

IN THE HIGH COURT OF FIJI
AT SUVA
CRIMINAL JURISDICTION

CRIMINAL CASE NO: HAC 030(A)/2005

BETWEEN:

THE STATE

AND:

SAILOSI VOLIVALE

Counsel: Mr. P. Bulamainavalu for State
Ms. R. Senikuraciri for Accused

Date of Hearing: 1st June 2009
Date of Ruling: 2nd June 2009

RULING

[1] Following a trial, Sailosi Volivale (the defendant) was convicted of murder, burglary and robbery with violence, respectively, on 9 April 2009. In passing judgment, the trial judge (Shameem J) concurred with the unanimous opinions of guilty by assessors. The sentence was adjourned to allow the parties to file submissions on minimum term for the offence of murder.

[2] Before the defendant could be sentenced, the constitutional event of 10 April 2009 took place, after which Shameem J has not returned to the bench. In other words, Shameem J is unavailable to sentence the defendant.

[3] The issue is whether another judge, not being the original trial judge, has jurisdiction to sentence the defendant? In this regard, I invited submissions from the parties. Both, counsel for the State and counsel for the defendant, submit that this Court has jurisdiction to sentence the defendant.

[4] The mode of trials in the High Court is provided by the Criminal Procedure Code (CPC).

[5] Section 300 of the CPC provides:

“If the judge convicts the accused person, or if the accused person pleads guilty, it shall be the duty of the Chief Registrar or other officer of the court to ask him whether he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect on the validity of the proceedings.”

[6] If no motion in arrest of judgment is made, then Section 302 of the CPC provides:

“If no motion in arrest of judgment is made, or if the court decides against the accused person upon such motion, the court may sentence the accused person at any time during the session.”

- [7] The notable difference in sections 300 and 302 is that section 300 explicitly uses the phrase “the judge convicts”, while section 302 uses the phrase “the court may sentence.”
- [8] The phrase “the judge” as referred in section 300, in my view, means the trial judge. In this regard, there is no ambiguity about who can convict an accused person following a trial. Section 300 allows only the trial judge who has heard evidence, to convict an accused person. The plain meaning of the phrase “the judge” supports such proposition. However, the power to sentence is left to the court.
- [9] The question is whether the meaning of the phrase “the court” is confined to the original trial judge or does it include another judge when the trial judge is unavailable?
- [10] It has been a long standing principle in common law that statutes dealing with jurisdiction and procedure are, if they relate to the inflictions of penalties, strictly construed. Compliance with procedural provisions will be stringently exacted from those proceedings against the person liable to be sentenced. (**R v. Jones, exp. Daunton** [1963] 1 WLR 270, **R v. Clarkson** [1961] 1 WLR 348).
- [11] If there is any ambiguity or doubt it will, as usual, be resolved in the favour of the accused (**R v. Bullock** [1964] 1 QB 481).
- [12] The cardinal principle of statutory interpretation is to give the words their plain meaning. Thus, one cannot ignore the use of the plain language in section 302.

The plain language is that 'the court may sentence". The word "court" is not defined in the CPC, but is defined in the Penal Code as "a court of competent jurisdiction" (s.2 of the Penal Code). I have no reasons to hold that this Court is not a court of competent jurisdiction.

[13] In the present case, the defendant has been convicted of some serious offences. His right of appeal to the Court of Appeal is curtailed by the fact that he has not been sentenced. Appeals to the Court of Appeal lie from the final order of the High Court (s.3 of the Court of Appeal Act). In these circumstances, any ambiguity must be decided in favour of the defendant so that he is not prejudiced.

[14] Therefore, it follows that it is in the defendant's interest that he be sentenced, so that he could pursue his appeal rights. Also, I cannot see any prejudice to the defendant if he is sentenced by another judge if the trial judge is no longer available.

[15] Therefore, I hold, if for any reason, the original trial judge is unavailable after convicting an accused person, another judge could sentence the accused under section 302 of the CPC.

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Daniel Goundar

JUDGE

At Suva
2nd June 2009

Solicitors:

Office of the Director of Public Prosecutions for State
Office of the Legal Aid Commission for the Accused