of CPA.
31. Section 188 of CPA provides as follows:

“Power to stop summary trial and transfer to High Court

188 (1) If before or during the course of a trial before a Magistrates Court it appears to the Magistrate that the case is one which ought to be tried by the High Court the Magistrate may transfer the case to the High Court under Division 3.

(2) Before the calling of evidence at trial, an application may be made by a public prosecutor or police prosecutor that the case is one which should be tried by the High Court, and upon such an application the Magistrate shall-

- a) Hear and consider the reasons for the application;
- b) Hear and consider any submissions made on behalf of the accused person as to the most appropriate court to hear and determine the charges; and
- c) Otherwise determine matters relevant to the grounds for the application,

And may continue to hear the case (unless the charges are of a nature that may be tried only by the High Court) or transfer the case to the High Court under Division 3."

32. This provision gives the Magistrate unfettered discretion to transfer any case to High Court **if appears to the Magistrate that the case is one which ought to be tried by the High Court irrespective of whether the offence is indictable offence, indictable offence triable summarily, summary offence and/or offences for which no Court is assigned.**
33. The Magistrate has the discretion to transfer the case on his or her own motion pursuant to s188 (1) or on application of the prosecutor (s188 (2)).
34. In this instance the Petitioner was charged with indictable offences and a summary offence arising out of the same facts. The Learned Magistrate in the exercise of discretion conferred upon the Magistrate transferred the entire case to the High Court.
35. **This Court finds that the Learned Magistrate's exercise of discretion to transfer the entire case to High Court was valid and lawful.**
36. It is more appropriate for Magistrates to transfer proceedings to High Court where the accused is charged with indictable offence (over which High Court has exclusive jurisdiction), and summary offence arising out of same facts for the simple reason that common sense and public interest dictates that the offences arising out of same facts ought to be tried once before one Judicial Officer. This will surely ensure that victims of crimes are not put to undue inconvenience and that there is no inconsistency in finding of facts and application of legal principles in addition to the delay that will ensue if two judicial officers will be involved in dealing with charges arising out of same facts.

37. Section 191 of CPA provides as follows:-

*“A **Magistrate** may transfer any charges or proceedings to the **High Court.**”*

This provision supplements s188 (1) of CPA.

38. The Magistrate in exercise of his or her discretion under this provision may transfer any charges or proceedings irrespective whether it is indictable offence triable summarily or summary offence.

39. In summary this Court holds that:-

- a. **Indictable offence:** Proceeding are instituted in Magistrates Court and then transferred to the High Court which has exclusive jurisdiction pursuant to s4(1)(a) and 35(2) of CPA.
- b. **Indictable Offence Triable Summarily:** The accused has right to elect to be tried in the Magistrate Court or the High Court pursuant to ss4(1) (b) and 35(2) of the CPA.

If the accused elects trial by Magistrate and if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in the exercise of his or her discretion transfer the proceedings to the High Court.

- c. **Summary Offence:** The Magistrate Court has jurisdiction to hear cases. However if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in the exercise of his or her discretion transfer the proceedings to the High Court.
- d. **Offence for which no Court is prescribed (s5(2) of CPA):** The Magistrate has jurisdiction to hear cases. However if it appears to the Magistrate that proceedings ought to be transferred to High Court or application is made by prosecutor for transfer of case to High Court then the Magistrate may in exercise of his or her discretion transfer the proceedings to the High Court.

40. Once, the Magistrate transfers the charges or proceedings to the High Court pursuant to s188 and 191 of CPA then the High Court in exercise of its unlimited Jurisdiction pursuant to s100(3) of the Constitution shall hear and determine the matter.

41. With all due respect to the Panel this Court holds that Ground 1 lacked merit and should have been dismissed by the Panel.
42. Prior to considering Ground 2 and in order to provide clarity this Court will address the issue raised by LAC, ODPP and FICAC in their submissions in relation to joinder or substitution of offences after the case has been transferred to High Court for trial;
43. Section 198 of CPA provides as follows:-

*“ In the information, the Director of Public Prosecutions or Commissioner of Independent Commission Against Corruption may charge the accused person with **any offence**, either in addition to or in substitution of offence in respect of which the accused person has been transferred to the High Court for trial”.*
44. Under this provision the DPP or Commissioner- FICAC has discretion to **add** or **substitute any offence** in respect to cases transferred to High Court pursuant to sections 4 (1) (a), (b), 188 or 191 of CPA.
45. This Court holds that any offence that is added or substituted pursuant to s198 (2) can be heard by the High Court irrespective of whether offence added or substituted is indictable, indictable offence triable summarily, summary offence or offence for which no Court is prescribed.

Ground 2

46. This Court is in agreement with the Panel that the time the Petitioner spent in remand which was equated to one (1) year eleven (11) months should have been deducted.
47. The head sentence passed by the Trial Judge was twelve (12) years imprisonment with ten (10) years non-parole period.
48. This Court notes that whilst the Panel reduced the head sentence to ten (10) years and one (1) month it overlooked to re-set the non-parole period.
49. This Court is of the view that non-parole period be set at eight (8) years six (6) months.
50. This Court is of the view that whilst Orders 1 and 3 pronounced on 25 August 2022 are to remain same, Orders 2 and 4 are to be set aside or varied.

Orders

51. Accordingly orders pronounced in this proceedings on 25 August 2022, are varied as follows:-

1. Delay, if any, in filing the special leave to appeal is condoned.
2. Special leave to appeal against conviction on the fourth count is refused and it is held that the conviction of the Petitioner on this count by the High Court was within jurisdiction and is therefore affirmed.
3. Special leave to appeal against the sentence awarded to the Petitioner is granted limited to the question of calculating the period of incarceration of the Petitioner. The Petitioner is entitled to and is granted the benefit of the period spent by him in remand custody, that is, 23 months (equivalent to 1 year 11 months) as required by section 24 of the Sentencing and Penalties Act 2009 for calculating the period of incarceration.
4. The head sentence of the Petitioner is 12 years. The period of remand custody for which the Petitioner is entitled to a benefit is 1 year and 11 months. The sentencing period is, therefore, calculated as 10 years and 1 month with non-parole period of 8 years 6 months.



Hon. Mr. Justice Kamal Kumar
President of the Supreme Court

Hon. Madam Justice Farzana Jameel,
Judge of the Supreme Court

Hon. Madam Justice Anjala Wati,
Judge of the Supreme Court

Solicitors:

Legal Aid Commission

Office of the Director of Public Prosecution

Fiji Independent Commission Against Corruption