

**IN THE HIGH COURT OF FIJI**

**APPELLATE JURISDICTION**

**AT SUVA**

**CRIMINAL APPEAL CASE NO: HAA 110 OF 2008**

**BETWEEN:**

**THE STATE**

**AND**

**VILIMAE FATAFEI**

Mr. Fotofili for the State

Mr. T. Terere for the Respondent [as Duty Solicitor]

**R U L I N G**

1. This is an appeal by the State [Director of Public Prosecutions] against what it claim as the acquittal of the Respondent, against the charge of Robbery With Violence laid against him in the Nasinu Magistrates Court.

**Background facts**

2. The respondent was charged with one count of Robbery with Violence contrary to section 293(1)(b) of the Penal Code Cap 17. The particulars of the offence being: that the respondent on the 14 day July 2007 at Nasinu in the Central Division robbed Natesh Naicker s/o Rama Naicker of \$35.00 cash and immediately before such robbery did use personal violence to the said Natesh Naicker.
3. The case was first called in the Nasinu Magistrate Court on 16 July 2007, where the appellant's rights to counsel and election for trial were administered. The

appellant advised the court that he elects magistrates court trial and he wished legal counsel to represent him. He applied for bail to allow him to find counsel. It was refused because of his previous record in having committed offences while on bail.

4. On the second call date 20 July 2007, the appellant now represented by Mr. Karavaki applied for bail again and it was granted with surety and strict bail conditions. There was another 14 mention for this case before 3 June 2008 when the learned magistrate made the ruling the subject of this appeal.
5. In reviewing the court record, I noted that of the 14 adjournments granted by the court, four were due to the failure of the appellant to attend court on the mention date. Three adjournments have been due to the pre-trial process still in progress and the rest of the adjournments given by the court with no reason recorded. But it is clear from the record that it may have been due to the learned Magistrate's commitment in other cases.
6. The hearing date of 3 June 2008, was set when the case was called for mention on 20 February 2008. On 3 June 2008, the complainant did not turn up for the hearing despite being summoned to do so on 30 March 2008[Affidavit of Service of Summon]. The prosecutor requested another hearing date advising the court that the charge is a serious one, it is less than a year old and that the interest of justice requires that a final date be given for trial to be held.
7. The learned Magistrate in exercising the court's discretion, rejected the application for a further adjournment on the following basis: i) all parties including the complainant were summoned to appear on 3 June 2008 for the trial; ii) enough time has been given to the prosecution to prepare its case; iii) the delay is unacceptable to the court – justice delayed is justice denied. Having reached that decision on the issue of adjournment, the court went on to conclude that 'The police prosecution is not able to make out prima a facie case. In view of the above, this Court dismisses the case against the accused and the accused is discharged forthwith pursuant to section 210 of CPC.'

#### Grounds of Appeal

8. The State appeal, is grounded on two specific grounds:

- i) The trial magistrate erred in law when she failed to act judicially in refusing the prosecutor's application for adjournment;
  - ii) The trial magistrate erred in law when she acquitted the accused.
9. These grounds of appeal were set out in the Petition of Appeal filed on 1 July 2008 by the State. On 6 February 2009 both parties were ordered to file written submission by 13 February 2009. The respondent did file their written submission as ordered. The applicant did not and there was no explanation provided for this discourteous behaviour.

#### Respondent's submission

10. In a carefully presented submission, Mr. Terere for the respondent argued that the trial magistrate did not err in law in deciding not to grant the adjournment sought by the prosecution. This he claim was so because by simply discharging the respondent from the charges he was not affecting the right of the prosecution to recharge the accused. He referred to some useful case authorities regarding the review of exercise of judicial discretions on appeal. He significantly pointed out that contrary to the claim of the DPP, the trial magistrate did not acquit the respondent, she discharged the respondent from the charge he faced.
11. The fatal difficulty with Mr. Terere's submission is that he submits the trial magistrate ought to have dealt with his case under section 198 of the Criminal Procedure Code [CPC] and not section 210 of the CPC. I agree. The difficulty here is tat having chosen to use section 210 of the CPC as the basis of her action, the trial magistrate cannot then use section 198 CPC considerations to justify the exercise of her discretion.

#### Appeal Determination

12. I will first deal with the first ground of appeal submitted by the State, namely, that the trial magistrate erred in law in that she was injudicious in exercising the court's discretion in not granting the prosecution request for a further adjournment. I will first set out the relevant law and consider the circumstances of this case and then reach my conclusion.

### Exercise of Court's discretion not to grant adjournment

13. The power to grant adjournment is a discretionary one and when a court is exercising it, it must act judiciously. An appellate court like this one will not interfere unless it is satisfied that the discretion was not exercised judicially and the rights of the parties were defeated: Robert Tweedle Macahill v R [1980] FJCA 1; AAU 043 of 10980.
14. Section 202 of Criminal Procedure Code Cap 21 is pertinent in the court's exercise of its discretion. It is this provision which gives the power to adjourn before or during the hearing of a case. The procedure to be followed by the courts when dealing with an adjournment application was clarified in Macahill [supra] and they are: where the complainant appears sections 198 and 203 CPC have no application. In such circumstances where an adjournment is refused the CPC is mandatory: 'The court shall proceed to hear the case': section 200 CPC
15. In this case the prosecution did not apply to have the complaint withdrawn under section 201 CPC, instead they applied for an adjournment which was declined and there was no evidence called. The trial magistrates then proceeded to deal with the case under section 210 CPC.
16. In the light of the above, did the trial magistrate erred in not exercising her discretion judicially when refusing the prosecution application for adjournment. A trial magistrate in exercising his discretion to grant or refuse an adjournment is not confined to considering the interest of the accused person but is required to have regard to the interest of all parties and the overall interest of justice: R. v Cox [1960] VR 665
17. An appellate court like this one will be slow to interfere with the exercise of this discretion except if it appears that the result of the order made below is to defeat the rights of the parties altogether, would be an injustice to one of the other parties: Maxwell v Kean [1928] 1 KB 645 followed by Scott J in DPP v Kalou [1996] FJHC 130; HAA 0016 of 1996
18. From the court record the following factors were considered relevant by the trial magistrate when exercising her discretion:
  - i) The fact that all parties were notified of the 3 June 2008 trial date;
  - ii) The prosecution have been given enough time to prepare;

- iii) The court schedule is full and will not be able to hear the case until October/November 2008 if an adjournment is granted as requested by the prosecution;
- iv) Delay is unacceptable

19. In carefully considering these factors I find that while they are indeed relevant, but they have, in my view, limited the court's consideration only to the interests of the court and the accused. The public interest represented by the prosecution in ensuring that when people are properly charged with serious offences like in this case, that they should not be lightly let off. Indeed there is a policy requirement that the court should ensure that such prosecutions are properly concluded: per Winter J in State v Nand [2005] FJHC 79; HAA 087 of 2004.
20. It should be noted that more than half of the number of adjournments granted in this case before the 3 June 2008 trial date was fixed, were due to the accused absence or the court not ready. For the trial magistrate to now say that delay is unacceptable when the prosecution is seeking a further adjournment incorrectly implies that it was the prosecution who were largely responsible for the delay.
21. In the light of the above approach of the trial magistrate it appears to me, that the refusal to grant the adjournment to the prosecution was in the nature of disciplinary action to punish the non appearance of the complainant on the trial date that had been fixed and for which he was summoned. This was an improper use of the court's discretion as observed by Mustill LJ in R v Swansea, Jutsices and Davies Ex-parte Director of Public Prosecutions 154 JP 709, at 712
- ‘..the power to refuse an adjournment is not a disciplinary power to be exercised for the purpose of punishing slackness on the part of one of the participants in the trial. The power to adjourn is there so that the court shall have the best opportunity of giving the first available hearing to the parties,’
22. The respondent argues that the trial magistrate had exercised her discretion according to law because the effect of her discharging and acquitting the accused did not violate rights of parties. I disagree. As a matter of fact, the right of the prosecution is to have the charge that was properly laid in this case to be tried to conclusion. The exercise of the trial magistrate discretion took that right away from the prosecution without consideration of all the relevant factors. The fact

that the charge may be laid again is a legal consequence of the decision of the court.

23. I also note the fact that the adjournment could have been granted and still not violate the 12 month bar period in section 202 (7) CPC.
24. In the light of the discussion of the relevant law above and having applied it to the facts as revealed in the court record, I conclude that the trial magistrate erred in law in not granting the adjournment sought by the prosecution on 3 June 2008.
25. The State appeal on this ground succeeds. I order that the order refusing the prosecution application for adjournment and the dismissal of the charge be set aside. I further Order that the case be called for mention to set new hearing date in the Nasinu Magistrates Court on 16 March 2009 at 9 am.

#### Error to acquit under section 210 CPC

26. The second ground of the State's appeal, namely, that the trial magistrate erred in law in acquitting the appellant under section 210 of the CPC, is misinformed factually. It is factually misinformed because the appellant was not acquitted of the charges he faced, the charges were dismissed. The court record states:

*'In view of the above this court dismisses the case against the accused and the accused is discharged under section 210 of the CPC..'*

27. As to whether the learned trial magistrate erred in law in relying on section 210 of the CPC I will now briefly consider. I can only surmise that the trial magistrate was actually following the procedure in section 201 (2)(b)(ii) of the CPC which in the appropriate factual context would allow charges against an accused person to be discharge, subject to section 210 of the CPC. The court record is silent on whether there was an application by the prosecution to have the charge withdrawn when the complainant did not appear. In that light section 201 of the CPC was not open to the court to use.
28. Section 210 of the CPC can only be used in two specific situations: i) where the prosecution has called all its evidence and before the defence is asked to make their case, the court may assess the evidence called and if it concludes that no case has been made out, the court may dismiss the case and acquit the accused or ii) where an adjournment has been refused and the prosecutor is called upon to

tender evidence in support of the charge and the prosecutor tenders no evidence: DPP v Vikash Sharma 40 FLR 234 followed in State v Agape Fishing Enterprises [2008] FJHC 19; HAA 011 of 2008.

29. On the facts in this case, the first situation referred to above does not apply because there were no evidence called at all. If the trial magistrate was relying on the second situation above, then section 209 of the CPC should have been followed and court record noted appropriately. If that was followed, then the trial magistrate should advise both parties that trial was proceeding as schedule and the prosecutor should be called upon to begin. If the prosecutor then called no evidence then section 210 of the CPC would apply. This is not what happened in this case. There is nothing in the record that section 209 CPC was considered nor followed by the trial magistrate.

30. In this case, after refusing the adjournment the court record merely state:

*'The police prosecution is not able to make out a prima facie case. In view of the above this court dismisses the case against the accused and the accused is discharged forthwith pursuant to section 210 of the CPC..'*

The court record does not discuss how did the trial magistrate reached the conclusion that the prosecution could not make out a prima facie case. This is unacceptable.

31. Unlike the factual situation in Vikash Sharma (supra) where the prosecution was not ready to proceed on the day fixed for trial, due to the fact that the police prosecution file was with the Divisional Prosecution Officer/Southern. In this case the prosecution was ready except that the complainant who had been summoned did not turn up to court and they asked for an adjournment but it was refused. We are left to ask: if the section 209 CPC was indeed followed and the prosecution was asked by the trial Magistrate to call evidence and the prosecution was able to call other witnesses apart from the complainant and tender the caution interview statement of the accused, if there was one. What would have been the conclusion. No one knows. All these are matters of speculation because of the lack of proper record been made on how and why certain conclusions were reached by the court.

32. I have concluded that on the second ground of the appeal, the trial magistrate also erred in law in discharging the accused under section 210 of the CPC on the facts

in this case. It should also be noted that under section 210 CPC there can only be a finding that there is a no-case-to-answer followed by an order for acquittal not discharge as was ordered in this case.

### **ORDERS**

33. I make the following orders:

- i) Appeal is allowed;
- ii) Order of the trial Magistrate in discharging the appellant is set aside;
- iii) that a trial date in this matter be fixed by the Nasinu Magistrate Court;
- iv) The appellant to appear before the Nasinu Magistrate Court on 16 March 2009 at 9 am to fix hearing date

Isikeli Mataitoga  
**JUDGE**

At Suva  
27 February 2009.