

IN THE COURT OF APPEAL, FIJI ISLANDS
APPLICATION FOR LEAVE TO APPEAL
FROM THE HIGH COURT OF FIJI

Criminal Appeal No. AAU0078/2007
[High Court Criminal Appeal No: HAA 62/2007]

BETWEEN: **PREM SIDHARTA KUMAR**

Appellant

AND: **THE STATE**

Respondent

Coram: Hickie, JA

Date of Hearing: 5 February 2009

Counsel: **Mr M. Raza for the Appellant**
Mr V. Rayawa for the Respondent

Date of Decision: 18 March 2009

DECISION

A. BACKGROUND

[1] On 12 October 2005, the Appellant stood trial in the Suva Magistrates' Court for one count of "Rape", contrary to Sections 149 and 150 of the Penal Code, Cap. 17. He was found guilty by the Learned Magistrate on 27 February 2007 and sentenced on 21 March 2007 to 8 years imprisonment.

[2] The Appellant appealed on 4 April 2007 to the High Court against conviction and sentence. The Appeal was heard on 27 July 2007 wherein Mataitoga J allowed the appeal (finding the trial magistrate misdirected himself on a number of questions of law) and ordered a re-trial.

[3] The Appellant is seeking to Appeal the judgment of Mataitoga J on the basis that a re-trial should not have been ordered.

B. THE APPEAL

1. The Grounds in support of the Appeal

[4] Counsel for the Appellant has submitted that the power of a High Court Judge to order a re-trial is discretionary and ought to be exercised judicially: *Shekar v The State* [2005] FJCA 18.

[5] Further, Counsel for the Appellant has submitted that it would be highly prejudicial to the Appellant if the Order for a re-trial is not vacated. On this issue, Counsel has submitted that the Learned Appellate Judge failed to consider (citing *Azamatula v State* (Unreported, Fiji Court of Appeal, criminal Appeal No. AAU0060.2006S, 14 November 2008, Goundar, Khan and Lloyd JJA; Paclii:[2008] FJCA 84), <http://www.paclii.org/fj/cases/FJCA/2008/84.html>):

- (a) The strength of evidence against the Appellant;
- (b) The likelihood of a conviction being obtained on a re-trial;
- (c) The prejudice to the Appellant which would enable the Prosecution to make a new case and/or “fill in any gaps in evidence”.

[6] In addition, Counsel for the Appellant has submitted that neither the Appellant nor the Prosecution was asked to make submissions on the issue of whether a re-trial should be ordered.

2. The submissions by the DPP in Reply

[7] Counsel for the DPP has also relied upon the recent judgment of the Court of Appeal in *Azamatula* (supra) and that “for the Appellant to succeed he has to show either one or all three” of the following factors”:

- (a) The strength of the prosecution case;
- (b) The interests of the public;
- (c) The Prosecution will just be given the opportunity to close the gaps in their case.

[8] If I was to understand Counsel for the DPP correctly, he did agree with Counsel for the Appellant that this is a question of law. If, however, I have misunderstood Counsel for the DPP, then I am still of the view that this is a question of law.

3. Question of Law for the Full Court

[9] Section 22(1) of the Court of Appeal Act states:

“Appeals from Supreme Court in its appellate, etc., jurisdiction in criminal cases

22.-(1) Any party to an appeal from a magistrate's court to the High Court may appeal, under this Part, against the decision of the High Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence) ...

(3) On any appeal brought under the provisions of this section, the Court of Appeal may, if it thinks that the decision of the magistrate's court or of the High Court should be set aside or varied on the ground of a wrong decision of any question of law, make any order which the magistrate's court or the High Court could have made, or may remit the case; together with its judgment or order thereon, to the magistrate's court or to the High Court for determination, whether or not by way of trial de novo or re-hearing, with such directions as the Court of Appeal may think necessary ...” [My emphasis]

[10] In view of the above, I am of the view that this Question of Law needs to be considered by the Full Court rather than a single judge granting leave.

ORDERS

[10] This Court makes the following Orders:

1. The Appeal be referred to the next sittings of the Full Court of Appeal with priority.
2. Bail as granted by Mataitoga J on 27 July 2007 is to continue.

The Hon. Thomas V. Hickie
Judge of Appeal

Solicitors:

Mehboob Raza & Associates, Barrister & Solicitors, Suva
Office of the Director of Public Prosecutions for Respondent