REMESIO RAIKOSO v STATE (AAU0055 of 2004S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, HENRY and MCPHERSON JJA

13, 15 July 2005

Criminal law — jurisdiction — indecent assault — power to recall witness after conclusion of trial — sentence imposed differed from that served — confusion as to sentence brought to Chief Justice's attention — Court of Appeal Act (Cap 12) s 22(1) — Criminal Procedure Code (Cap 21) ss 135, 215.

The Appellant, who was a detective corporal in the police force, was convicted of indecently assaulting a woman (complainant). The complainant reported the incident to a police officer (Gadolo). Gadolo in evidence confirmed the receipt of the complaint. The Appellant denied such allegations and called a police officer as witness. Before sentencing, the Appellant claimed that Gadolo was in fact a corporal and not a police sergeant and was demoted for making false allegations. However, the High Court found no evidence that the witness had fabricated evidence. The Appellant then made an oral application to the Magistrates Court to have Gadolo recalled. The Magistrates Court held that it had no jurisdiction to recall the witness and proceeded to pass sentence of 9 months' imprisonment upon the Appellant.

The High Court expressed doubts that the issue of the rank of the witness would have justified a recall even if the discretionary power of the judge existed. The Appellant's appeal to the High Court against both conviction and sentence was dismissed in a reserved decision. The sentence imposed in open court was 18 months' imprisonment. Subsequently, the record showed that the sentence was one of 9 months' imprisonment. The Appellant challenged whether: (1) the magistrate had power to recall witness after conclusion of the trial and the decision was announced; and (2) the alteration of sentence from 18 to 9 months' imprisonment was valid.

Held — (1) The Magistrates Court has no power to recall witness after conclusion of the trial and a verdict or decision has been announced. The appropriate procedure was for the Appellant on appeal to the High Court to apply to have specified evidence taken by that court. The High Court can then determine whether to have the evidence taken and if so to evaluate it and determine its significance, if any, in the particular circumstances.

(2) The sentence that was orally imposed in open court, the warrant of commitment and the unsigned transcript showed 18 months' imprisonment as sentence while the transcript of the sentencing notes in the Magistrates Courts records showed 9 months' imprisonment. Doubt as to the correct sentence was resolved in a minute expressly confirming the sentence as being 9 months' imprisonment.

Appeal dismissed.

Cases referred to

R v Nash [1958] NZLR 314; *R v Sullivan* [1923] 1 KB 47, cited.

D. Sharma for the Appellant

U. Fatiaki and *R. Gibson* for the Respondent

[1] Ward P, Henry and McPherson JJA. The Appellant was convicted in the Magistrates Court at Suva on 2 February 2004, on one charge of indecent assault of a woman and sentenced to 9 months' imprisonment. His appeal to the High Court against both conviction and sentence was dismissed in a reserved decision delivered on 1 October 2004. In his appeal to this court, the notice of appeal and his written submissions raised no less than 17 grounds of appeal.

[2] Section 22(1) of the Court of Appeal Act (Cap 12), which is the source of this court's jurisdiction in the present case, is clear and unambiguous in restricting a second right of appeal to questions of law. It is therefore counsel's duty properly to identify a discrete question (or questions) of law in promoting a s 22(1) appeal. In the present case, there has been a failure to do that and the appeal was presented effectively as a second general appeal incorporating the wide variety of complaints made to the High Court. That is not acceptable. In the course of hearing, Mr Sharma responsibly recognised the situation and after some discussion, identified three issues which were pursued in argument. The remaining issues were abandoned and require no further consideration.

[3] The Appellant was a detective corporal in the police force. The complainant was employed as a telephone operator at the Central Police Station, Suva. Her evidence at trial was that about 6.20 pm on 28 February 2003, while working at the switchboard, the Appellant who was then on duty, entered the room and indecently assaulted her. Having pushed the Appellant away, she telephoned the front desk and lodged a complaint with another police officer, Eroni Gadolo. In evidence, Gadolo confirmed receipt of the complaint which he timed at 6.20 pm. The Appellant gave evidence denying any indecent conduct and called as a witness another police officer. We turn to the issues requiring consideration.

Failure of the trial judge to recall witness Gadolo

[4] The hearing of evidence was concluded on 27 January 2004, with written submissions being received from the defence on 28 January and from the prosecution on 29 January. On 2 February, the magistrate delivered his decision in open court convicting the Appellant. On 4 February, when the Appellant was due to be sentenced, his counsel sought and was granted an adjournment stating he wished to clarify information received that the witness Gadolo who had given his occupation as a police sergeant, was in fact a corporal. Counsel alleged that the witness had been demoted because he had made false allegations against three other police officers. On 13 February, counsel advised the court that it was confirmed in a letter that Gadolo was a corporal and not a sergeant at the relevant time. The letter makes no reference to the reasons for demotion. Counsel then made an oral application to the magistrate to have Gadolo recalled. Having heard argument from the State, the magistrate held that he had no jurisdiction to recall the witness and proceeded to pass sentence. In the High Court, Shameem J noted that there was no evidence that the witness had been demoted for fabricating evidence and confirmed the lower court decision that it had no power to make the order sought. She expressed doubts that the issue of the rank of the witness would have justified a recall even if the power existed.

[5] In this court, Mr Sharma submitted that the jurisdiction of the magistrate to recall the witness is to be found in s 135 of the Criminal Procedure Code (Cap 21), which provides:

> 135. Any court may, at any stage of any inquiry, trial or other proceeding under this Code, summon or call any person as a witness, or examine any person in attendance though not summoned as a witness, or recall and re-examine any person already examined, and the court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

[6] It is clear that the section is concerned with the trial process prior to the tribunal in question reaching a decision. The provision gives statutory effect to what has long been recognised as a discretionary power vested in a judge conducting a criminal trial. See *R v Sullivan* [1923] 1 KB 47, *R v Nash* [1958]

NZLR 314 and the discussion in Archbold *Criminal Pleading, Evidence and Practice 2005* at 8–251. But it is beyond question that the power cannot be utilised when the trial has been concluded and a verdict or decision announced. Once that stage has been reached, the tribunal has no jurisdiction to set aside its own decision or otherwise reopen matters already decided. The trial process for s 135 purposes is at an end. This conclusion is re-enforced by s 215 of the Code which provides:

> 215. The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or make an order under the provisions of section 44 of the Penal Code.

[7] The appropriate procedure here was for the Appellant on appeal to the High Court to apply to have specified evidence taken by that court. The High Court can then determine whether to have the evidence taken and if so to evaluate it and determine its significance, if any, in the particular circumstances. It is not possible for this court now to undertake that kind of exercise. We note that the appeal to the Court of Appeal and the further appeal to this court on this ground was firmly based on the magistrate being invested with a discretionary power to recall the witness. There was no such power and on this point, the appeal therefore fails.

Evidence of Police Constable Iliesa

[8] One of the grounds of the appeal to the High Court was the failure of the magistrate to analyse the evidence and to explain why he preferred that of the complainant. In the course of considering that particular ground the judge referred to the evidence of Police Constable Iliesa. It is now contended that in the course of that, the judge exceeded her jurisdiction by finding facts and drawing inferences and therefore in effect misdirected herself. We find no substance in this submission. The judge was not finding facts or drawing inferences, but simply assessing the evidence, relating it to the magistrate's finding that he preferred the evidence of the complainant and then considering the significance of the Appellant's complaint in this respect. We see nothing wrong in the way this aspect was dealt with by the judge. Importantly, an analysis of the passages of the High Court judgment referred to does not give rise to any identifiable question of law which calls for resolution by this court.

Sentence

[9] We were advised that the sentence imposed in open court on 9 March 2004 was imprisonment for 18 months. Subsequently, the record shows that the sentence was one of 9 months' imprisonment. As we understand, the latter is the effective sentence which was actually served by the Appellant. For the Appellant, Mr Sharma submitted that the Appellant had been prejudiced because the warrant of commitment specified a term of 18 months' imprisonment and notice of the alteration to 9 months came to light only during the High Court appeal process and the time for early release had already passed. This however does not give rise to any question of law relating to the imposition of the sentence which would require the intervention of this court. Mr Sharma submitted that the conviction somehow was rendered unsafe as a consequence of this administrative problem. That cannot follow. This problem does not in anyway indicate there may have been a miscarriage of justice in respect of the conviction.

[10] Before leaving this aspect of the appeal, we must express our concern over the apparent alteration of the sentence from 18 months' imprisonment to 9 months. Counsel advised us that the sentence orally imposed in open court on 9 March 2004 was 18 months' imprisonment. The warrant of commitment dated 9 March 2004 signed by the magistrate stipulates 18 months' imprisonment. An unsigned transcript of the sentencing notes dated 13 February and annexed to Mr Sharma's submissions to this court records 18 months' imprisonment. The transcript of the sentencing notes in the Magistrates Courts records, also dated 13 February, shows 9 months' imprisonment. The sequence of events appears to have been:

2 February — Conviction entered, mitigation plea due 4 February.
4 February — Adjournment requested and ground for clarification of Gadolo situation, mitigation plea received.
13 February — Applications by Mr Sharma adjourned to 19 February.
19 February — Application to recall argued — ruling due on 4 March.
4 March — Ruling adjourned to 9 March.
9 March — Ruling made and sentence imposed.

[11] Doubt as to the correct sentence arose in the hearing of the High Court appeal, which was resolved by Shameem J in a minute expressly confirming the sentence as being 9 months' imprisonment. We are unaware whether the warrant of commitment was amended.

[12] The circumstances surrounding sentence as presently disclosed are unsatisfactory and we consider that the matter should be brought to the attention of the Chief Justice.

Conclusion

[13] For the above reasons, the appeal is dismissed.

We direct that the circumstances surrounding the confusion as to the sentence imposed be brought to the attention of the Chief Justice.

Appeal dismissed.