IN THE HIGH COURT OF FIJI

CRIMINAL JURISDICTION

AT LAUTOKA

CRIMINAL CASE: HAA (FICAC) 31 OF 2016

BETWEEN	:	FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION ("FICAC")
AND	:	ANIZ AHMED
Counsel	:	Ms Lilian. Mausio for State Ms Vinaina Diroiroi for Accused
Date of Hearing	:	27th of October, 2016
Date of Judgment	:	22nd of November, 2016

JUDGMENT

1. The Appellant files this appeal against the ruling on No Case to Answer delivered by the learned Magistrate of Nadi on the 20th of June 2016 on following grounds, *inter alia;*

   i) *Learned Magistrate erred in law in not applying the correct charge against the accused,*

   ii) *The learned Magistrate erred in law in not applying the correct test for No Case to Answer,*

iii) The learned Magistrate erred in fact and in law in failing to properly consider and evaluate the evidence relevant to the elements of the charge before him, when he found the Respondent not guilty,

iv) The Learned Magistrate erred in fact and in law in acquitting the Respondent who did not amount a defence in the defence case, having found that all elements of the offence were met at the state of No Case to Answer,

2. Pursuant to the service of the Petition of Appeal, the Appellant and the Respondent appeared in court on the 1st of September 2016. I then directed them to file their respective written submissions, which they filed as per the direction. The appeal was then proceeded to hearing on the 27th of October 2016. The learned counsel for the Appellant sought leave to withdraw the second ground of appeal, for which the Respondent did not make any objection. I accordingly allowed the Appellant to withdraw the second ground of appeal. Moreover, the learned counsel for the Appellant and the Respondent informed the court that they do not wish to make any oral submissions and rely on the written submissions which they have already filed. Having carefully perused the petition of appeal, respective written submissions of the parties and the record of the proceedings of the Magistrates court, I now proceed to pronounce my judgment as follows.

3. The Respondent was charged in the Magistrates court for one count of Attempting to Prevent the Course of Justice, contrary to Section 190 (e) of the Crimes Decree. The particulars of the offence are that;

"Aniz Ahmed between the 1st to 3rd of August 2012 at Nadi in the Western Division attempted to prevent the course of justice, by influencing FICAC prosecution witness Mohammed Rizwan Khan in the case of FICAC v Aniz Ahmed CF 636/12 where he influenced Mohammed Rizwan Khan to withdraw the complaint against the said Aniz Ahmed"

4. The Respondent pleaded not guilty for the charge, hence the matter was proceeded to the hearing. At the conclusion of the prosecution's case, the Respondent made an application under Section 178 of the Criminal Procedure Code, that there is no sufficient case for the Respondent to answer in defence. The learned Magistrate found that the evidence presented by the prosecution is inconsistent and untrustworthy. Having concluded that, the learned Magistrate held that the prosecution has failed to prove its case beyond reasonable doubt and acquitted the accused accordingly. Aggrieved with the said ruling of the learned Magistrate, the Appellant has filed this Petition of Appeal on the grounds as mentioned above.

5. Having briefly discussed the factual and procedural background of this appeal, I now turn onto discuss the first ground of appeal, which is founded on the contention that the learned Magistrate erred in law in failing to consider the correct charge against the accused.

6. The learned counsel for the Respondent in her written submission conceded that the learned Magistrate has failed to consider the correct elements of the offence that the accused was charged for.

7. Section 190 (e) of the Crimes Decree states that;

A person commits a summary offence if he or she —

e) In any way obstructs, prevents, perverts or defeats, or attempts to obstruct, prevent, pervert or defeat, the course of justice.

8. The learned Magistrate in paragraph 14 and 15 of his ruling has discussed the elements of the offence, and concluded that there are two main elements that;

i) A person,

ii) Prevents the course of justice.

9. However, the statement of offence and the particulars of offence have specifically stated that the Respondent was charged for attempting to obstruct the course of justice. He was not charged for obstructing the course of justice, but for the attempting to obstruct the course of justice.

10. At paragraph 33 of the Ruling, the learned Magistrate has stated that the crucial element that the court has to determine is 'did the accused prevented the course of justice". It appears that the learned Magistrate has considered wrong elements of the offence in this impugned ruling.

11. I accordingly hold that the first ground of appeal succeeds.

12. I now draw my attention to the third and fourth grounds of appeal, that are founded on the contention that the learned Magistrate failed to properly evaluate the evidence presented by the prosecution in line with the correct elements of the offence. Having concluded that the learned Magistrate has failed to consider the

correct elements of the offence, I find that he has evaluated the evidence in line with the erroneous elements. I accordingly find that the third and fourth grounds of appeal also succeed.

13. I now turn on to discuss the appropriate remedy pursuant to section 256 (2) of the Criminal Procedure Decree.

14. Justice Waidyarathne in **Josateki Cama and others v The State (Criminal Appeal No AAU 61 of 2011)** has expounded the scope of the discretionary power of the court to order for a retrial in a comprehensive manner. His Lordship observed that;

"It had been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it,

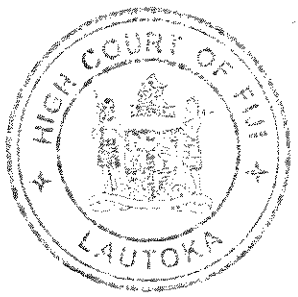
Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellant".

15. Having considered the reasons discussed above and the principles outlined by Justice Wiadyarathne in **Josateki Cama**, it is my opinion that the interest of justice have outweighed the prejudicial impact on the Respondent if an order of retrial is granted. Hence, I find a retrial against the Respondent would adequately serve the interest of justice. I accordingly set aside the ruling dated

20th of June, 2016 and quash the order of acquittal. Moreover, I order an immediate retrial before another Magistrate in the Magistrate's court.

16. 30 days to appeal to the Fiji Court of Appeal.

R. D. R. Thushara Rajasinghe
Judge



At Lautoka
22nd of November, 2016

Solicitors: **Office of the Fiji Independent Commission against Corruption**
Office of the Legal Aid Commission