IN THE COURT OF APPEAL, FIJI

[On Appeal from the High Court]

CRIMINAL APPEAL NO.AAU 0081 of 2015

(Magistrate Court Criminal Case No. CF 1001/12)

BETWEEN : **EPARAMA MANI**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, JA**
Fernando, JA
Nawana, JA

Counsel : **Appellant in Person**
Mr. M. D. Korovou for the Respondent

Date of Hearing : **12 February 2019**

Date of Judgment : **7 March 2019**

JUDGMENT

Prematilaka, JA

[1] I have read in draft the judgment of Nawana, JA and agree with the reasons and conclusion herein.

Fernando, JA

[2] I agree with the reasoning and conclusion of the judgment of Nawan, JA.

Nawana, JA

[3] This appeal, received within an enlarged time, arises out of an order of Magistrate's Court in Suva dismissing a charge consequent to an application by the prosecution for an adjournment of trial.

[4] The application for adjournment was made by the police prosecuting officer on the ground that the presence of the principal witness could not be secured in court to proceed with the trial when the trial was set to be commenced on 09 March 2015.

[5] The accused-appellant (appellant), in response, objected to the application for adjournment relying on Section 171 (1) (b) of the Criminal Procedure Act, 2009 (Criminal Procedure Act). The trial, as of 09 March 2015, had stood adjourned previously on a few occasions.

[6] The learned Magistrate, having briefly recorded reasons, proceeded to dismiss the charge on 09 March 2015. The reasons recorded by the learned Magistrate were:

(i) The complainant was in Papua New Guinea;
(ii) There was no certainty as to when the complainant would return;
(iii) The case was initiated in [2009], where trial de novo had been ordered by the Chief Magistrate;
(iv) The prosecution could not continue to seek an adjournment at its own convenience;
(v) The appellant had been continuously appearing; and,
(vi) The appellant's application for permanent stay had been refused.

[7] The learned Magistrate was in error when she referred to the case as one of those initiated in 2009, when the offence had been committed on 14 July 2012 and the proceedings had, in fact, begun in 2012 itself.

[8] Be that as it may, the learned Magistrate, who presumably made the order under Section 171 (1) (b) of the Criminal Procedure Act on 09 March 2015 pursuant to the objection by the appellant, was vested with discretion to dismiss the charge if *'the complainant'* did not appear in court.

[9] Sections 171 (1) (b) the Criminal Procedure Act provides for:

> ***Non-appearance of parties after adjournment***
> 171 (1) If, at the time or place to which the hearing or further hearing is adjourned-
> (a) ...
> (b) ***If the complainant does not appear***, the court may dismiss the charge.

[10] The learned Magistrate appears to have dismissed the charge in the exercise of discretion in his ruling dated 09 March 2015 as provided for under the above provision of law.

[11] The appellant sought to appeal the ruling of the learned Magistrate by an application for leave to appeal, which was accompanied by an application dated 17 July 2015 for enlargement of time to appeal. The complaint of the appellant, as contended in his application for leave to appeal, was that the learned Magistrate should have acquitted him of the charge instead of making an order for dismissal of the charge.

[12] A single Justice of Appeal considered the application for enlargement of time to appeal and granted the same for the reasons set-out in the ruling dated 17 April 2017.

[13] Hearing before the Full Court was taken up on 12 February 2019. At the hearing, assistance of parties was sought to ascertain whether there was an appeal filed after the

enlargement of time. Court was informed that there was no formal appeal filed after the enlargement of time. Mr. Mosese Korovou, learned counsel for the State, submitted that the application for leave to appeal, accompanied by the application for enlargement of time dated 17 July 2015 as referred to above, was deemed to have constituted the appeal for consideration by this court.

[14] Learned counsel for the State had previously submitted before the single Justice of Appeal that the complaint of the appellant had involved a question of law investing a right of appeal in the appellant in terms of Section 21 (1) (a) of the Court of Appeal Act. The effect of the learned counsel's submission was that the appeal could be considered without the leave first having been obtained from this court.

[15] This court, in the circumstances, holds the appeal to have been properly constituted and received within the enlarged time in pursuance of the order by the single Justice of Appeal in terms of Section 35 (1) of the Court of Appeal Act.

[16] Facts, as borne-out by the Magistrate's Court Record leading to the impugned order of the learned Magistrate dated 09 March 2015, briefly are as follows:

(i) The appellant had been charged before the Magistrate, under extended jurisdiction by the High Court, for having committed the offence of 'Aggravated Robbery' contrary to Section 311 (1) (a) of the Crimes Act(Crimes Act).

(ii) The offence, which involved property to the value of $ 4000.00 belonging to the complainant, Mr. Andrew Ting Enq Bing, was alleged to have been committed in Suva on 14 July 2012.

(iii) The appellant was formally charged on 23 July 2012. The case, having been called on several occasions before the Magistrate from 23 July 2012, reached the stage of trial on 13 February 2013 with the plea of 'Not Guilty' of the appellant

being recorded on 02 January 2013. The trial, thereupon, proceeded from 19 February 2013. The appellant defended himself at the trial.

(iv) Learned Magistrate received the evidence of the victim and the principal witness, Mr. Andrew Ting Enq Bing, and other witnesses for the prosecution. At the close of the prosecution case, the learned Magistrate decided to call for the defence on 20 February 2013, at which point the appellant sought an adjournment. The learned Magistrate, having granted the adjournment, fixed the case to proceed with the defence case on 21 February 2013.

(v) The appellant adduced the evidence of one witness on 21 February 2013 and sought an adjournment until the next day to enable him to call two more witnesses. Further continuation of the trial, however, was fixed for 21 March 2013 in view of other judicial commitments of the learned Magistrate; and, also due to the appellant being required to be present before the High Court for another trial from 04-15 March 2013.

(vi) The Court could not resume proceedings on 21 March 2013. Instead, it stood adjourned until 17 May 2013 when the appellant made an application for a trial *de novo*. The Chief Magistrate, having considered the application of the appellant, ordered a trial *de novo* on 31 May 2013.

(vii) While the case was being called in order to fix a date of hearing, the appellant filed an application before the learned Magistrate, before whom the trial *de novo* stood adjourned, for permanent stay of proceedings on 31 December 2014. The learned Magistrate, by her ruling dated 31 December 2014, refused the application for the stay of proceedings for want of jurisdiction.

(viii) The adjourned *de novo* trial was, thereafter, fixed to be commenced on 9 March 2015 on which date the application for further adjournment was made on the

ground of the absence of the principal witness, which was refused by the learned Magistrate and dismissed the charge.

[17] It is in the context of this factual background that the legal issue of correctness of the assumption of jurisdiction by the Magistrate under Section 171 (1) (b) of the Criminal Procedure Decree and the purported exercise of the discretion of the Magistrate to dismiss the charge under that section must be considered.

[18] The matter, as presented before this court by way of an appeal by the appellant, is plain and straightforward upon consideration of the factual background. The fundamental issue, however, is whether the learned Magistrate had correctly dealt with the application for adjournment of the trial made by the police prosecutor before making the purported order under Section 171 (1) (b) of the Criminal Procedure Act pursuant to the objection by the appellant under that Section.

[19] Primarily, the appellant had erroneously relied on Section 171 (1) (b) when he pursued his objection against further adjournment of the trial on 09 March 2015. That is because the case was not one of those where ***the complainant*** did not appear in court to trigger Section 171 of the Criminal Procedure Act. Instead, the police prosecutor, representing the complainant-police, did appear before court and made the application for an adjournment of the trial on the ground of the absence of ***a witness.***

[20] A reasonably excusable absence of a party or ***a witness*** has been defined to be a ***good cause*** for an adjournment of the trial under Section 170, which governs the 'adjournment of trial' under the Criminal Procedure Act.

[21] Section 170 reads:

Adjournment

170. — (1) During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively

until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.

(2) For the purpose of sub-section (1) 'good cause' includes the reasonably excusable absence of a party or witness or of a party's lawyer.

...

(6) If a case is adjourned, the magistrate may not dismiss it for want of prosecution and must allow the prosecution to call its evidence or to offer no evidence on the day fixed for the adjourned hearing, before adjudicating on the case.

[22] Upon a consideration of the provisions Section 170, it would appear that the police prosecutor was well within the law when he made the application for adjournment on the ground of the absence of the principal witness. The learned Magistrate, on the other hand, was empowered in law, upon consideration of the application for adjournment and the facts and circumstances of the case, to decide whether to allow or refuse the application for adjournment in the exercise of his discretion judiciously.

[23] The learned Magistrate, in this case, had decided to refuse the application for adjournment.

[24] When an application is refused, the trial must inevitably proceed from the point of time of refusal. The effect of Section 170 (6) is such that the learned Magistrate was required to order the prosecution to call its evidence or offer no evidence before adjudicating on the case. The learned Magistrate had not taken any of such steps before he adjudicated on the case with an order of dismissing the charge in a purported exercise of power under Section 171 (1) (b) of the Criminal Procedure Act.

[25] The learned Magistrate, before erroneously assuming jurisdiction under Section 171 (1) (b) in response to the objection of the appellant, should have dealt with the application for adjournment under Section 170 of the Criminal Procedure Act.

[26] The learned Magistrate's order, consequently, has had the inefficacy of keeping the case in abeyance, when he minuted the record '*File Closed*' after refusing the application for adjournment. I am of the view that the learned Magistrate was not empowered in law to keep a case in abeyance in the way he did without deciding on the legal status of the parties who are brought before him in light of the provisions of the Criminal Procedure Act.

[27] The judgment of the Supreme Court in **State v Mototabua;** FJSC CAV0005 of 2009, decided on 09 May 2012 is, in this regard, a case in point where His Lordship Gates CJ held that:

> *If the Magistrate exercises his or her discretion to refuse the adjournment, the case must proceed to trial. In this case the prosecutor would have had to inform the court he was not going to call any witnesses in support of the charge. The Accused would submit there was no case to answer. Thereafter, the magistrate would rule that the case was not made out against the Accused on the charge, and pursuant to section 210 [section 178 CPD] the court is obliged to dismiss the case and forthwith acquit the Accused. By following the procedure laid down for each step of the proceedings in the CPC the magistrate is provided with an answer to the dilemma.* ***After adjournment is refused, the trial commences. Following the lack of some, or all, of the evidence from the prosecution, the magistrate must give judgment on the case brought against the Accused. The resultant orders are inevitable, namely dismissal and acquittal.***
>
> *In this case, it was almost inevitable that an adjournment would be refused. With the prosecutor forced onto trial and being unable to offer any evidence, judgment would follow that there was no case against the Accused. In those circumstances the result would have been acquittal not discharge. Neither section 198 nor section 201 applied.* (Emphasis added)
>
> (Paragraphs 24 and 25 of the Judgment)

[28] His Lordship's judgment is very clear and instructive in regard to a matter before court insofar an adjournment is concerned.

[29] I am of the view that the learned Magistrate had misdirected herself when she made the order for the dismissal of the charge in a purported exercise of power under Section 171 (1) (b), when she was required to have considered the application for adjournment in terms of Section 170 of the Criminal Procedure Act and made the order in line with the procedure laid down by the Supreme Court.

[30] In the circumstances, I observe that the order of the learned Magistrate is erroneous in law.

[31] Mr. Korovou submitted at the hearing that there was no conviction or an acquittal involved in the case as required under Section 21 of the Court of Appeal Act. Hence, he submitted that the appeal was misconceived in law as this court did not have jurisdiction to rule on the matter.

[32] Section 21 of the Court of Appeal Act states:

> ***Appeals in Criminal Cases***
>
> *21. (1) A person convicted on a trial held before the High Court may appeal under this Part to the Court of Appeal-*
>
> *(a) against his conviction on any ground of appeal which involves a question of law alone;*
>
> *(b) ...*
>
> *(c) with the leave of the Court of Appeal against the sentence passed on his conviction unless the sentence is one fixed by law.*
>
> *(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal –*
>
> *(a) against the acquittal of any person on any ground of appeal which involves a question of law alone;*

(b) ...

(d) with the leave of the Court of Appeal against the sentence passed on the conviction unless the sentence is one fixed by law.

[33] This court upholds the submission of the learned counsel for the state upon consideration of the provisions of Section 21 of the Court of Appeal Act.

[34] While observing the matters, as set-out above, on the basis of the Magistrate's Court Record in the interests of justice, this court, nevertheless, proceeds to dismiss the appeal for want of jurisdiction.

Order of the Court:

Appeal dismissed.

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Hon. Mr. Justice C. Prematilaka
JUSTICE OF APPEAL

COURT OF APPEAL FIJI

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Hon. Mr. Justice A. Fernando
JUSTICE OF APPEAL

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Hon. Mr. Justice P. Nawana
JUSTICE OF APPEAL