

**IN THE COURT OF APPEAL FIJI ISLANDS**  
**ON APPEAL FROM THE HIGH COURT OF FIJI**

**CRIMINAL APPEAL NO. AAU0055 OF 2007S**  
**(High Court Criminal Action No. 10 of 2006S)**

**BETWEEN:**            **JAI NAND KUMAR**

***Appellant***

**AND:**                **THE STATE**

***Respondent***

**Coram:**            Byrne, JA  
                         Pathik, JA  
                         Powell, JA

**Hearing:**            Wednesday, 9 April 2008, Suva

**Counsel:**            M Raza                    ]            for the Appellant

                         W Kurisaqila            ]  
                         N Tikoisuva            ]            for the Respondent

**Date of Judgment:** Monday, 14 April 2008, Suva

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**JUDGMENT OF THE COURT**

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[1] On 1 February 2002 the appellant Mr Kumar was charged with attempted rape. On 4 February 2002 the Magistrate's Court at Labasa granted the appellant \$500 bail.

[2] His trial began on 19 September 2002 before the Resident Magistrate. The appellant was represented by a Mr Amrit Sen.

- [3] At the end of the prosecution evidence the appellant submitted that he had no case to answer. From a reading of the transcript the prosecution evidence seems compelling and the no case submission curious, however a year later, on 21 November 2003, the Magistrate ruled that there was no case to answer.
- [4] The State appealed against the Magistrate's decision and that appeal was heard by Singh J in January 2005. Mr Sen appeared for the appellant. At the commencement of the appeal the appellant said that the appeal had not been filed within time, namely on or before 19 December 2003.
- [5] The evidence as to when the appeal was filed was conflicting. On one view it had been filed on 10 December 2003, on another not until February 2004. The records at the Court Registry were in some confusion but on the assumption that the appeal had been filed out of time Singh J, pursuant to section 310 of the Criminal Procedure Code, extended time to appeal. He gave four reasons for doing so and then proceeded to hear and uphold the appeal and he ordered the matter to proceed before the same Magistrate.
- [6] The hearing before the Magistrate was to resume on 12 September 2005 but although the appellant had two legal representatives there, including Mr Sen, the appellant was absent. The Magistrate had travelled specifically from Suva to Labasa for the continuation. The legal representatives agreed that the hearing should continue on 13 September 2005 but again the appellant was absent, as he was again on 14 September 2005. The appellant, it appears from the record, had not been served with a notice of continuation of the hearing.
- [7] However on 20 March 2006, the appellant says in an affidavit sworn 26 April 2006, he was served with a notice of the adjourned hearing date of 4 April 2006. The appellant says in this affidavit that he was ill and *"I was advised to go to Suva to*

*seek further check up. Accordingly, I was not able to attend to Court and my medical report from Labasa Hospital was given to the Learned Magistrate."*

- [8] On 4 April 2006 Mr Sen tendered a sick sheet on behalf of his client and said that his client had gone to Suva. Mr Sen told the Court that the continued hearing could conveniently take place in Suva on any day after 11 April 2006. He told the Court he would get his client there on the hearing date.
- [9] On 6 April 2006 the legal representatives including Mr Sen agreed to have the hearing in Suva on 12 April 2006. The Magistrate noted that at the end of April 2006 he was leaving for Nauru on a one year assignment.
- [10] On 12 April 2006 neither the appellant nor Mr Sen appeared and the prosecutor applied to have the trial continue in the appellant's absence, the submission being that the appellant had been evading court appearances. That application was granted and on 13 April 2006 the Magistrate found him guilty of attempted rape and sentenced him to 2 years 8 months imprisonment.
- [11] On 26 April 2006 Mr Kumar filed a Petition of Appeal in the High Court. The principal ground of appeal was that the appellant ought not to have been convicted in his absence but he also appealed against the severity of the sentence. This appeal was heard by Shameem J on 1 June 2007 and on 8 June 2007 she allowed the appeal, quashed the sentence and conviction and ordered a retrial.
- [12] Shameem J found that despite clear and unequivocal notices and orders to attend neither the appellant nor his counsel attended court for the special court hearing on 12 April 2006 and that there had been no breach of the Constitution when the Magistrate continued the trial in the appellant's absence. However Shameem J was

unable to conclude that the trial had thereafter proceeded fairly because the Magistrates Court was not able to locate the judgment.

[13] Mr Sen appeared for the appellant at the hearing before Shameem J and, the record shows, asked for a re-trial. In the Court of Appeal the appellant was represented by Mr Raza who informed the Court that Mr Sen could not explain why he asked for a re-trial.

[14] In his appeal to this Court, by of Notice of Appeal dated 21 June 2007, the appellant seeks an order that the order for a re-trial be quashed (Ground 5). He also seeks to appeal:

- The decision of Singh J to hear the appeal to him, the appellant contending that this was in breach of section 310(1) of the Criminal Procedure Code Cap 21 (Ground 1)
- The decision of Singh J extending time to appeal against the no case to answer ruling of the Magistrate (Ground 2)
- The decision of Shameem J in holding that section 28(1)(h) empowered the Magistrate to hear a charge of felony against the appellant in his absence [Ground 3).
- The finding of Shameem J that *"there was a delay by the appellant when the court record suggested otherwise"* (Ground 4)

#### Ground 4

[15] In his written submissions the appellant says that *"the prosecution cannot expect the Appellant to appear when he is not served"* and that *"there is nothing in the record*

*to show that the Counsel for the Appellant caused the delay.” Put shortly, the appellant says that there is no evidence that he was served with a notice informing him of the date of the resumption of the trial ordered by Singh J (12 September 2005), and on the adjourned dates thereafter (13 & 14 September 2005, and 4, 6, 12 & 13 April 2006).*

[16] That submission is rejected.

[17] The overwhelming inference to be drawn from the facts set out above is that the appellant has during the past 6 years skilfully exploited shortcomings within the judicial system and its administration to delay, with the view to ultimately escaping, justice.

[18] The appellant had legal representation when the hearing was fixed for resumption on 12 September 2005, the same legal representative that he had since 2002. It beggars belief that the legal representative would appear for the continuation of a serious criminal hearing resuming after a three year hiatus without obtaining instructions from his client or that he would not inform his client of the resumed date. The appellant, it appears from all the records, was in full-time employment throughout the period.

[19] There was it seems no difficulty in informing the appellant that on 12 April 2006 the trial had proceeded in the appellant’s absence, his appeal against that decision being filed within a fortnight.

[20] More disturbingly there is no explanation of why Mr Sen allegedly failed to inform the appellant that the hearing on 4 April 2006 had been stood over until 12 April 2006. If that was the case one would have expected that evidence of such a gross

failure would have been given by Mr Sen in the proceedings before Shameem J, particularly when he had assured the Magistrate that he would make sure the appellant appeared.

[21] Instead the transcript of argument before Shameem J on 1 June 2007 reveals that Mr Sen told Shameem J on 1 June 2007 that the failure by the appellant to appear was *“No fault of his because he was not aware of the date.... This is a case of judicial misconduct... I never did anything wrong in this case...”*

[22] If Mr Sen did nothing wrong then we can assume that he told the appellant that his case had been stood over for hearing from 4 April to 12 April 2006. No explanation is given anywhere why Mr Sen himself failed to appear on 12 April 2006.

[23] The appellant, it seems to this Court, decided that Suva was a convenient place to be when the Court was in Labasa and that Labasa was the place to be when the Court was in Suva. The appellant’s decision not to appear on 4 April 2006 but instead to go to Suva for a check-up was high-handed and contemptuous of the Court.

[24] This ground of the appeal must fail.

**Grounds 1& 2 – that leave to appeal the no-case to answer decision should have been refused**

[25] Section 310 of the Criminal Procedure Code requires appeals to be lodged within 28 days from the date of decision. It also gives both the Magistrate’s Court and the High Court a discretion to enlarge the period of limitation “for good cause”. Subsection (2) defines “good cause” and one of the factors listed as being a good cause is where the sanction of the DPP is required for the appeal by virtue of section

308 of the Code. This was a case where the DPP's sanction was required, the appeal being from an order of acquittal.

- [26] Singh J gave three other reasons for extending the time to appeal including the state of the court records in the Labasa office, the seriousness of the charge and the fact that there was no evidence of prejudice to the appellant.
- [27] An appellate court ought not to interfere with the exercise of a discretionary order by a trial judge unless it appears some error has been made in exercising the discretion and that a substantial wrong has occurred: *House v The King* (1936) 55 CLR 499
- [28] The trial judge's exercise of his discretion did not miscarry. The case of *Cavulati v State* (2003) FJCA 59 cited by the appellant has no bearing on this. The statute creating the right of appeal gives the right to appeal out of time with leave of the Court.
- [29] That is what was done.
- [30] Counsel for the appellant in this Court says that the application by the prosecution for leave to appeal out of time was made orally in Court. He says the application should have been supported by affidavit evidence which evidence the appellant should have been given the opportunity to reply to by affidavit.
- [31] That may be the preferable position but there is nothing to indicate that Mr Sen made an application for an adjournment so that such a course could be taken. What is clear from the judgment is that the objection that the appeal had not been filed in time was first raised by Mr Sen at the commencement of the hearing. In any event the four reasons given by Singh J for extending appeal were incontrovertible matters not requiring evidence.

**Ground 3 – that the trial in the absence of the appellant was unconstitutional**

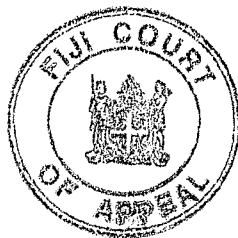
[32] Given that Shameem J ordered a retrial on other grounds, it is strictly unnecessary for this Court to decide the correctness of her decision that the Magistrate was entitled to proceed to hear the charge in the appellant’s absence.

[33] However Mr Raza is correct when he says that section 28(2) of the Constitution, which provides that “*Sub-paragraph 1(h)(i) does not apply if the offence with which the person is charged is an offence punishable by a term of imprisonment*”, ought to have seen the conviction and sentence quashed on this ground as well.

**Ground 4 – that the order for a re-trial should be quashed**

[34] For the reasons set out above the appeal fails. Shameem J’s order for a re-trial will not be quashed.

[35] The appeal is dismissed.



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Byrne, JA

Handwritten signature of Pathik in black ink.

Pathik, JA

Handwritten signature of Rameel Powell in black ink.

Powell, JA

**Solicitors:**

**Mehboob Raza and Associates, Suva for the Appellant**

**Office of the Director of Public Prosecutions, Suva for the Respondent**

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