

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 46 OF 2019

BETWEEN: **MAHENDRA CHAND** **APPELLANT**

A N D: **NASINU TOWN COUNCIL** **RESPONDENT**

Counsel: Mr. S. Kumar for the Appellant
 Ms. S. Khan for Respondent

Date of Hearing: 18th September 2020

Date of Judgment: 19th March 2021

J U D G M E N T

- 1) The Appellant had been charged in the Magistrate's Court at Nasinu with one count of Developing Land without proper approval from the Council or Town and Country Planning, contrary to Section 7 (1) and 7 (7) of the Town and Planning Act. The Appellant was served with summons but had failed to appear in Court on the 27th of July 2017, which was the first date of the proceedings. However, the Appellant had appeared in Court on the 23rd of January 2018. Subsequent to several adjournments, the matter was eventually taken up for hearing on the 24th of July 2019. The Appellant had been unrepresented by a lawyer during

the proceedings in the Magistrate's Court. In his ruling dated the 23rd of October 2019, the learned Resident Magistrate had found the Appellant guilty of this offence and then sentenced him with ten penalty units (\$1000) to be paid in 21 days, in default of 15 days imprisonment. Moreover, the learned Magistrate had imposed a further fine of \$20 per day for the non-compliance of the said penalty. Aggrieved with the said ruling and the sentence, the Appellant filed this appeal on the following grounds, *inter alia*:

Ground 1:

That the learned sentencing Magistrate erred in law and fact by not complying with Section 14 (2) (d) of the Constitution of the Republic of Fiji in failing to inform the Appellant of the right of representation which has caused serious prejudice to the Appellant.

Ground 2:

That the learned trial Magistrate has erred in law and in fact in failing to adjudicate Defence case properly thereby fell into an error of Section 142 of the Criminal Procedure Decree 2009, which has seriously prejudiced the Appellant.

Ground 3:

That the learned trial Magistrate erred in law and in fact in contravening Section 15 (3) of the Constitution of the Republic of Fiji and Section 170 (7) of the Criminal Procedure Decree 2009 which has seriously prejudiced the Appellant.

Ground 4:

That the learned trial Magistrate erred in law and in fact in failing to explain the procedure of court to the accused and or assist him in conduct of his defence when he appeared to defend in person has caused serious prejudice to the Appellant.

Ground 5:

That the learned trial Magistrate erred in law and in fact in convicting the Appellant for the offence when the particulars of offence were not proved before the court.

Ground 6:

That the learned trial Judge erred in law and in fact in failing to give just and fair decision by failing to evaluate the evidence adduced by Prosecution and the Defence adequately particularly with regard to the material contradiction of the evidences of prosecution witnesses, his judgment is based upon assumptions and suppositions of what could have occurred which is prejudicial to the accused; see Cr. Case of HAC 004,2004S Simone Kaitani and others per Gates J as then he was then now former Chief Justice.

Ground 7:

That the learned trial Magistrate erred in law and in fact in taking irrelevant considerations into account and left out relevant considerations see regarding paragraph 3 of his judgment that "hulding was erected in 1997" and goes further by stating "he has admitted that he did not lodge his plan" and failed to take into account that the property was bought on mortgage sale with existing house on it.

Ground 8:

That the learned trial Magistrate erred in law and in fact by imposing maximum sentence on a first offender; see paragraph 5 of sentencing remarks thereby caused serious prejudice to the Appellant and the Appellant applies for stay of the Judgment and sentence pending determination of the Appeal."

First Ground

2. I first turn to the first ground of appeal. The Appellant alleges that the learned Magistrate did not inform him of the right to have legal representation. The Fiji Court of Appeal in **Naidu v State [2018] FJCA 165; AAU0069.2014 (the 4th of October 2018)** had discussed the scope of Right to Defend and the manner in exercise the right to defend extensively.
3. Section 14 (2) (d) of the Constitution states that:

"Every person charged with an offence has the right:

"to defend himself or herself in person or to be represented at his or her own expense by a legal practitioner of his or her own choice, and to be informed promptly of this right or, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid by the Legal Aid Commission, and to be informed promptly of this right."

4. Section 14 (2) (d) of the Constitution states that every person charged with an offence has the right to defend himself. Therefore, the main right given to the accused under Section 14 (2) (d) of the Constitution is the right to defend himself against the charge with which he has been charged. Section 14 (2) (d) has further stated the manner in which the accused could exercise this right to defend himself. The accused could defend himself either in person or through a Legal Practitioner of his own choice and at his own expense. It is an option that the accused could avail of. Section 14 (2) (d) states a further option for the accused if he chooses to be represented by a Legal Practitioner. The accused could retain the service of a Legal Practitioner of his own choice. For that, the accused has to bear the expenses of retaining the Legal Practitioner. If the accused has no sufficient means to engage a legal

Practitioner, he could seek assistance from the Legal Aid Commission to provide him with a Legal Practitioner.

5. Unlike other rights that have been stipulated under Section 14 (2) of the Constitution, Section 14 (2) (d) has specifically required that the accused must be promptly informed about his right to defend himself and how he can exercise his right to defend, including the right to obtain assistance from the Legal Aid Commission. Accordingly, the accused must be informed of the right to defend himself and how he could exercise his rights to defend.
6. The right to defend himself against the charge under Section 14 (2) (d) is based upon the concept of a fair trial. The concept of a fair trial is fundamentally founded on two fundamental principles of natural justice. They are *nemo iudex in causa sua* (no man a judge in his own cause) and *audi alteram partem* (hear both sides). The right to defend himself is an integral component of the principle of *audi alteram partem*.
7. The Court has the utmost responsibility to assure whether the accused is promptly and adequately informed of his right to defend himself and also how he could exercise his right to defend himself. Moreover, the Court must be satisfied that the accused has made an informed and considered decision about his right to defend and his legal representation.
8. The Court is the custodian of the rights of the parties in the proceedings. (*vide Section 6 of the Constitution*) The Court has to ensure a fair trial. Therefore, the Court must vigilantly observe that the parties to the proceedings are given their respective rights to ensure that proceedings are conducted fairly and in a just manner. Therefore, it is the duty of the Court to communicate and explain in detail to the accused about his right to defend himself and the manner he could exercise this right. Moreover, the Court must be satisfied that the accused made an informed and considered decision about his representation in the trial. Therefore, the Court must communicate this right to the accused at the most meaningful time of the proceedings before the plea is taken.

9. A mere explanation that the accused has a right to have legal representation or a mere explanation of the three options of legal representation does not satisfy the requirement as stipulated under Section 14 (2) (d) of the Constitution. Pursuant to Section 14 (2) (d) of the Constitution, the right to representation, either in person or through a Legal Practitioner, is derived from the right to defend himself against the charge. Therefore, the Court must first explain to the accused his right to defend himself against the charge with which he or she has been charged. Having informed the accused of his right to defend himself, the Court must then explain to the accused that he has three optional rights in representation to exercise his right to defend himself in the proceedings.
10. In this case, the Appellant was summoned to appear in the Magistrate's Court. He had appeared in the Magistrate's Court on the 23rd of January 2018. According to the record of the Magistrate's Court Proceedings, the Appellant was not explained his right to defend and the manner he could exercise his right to defend. The learned Magistrate had not even taken the plea of the Appellant before proceeding to the hearing.
11. In view of these reasons, it appears that the Appellant was not given a fair trial in the Magistrate's Court. Hence, the first ground of appeal is succeeded. A right to a fair trial is an absolute right that could not be compromised. Thus, I find the ruling and the sentence of the learned Magistrate, which he arrived through procedural unfairness, are wrong in law. I, accordingly, allow this appeal and order a retrial before another Resident Magistrate.
12. The learned Magistrate in his ruling dated 23rd of October 2019, has only found the Appellant guilty of this offence. The learned Magistrate has not entered a conviction against the accused in his ruling. He has neither done it in the sentence. Section 7 (7) of the Town Planning Act states that:

"Every person who—

- i) carries out any development of land without the grant of permission required in that behalf under the provisions of this section; or*

- ii) *contravenes or fails to comply with any conditions subject to which permission has been granted under the provisions of this section; or*
- iii) *obstructs or interferes with the exercise by the local authority of the powers vested in it by the provisions of this section, shall, in addition to any civil liability, be guilty of an offence and be liable on conviction to a fine not exceeding \$1,000 or to imprisonment for a period not exceeding 3 months; and if such contravention, failure to comply, obstruction or interference is continued after the conviction, he or she shall be guilty of a further offence and liable on conviction to a fine of \$20 for every day on which the contravention, failure to comply, obstruction or interference is so continued. I do not wish to proceed to the remaining grounds appeal in view of the reasons discussed above.*

13. According to Section 7 (7) of the Town Planning Act, a person is liable to a fine as prescribed under section 7, only upon conviction to the offence. The learned Magistrate in his sentence has not acted under Section 15 and 16 of the Sentencing and Penalties Act. Therefore, the fine imposed on the Appellant without entering a conviction is wrong in law.

14. The orders of the Court:

- i) The appeal is allowed,
- ii) The ruling dated 23rd October 2019 is quashed and the sentence dated 19th of November 2019 is set aside,
- iii) A Re-trial is ordered before another Resident Magistrate.

15. Thirty (30) days to appeal to the Fiji Court of Appeal.



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Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva

19th March 2021

Solicitors

Sunil Kumar Esq. for the Appellant,

Nasinu Town Council for the Respondent.