

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 11 OF 2024

IN THE MATTER of an Application for Leave to Appeal out of Time.

AND IN THE MATTER of an Appeal from the decision of the Resident Magistrate, Magistrate's Court of Nadi, in Criminal Case No. 49 of 2019.

BETWEEN: **JEONG SIK CHOON**

APPELLANT

AND: **STATE**

RESPONDENT

Counsel: Mr. Moses Naivalu for the Appellant
 Ms. Sheenal Swastika for the Respondent

Date of Hearing: 25 September 2024

Date of Judgment: 12 November 2024

JUDGMENT

[1] This is an Application made by the Applicant/Appellant (hereinafter referred to as the Appellant) by way of a Notice of Motion, filed on 16 April 2024, seeking Leave to Appeal Out of Time against the Judgment delivered by the Resident Magistrate, Magistrate's Court of Nadi, in Criminal Case No. 49 of 2019, on 7 February 2024.

- [2] The Notice of Motion is supported by an Affidavit in Support filed by the Appellant on 16 April 2024.
- [3] It is revealed when perusing the Case Record of the Magistrate's Court of Nadi that the Appellant was charged (by way of a Charge filed on 9 January 2019) before the Magistrate's Court of Nadi, with the following offence:

Statement of Offence (a)

ASSAULT CAUSING ACTUAL BODILY HARM: Contrary to Section 275 of the Crimes Act 2009.

Particulars of Offence (b)

JEONG SIK CHOON, on the 07th day of January 2019, at Nadi, in the Western Division, assaulted TELAITE VUKI thereby occasioning her actual bodily harm.

- [4] The Appellant pleaded not guilty to the charge and the matter proceeded to trial.
- [5] The hearing in the matter commenced on 2 December 2021, before the Learned Resident Magistrate, Mrs. Nirosha Kannangara. The prosecution led the evidence of 2 witnesses-the complainant Telaite Vuki (the wife of the Appellant) and Corporal 3065 Prantl. The Medical Examination Report of the complainant and the caution interview statement of the Appellant were tendered to Court as prosecution exhibits. The prosecution then closed its case.
- [6] At this stage, a No Case to Answer application was made by the Appellant. By her Ruling, dated 14 June 2022, the Learned Resident Magistrate, Mrs. Kannangara, held that the Appellant had a case to answer and called for his defence.
- [7] On 8 November 2022, the Appellant testified in support of his case. Thereafter, the defence closed its case and the matter was reserved for Judgment. On the 3 subsequent dates the Appellant had not been present in Court and the Judgment had been adjourned.

- [8] Thereafter, the Learned Resident Magistrate, Mrs. Kannagara, had left the station and the matter came up before the Learned Resident Magistrate, Mrs. Shelyn Kiran.
- [9] It is recorded at page 99 of the Case Record as follows: *"Both Counsels have no objections to this Court proceeding with the matter and adopting the evidence received before my predecessor"*. The matter was then adjourned for Judgment.
- [10] Accordingly, on 7 February 2024, the Learned Resident Magistrate held that the prosecution has proved the case against the Appellant beyond reasonable doubt and found him guilty and convicted him of the charge of Assault Causing Actual Bodily Harm. The Learned Magistrate's Judgment is found at pages 49 to 54 of the Magistrate's Court Record.
- [11] On 11 March 2024, the Learned Resident Magistrate pronounced her Sentence. Accordingly, the Appellant was sentenced to 7 months imprisonment, which period of imprisonment was suspended for 2 years. The Learned Magistrate's Sentence is found at pages 45 to 48 of the Magistrate's Court Record.
- [12] This is an application made by the Appellant seeking leave to file an appeal out of time against the above Judgment delivered by the Resident Magistrate, Magistrate's Court of Nadi, on 7 February 2024. Therefore, this appeal is only against the conviction.
- [13] Since this application was filed only a few days out of time (approximately 8 days out of time), the Learned State Counsel submitted that the State would not be objecting for enlargement of time to be granted for filing of this appeal. Accordingly, the Appellant was granted leave for filing of this appeal out of time.
- [14] Furthermore, Court also permitted the Appellant to file Amended Grounds of Appeal, which the Appellant filed on 27 May 2024.
- [15] Accordingly, the substantive matter was taken up for hearing before me on 25 September 2024. Counsel for both the Appellant and the State were heard. Both parties filed written submissions, and referred to case authorities, which I have had the benefit of perusing.

GROUND OF APPEAL AGAINST THE CONVICTION

[16] Following are the Amended Grounds of Appeal against conviction:

GROUND OF APPEAL AGAINST CONVICTION

- (i) THAT the Learned Resident Magistrate erred in law and in fact when she failed to comply with the appeal findings of the Lautoka High Court in *Michel v State* Criminal Case HAA 31 of 2014 (17 August 2015).
- (ii) THAT the second Learned Trial Magistrate erred in law and in fact by failing to exercise her judicial discretion to declare a trial de novo and start the trial afresh due to the second Trial Magistrate not hearing the prosecution witnesses giving evidence to be able to decide on the demeanour and credibility of the prosecution in the interest of justice and in fairness to the Appellant before proceeding to a ruling.
- (iii) THAT similarly the second Learned Trial Magistrate erred in law and in fact by failing to exercise her judicial discretion to declare a trial de novo and start the trial afresh due to the second Trial Magistrate completely ignoring the Accused's (Appellant's) rights in only listening to the prosecution that they had no objections with the second Magistrate proceeding to adapting the evidence received before the first Magistrate and writing up the judgment.

THE LAW

[17] Section 246 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act) deals with Appeals to the High Court (from the Magistrate's Courts). The Section is reproduced below:

"(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law.

[18] Section 248 (1) of the Criminal Procedure Act provides that *"Every appeal shall be in the form of a petition in writing signed by the appellant or the appellant's lawyer, and (filed) within 28 days of the date of the decision appealed against."*

[19] However, Section 248 (2) of the Criminal Procedure Act sets out that *"The Magistrates Court or the High Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section."*

[20] Section 248 (3) of the Criminal Procedure Act stipulates:

"For the purposes of this section and without prejudice to its generality, "good cause" shall be deemed to include —

(a) a case where the appellant's lawyer was not present at the hearing before the Magistrates Court, and for that reason requires further time for the preparation of the petition;

(b) any case in which a question of law of unusual difficulty is involved:

(c) a case in which the sanction of the Director of Public Prosecutions or of the commissioner of the Fiji Independent Commission Against Corruption is required by any law;

(d) the inability of the appellant or the appellant's lawyer to obtain a copy of the judgment or order appealed against and a copy of the record, within a reasonable time of applying to the court for these documents."

[21] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

(b) remit the matter with the opinion of the High Court to the Magistrates Court; or

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

THE GROUNDS OF APPEAL AGAINST CONVICTION

[22] It is clear that the 3 Grounds of Appeal against conviction are inter-related. Thus they would be analysed and discussed together. The main issue taken up by the Appellant is that the Learned Resident Magistrate who took over the matter, erred in law and in fact by failing to exercise her judicial discretion to declare a trial de novo and start the trial afresh.

[23] Section 139 of the Criminal Procedure Act which deals with *conviction or commitment on evidence partly recorded by one magistrate and partly by another* is reproduced below:

(1) Subject to sub-sections (1) and (2), whenever any magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Decree or otherwise), by another magistrate, the second magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by second magistrate, or the second magistrate may re-summon the witnesses and recommence the proceeding or trial.

(2) In any such trial the accused person may, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and shall be informed of such right by the second magistrate when he or she commences the proceedings.

(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced, and may order a new trial.

[24] Section 139 (1) of the Criminal Procedure Act permits a Magistrate who is succeeding another Magistrate or taking over the case from another Magistrate to act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by the succeeding Magistrate. The succeeding Magistrate has the option to re-summon the witnesses and recommence the proceeding or trial (a trial de-novo).

[25] In terms of Section 139 (2) of the Criminal Procedure Act when the succeeding Magistrate commences the proceedings, the Accused has the right to demand that the witnesses or any of them be re-summoned and reheard. The Section also stipulates that the Accused shall be informed of such right by the succeeding Magistrate when he or she commences the proceedings.

[26] The Appellant is relying on the cases of *(John William) Michel v. The State* [2015] FJHC 591; HAA 31.2014 (17 August 2015); and *(Tevita) Qaqanivalu v. The State* [2023] FJHC 169; HAA 14.2022 (24 March 2023).

In *Michel v. The State (Supra)* it was held by His Lordship Justice Rajasinghe:

"According to the case record of this instant case, it appears that the second learned Magistrate has not explained the Appellant of his right as enunciated under Section 139 (2) of the Criminal Procedure Decree. The learned Magistrate has erroneously exercised her discretion to rely on the evidence recorded by her predecessor without explaining the Appellant of his right to demand the witnesses or any of them to be re-summoned or re-heard."

[27] In *State v. Draunimasi* [2020] FJHC 865; HAA 26.2020 (21 October 2020); His Lordship Justice Perera held as follows:

28. *Firstly, the provisions of section 139(1) above, allows a magistrate to act on the evidence recorded by the said magistrate's predecessors and to continue with a part-heard trial.*

29. *In the case at hand, before proceeding further the second magistrate had inquired from both parties whether they wish to have a trial de novo and both parties have clearly informed that they have no objections for the continuation of the trial. I do note that the said second magistrate had not specifically informed that the appellant has the right to demand all or any of the witnesses to be re-summoned and reheard. However, given the fact that the appellant was represented by a lawyer and the fact that no issue is raised in this appeal regarding the manner in which the second magistrate has given effect to the provisions of the said section 139(2), it is safe to assume that the appellant was aware of the relevant right and it is manifestly clear that the appellant and both his lawyers, the one who represented him at the trial and the present counsel who represents him in this appeal, had not deemed it necessary for witnesses to be re-summoned before the second magistrate.*

30. *More importantly, it is understood from the provisions of section 139(3) above that the failure of a magistrate to inform an accused in terms of section 139(2) in those precise terms is not fatal to a conviction and such a conviction is not liable to be set aside automatically on appeal. This is because the said section 139(3) expressly provides that the high court may set aside a conviction passed on evidence not wholly recorded by the same magistrate (only) if it is of the opinion that the accused has been materially prejudiced.*

31. *Given all the circumstances of this case alluded to above, I find that the appellant was not materially prejudiced due to the reason that he was not informed by the second magistrate in terms of section 139(2) in those precise terms.*

[28] As stated previously, according to the Magistrate's Court Record in the instant case, it is revealed that the hearing in the matter commenced on 2 December 2021, before

the Learned Resident Magistrate, Mrs. Kannangara. The prosecution led the evidence of 2 witnesses and closed its case. At this stage, a No Case to Answer application was made by the Appellant. By her Ruling, dated 14 June 2022, the Learned Resident Magistrate, Mrs. Kannangara, held that the Appellant had a case to answer and called for his defence. On 8 November 2022, the Appellant testified in support of his case. Thereafter, the defence closed its case and the matter was reserved for Judgment.

- [29] The matter was called next on 12 December 2022 and Judgment had been adjourned for 7 March 2023. However, on the said day, the Appellant had not been present in Court. His Counsel had informed that he has no instructions from the Appellant. As such, Judgment had been adjourned for 21 March 2023.
- [30] Even on 21 March 2023, the Appellant had not been present in Court. His Counsel had been present. Judgment had been adjourned for 3 May 2023.
- [31] Even on 3 May 2023, the Appellant had not been present in Court. His Counsel had been present. Judgment had again been adjourned for 23 June 2023.
- [32] On 23 June 2023, it is recorded that the Learned Resident Magistrate, Mrs. Kannangara, had left the station. Thereafter, the matter came up before the Learned Resident Magistrate Mrs. Shelyn Kiran, the succeeding Magistrate.
- [33] The matter was called before Mrs. Kiran on 16 October 2023. Even on the said date, the Appellant had not been present in Court. However, his Counsel had been present. It is recorded at page 99 of the Case Record as follows: *"Both Counsels have no objections to this Court proceeding with the matter and adopting the evidence received before my predecessor"*. The matter was then adjourned for Judgment for 29 November 2023.
- [34] It is clear from the record of the proceedings that the Learned Resident Magistrate Mrs. Kiran had acted in compliance with the provisions of Section 139 of the Criminal Procedure Act. In the continued absence of the Appellant she had no option but to inquire from the Counsel for the Appellant whether he is agreeable to adopt the evidence already recorded in the matter. The Appellant had not been present in Court

to inform him personally that he has the right to demand that the witnesses or any of them be re-summoned and reheard. The Appellant had been represented by his Counsel who had submitted to Court that he has no objections to Court proceeding with the matter and adopting the evidence received before her predecessor. Accordingly, the matter had been adjourned for Judgment.

[35] it must be noted that even on the 29 November 2023, the Appellant had not been present in Court. His Counsel had informed that he is overseas and that he will be returning on the 19 December 2023. The Judgment had then been adjourned for 20 December 2023.

[36] On 20 December 2023, when the matter was first called in Court, the Appellant had not been present and a bench warrant had been issued. However, the Appellant had come to Court later that day and the bench warrant had been cancelled. The Counsel for the Appellant had informed Court that he wanted 21 days to file closing submissions and the matter was adjourned for 7 February 2024, for Judgment.

[37] On 7 February 2024, the Judgment had been delivered and the Appellant had been found guilty and convicted as charged.

[38] It must be emphasized that even after the order for adopting of the evidence was made, on 16 October 2023, to which the Counsel for the Appellant had agreed, the matter was called before Court on two further occasions - 29 November 2023 and 20 December 2023. If the Appellant was not satisfied with the said order made by the Learned Resident Magistrate to adopt the evidence, he could have raised an objection personally or through his Counsel at that stage. If he so wished, he could have demanded that the witnesses or any of them be re-summoned and reheard, as provided for in Section 139 (2) of the Criminal Procedure Act. However, he failed to do so.

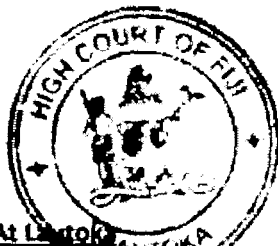
[39] Therefore, the facts and circumstances of this case can be clearly distinguished from the facts and circumstances of *Michel v. The State (Supra)* and *Qaqanivaku v. The State (Supra)*.

[40] Considering all the above, I am of the opinion that the Appellant has not been materially prejudiced as a result of the order made by the Learned Resident Magistrate to adopt the evidence led before her predecessor. As such, I am of the opinion that the Grounds of Appeal against conviction have no merit.


FINAL ORDERS

[41] In light of the above, the final orders of this Court are as follows:

1. Appeal is dismissed.
2. The conviction and sentence imposed by Resident Magistrate, Magistrate's Court of Nadi, in Criminal Case No. 49 of 2019 is affirmed.



At Lautoka
This 12th day of November 2024


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the Appellant:
Solicitors for the Respondent:

Law Naivalu, Barristers & Solicitors, Lautoka.
Office of the Director of Public Prosecutions, Lautoka.