

IN THE HIGH COURT OF FIJI
AT LAUTOKA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 14 OF 2014

BETWEEN : STATE

Appellant

AND : ARTI ASHNA DEVI

Respondent

**Counsels : Ms. Juleen JM Fatiaki for the Appellant
Mr. N. Sahu Khan for the Respondent**

Date of Hearing : 5 December 2014

Date of Judgment : 11 December 2014

JUDGMENT

1. The respondent was initially charged before the Ba Magistrate under following counts:

FIRST COUNT
Statement of Offence

False statement on oath:- Contrary to section 177(a) Crime Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi, on 20th day of May 2011 at Rakiraki in the Western Division being required by law to make statement on oath willfully made statement that she

reported against her husband namely AVINESH KRISHNA vide Rakiraki Police Station report No. 1506/2011 which she knew to be false.

SECOND COUNT
Statement of Offence

Forgery:- Contrary to section 156(1)(a) of the Crime Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi between 20/5/2011 and 23/5/2011, between Rakiraki and Ba in Western Division forged document namely interim domestic violence restraining order with intention to use it dishonestly to include ASP RICHARD RAJU, a public officer to accept it as genuine.

THIRD COUNT
Statement of Offence

Using forged document:- Contrary to section 157(1)(b) of the Crime Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi on the 23rd day of May 2011 at Ba in the Western Division used false document namely Domestic Violence Restraining Order with intention to be accepted by ASP RICHARD RAJU to obtain a gain that is possession of vehicle Registration No. FD782.

FOURTH COUNT
Statement of Offence

Obtaining Property by Deception:- Contrary to section 317(1) of the Crime Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi on the 23rd day of May 2011 at Ba in the Western Division dishonestly obtained vehicle registration number FD782 with the intention to permanently deprive AVINESH KRISHNA owner of the said vehicle.

2. Then on 3.5.2012 amended charge was filed and accepted by Court. The amended charge is as follows:

FIRST COUNT
Statement of Offence

Falsification of a document:- Contrary to section 160(1)(a), (b)(i) and (c) (i) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi between the 20th day of May 2011 and the 23rd day of May 2011, at Ba in the Western Division, dishonestly altered an Interim Domestic Violence Restraining Order (Ra DVRO Application No. 11/11) which was issued for the purposes of the Domestic Violence Decree 2009 under section 22, with the intention of obtaining a gain.

SECOND COUNT

Statement of Offence

Obtaining property by deception:- Contrary to section 317(1) of the Crimes Decree No. 44 of 2009.

Particulars of the Offence

Arti Ashna Devi on 23rd day May 2011, at Ba in the Western Division, by deception, dishonestly obtained a vehicle registration number FD782 belonging to AVINESH KRISHNA with the intention of permanently depriving the said AVINESH KRISHNA of the vehicle.

3. The evidence in this case was led before Hon. Magistrate Ms. V. Lal on 3.5.2012. Prosecution led evidence of 8 witnesses. A no case to answer submission was to be filed within 21 days. However Mr. Shah who was appearing for the Respondent was suspended from practice and no case to answer submission was filed on 20.11.2013 before Hon. Magistrate Moses V. M. Naivalu. The appellant had filed the submissions on 23.4.2014. By ruling dated 29.4.2014 the learned Magistrate had upheld the application of the respondent and acquitted the appellant.
4. This appeal dated 26.5.2014 was handed over to the High Court Registry on 27.5.2014 within time. However it was day stamped on 29.5.2014. The appellant had submitted a photocopy of the DPP's dispatch book to the effect that it was filed on 27.5.2014. Upon enquiry by the DR of this Court the relevant clerks have admitted that appeal was filed on 27.5.2014. I am satisfied that the appeal was filed within time.
5. The grounds of appeal against the ruling of the learned Magistrate are:
 - (i) That the learned Magistrate made his said ruling in regard to the original 4 charges and not the amended 2 charges, thereby effecting a material irregularity in the trial proceedings and a miscarriage of justice.
 - (ii) That the learned Magistrate erred in law and in fact in failing to apply, adequately or at all, any of the evidence relevant to the facts of the 2 amended charges, and has simply recited the relevant law and then asserted without particulars that there was no evidence in respect of the elements of the 4 original charges.

- (iii) That the learned Magistrate's finding that there was no evidence in respect of the 4 original charges is unreasonable and not supported by the evidence adduced.
6. Both parties have filed detailed written submissions. I have carefully considered those.
7. The respondent had taken up two preliminary issues in his submissions.
(i) The appeal was not filed within time.
(ii) There is no sanction from the DPP for this appeal against the acquittal.
8. The first preliminary ground is that the appeal was not filed within 28 days in compliance with section 248 of the Criminal Procedure Decree as amended by Criminal Procedure Decree (Amendment) Decree 1 of 2014.
9. As discussed in paragraph (4) above the appeal in this case was filed within time. There is no merit in this preliminary objection and it fails.
10. The second preliminary objection is that there is no sanction from the DPP. This position is now settled with the Judgment of Court of Appeal in **Fiji Independent Commission Against Corruption v Apolosi Seitoga** AAU 0058 of 2012 (5 December 2013) It was held that:

"[17] If FICAC or the DPP files an appeal against acquittal by the Magistrates' Court in compliance with their statutory right, then there is a presumption that the official decision to prosecute an appeal is made in a principled manner. In those circumstances, there is no logic in requiring a written sanction to validate your own appeal. Written sanction is only required if an appeal against acquittal is brought in the High Court by a person or institution other than FICAC or the DPP. Based on these reasons, we hold that the High Court erred in law in dismissing FICAC's appeal for want of written sanction."

11. There is no merit in the second preliminary objection and it fails.

1st Ground of Appeal

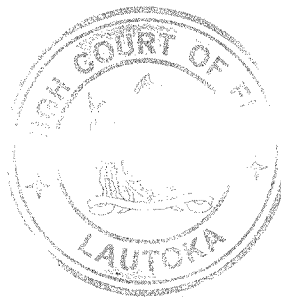
12. The learned Magistrate in his ruling had considered the initial four counts filed against the respondent. He had identified elements of those four counts. The analysis of evidence in respect of each element of offence is in paragraphs 10 & 11 of the ruling.


"[10] All evidence adduced by the prosecution has been weighed and evaluated by the court."

"[11] Again reflecting the Court's responsibility above I am therefore of the view that prosecution has failed to adduce relevant and admissible evidence"

implicating the accused in respect of the offence pertaining to above charges and taken at its highest, no reasonable tribunal could safely convict on it."

13. The appellant and respondent had filed written submissions on application for No case to answer in the Magistrate Court. Both parties have filed their submissions on the amended two charges. It is clear that the learned Magistrate had failed to consider those submissions. It is clear that the learned Magistrate had failed to consider the elements of the charges on which the trial proceeded.
14. Respondent in written submissions wants this Court to consider whether elements of the earlier four counts are as same as the elements of the amended two counts. As it is clear that learned Magistrate and erred in considering the elements of relevant counts, any indication from appellate court on the sufficiency available evidence will pre determine the case.
15. Therefore, there is a material irregularity in the trial proceedings and a miscarriage of justice.
16. There is merit in the first ground of appeal and it succeeds.
17. The second and third grounds of appeal are on the evidence adduced at the trail. It is not proper for this court to make any determination on the evidence adduced in the trail so far as it will be binding on the learned Magistrate who will be re-hearing this case.
18. Appeal is allowed. Order of acquittal set a side. A re-trial is ordered. The case to be mentioned before the Chief Magistrate on 12.1.2015 for nomination of another Magistrate to hear and conclude this case without delay.




Sudharshana De Silva
JUDGE

At Lautoka
11th December 2014

Solicitors: Nazeem Lawyers for the Appellant
Office of the Director of Public Prosecutions for Respondent