STATE v ELIKI MOTOTABUA (CAV0005 of 2009S)

SUPREME COURT — CRIMINAL JURISDICTION

GATES P, CHANDRA and SUNDARAM JJ

1, 9 May 2012

Criminal law — appeals — review of previous decision of Supreme Court — petition withdrawn — observations by Court — trial to proceed after refusal of adjournment — second petition to Supreme Court — procedure for second petition — Administration of Justice Decree s 8(5) — Criminal Procedure Code ss 191, 192, 198, 199, 200, 201, 202, 206, 210 — Constitution s 122(5) — Dangerous Drugs Act — Illicit Drugs Control Act.

The State sought review of a previous decision of the Supreme Court. The State withdrew the petition and the Supreme Court went on to make a number of observations.

Held –

(1) If a magistrate exercises his or her discretion to refuse an adjournment, the case must proceed to trial. In this case, the prosecutor would have had to inform the Court he was not going to call any witnesses in support of the charge. The accused would submit there was no case to answer. The magistrate would then rule that the case was not made out against the accused on the charge, and the Court is obliged to dismiss the case and acquit the accused.

(2) It is an overstatement of the position to say that there was no jurisdiction provided by s 8(5) to permit second criminal appeals. There is no referral procedure in Fiji via the Attorney-General as in England to this or any other Court. Section 8(5) does not impose such a limitation upon criminal petitions to the Supreme Court. It must be construed therefore to permit appeals in criminal matters also, albeit in the very limited circumstances referred to in *Silatolu*.

Silatolu CAV 0002.06, 17 October 2008, applied.

Petition dismissed.

Cases referred to

Ministry of Labour, Industrial Relations and Productivity v Merchant Bank of Fiji Ltd Cr App HAA011.2002S, 26th April 2002, applied.

Macahill v Reginam Court of Appeal No 43 of 1980, cited.

Fernandopulle v Premachandra de Silva and Others [1996] 1 Sri LR 70; *Makario Anisimai* CAV0006.08S, considered.

Commonwealth Trading Bank v Inglis [1974] 131 CLR 311; *Director of Public Prosecutions v Neumi Kalou & Anor* [1996] 42 FLR 126; *Director of Public Prosecutions v Vikash Sharma and 3 Others* HAA0011 of 1994S, followed.

M.D. Korovou instructed by *Office of the Director of Public Prosecutions, Suva* for the Petitioner.

Respondent in Person.

[1] Gates P. The State seeks a review of a previous decision of this Court in the same matter delivered on 12th August 2011. The petition raises again the question of the extent of, or the existence of, the court's power to review its own decisions purportedly pursuant to s 8(5) of the Administration of Justice Decree 2009.

[2] Section 8(5) of the Decree is framed in identical words to the earlier provisions of the 1997 Constitution [s 122(5)]:

> '(5) The Supreme Court may review any judgment, pronouncement, or order made by it.'

[3] Mr Korovou conceded that he could no longer continue with the appeal in view of the restrictions placed on such appeals in criminal matters as illustrated in *Makario Anisimai v The State* CAV0006 of 2008S, 23rd February 2012. That was a decision of this court handed down subsequent to the filing of the petition seeking review.

[4] We granted Mr Korovou leave to withdraw the petition. The petition therefore stands dismissed.

[5] Before parting with this matter however, it is necessary to make a number of observations.

The Magistrates Court Proceedings

[6] The Respondent was charged in the Tailevu Magistrates Court with an offence of possession of drugs under the Dangerous Drugs Act Cap 114 (as amended), a piece of legislation which has since been repealed and replaced by the Illicit Drugs Control Act 2004. The offence was alleged to have occurred on 19th December 2003.

[7] On 22nd February 2005 the Magistrate made a short ruling. It read:

> 'Under s 198 of Criminal Procedure Code the Accused is discharged for Prosecution not ready to proceed after 4th 'Hearing' date is set.
>
> Under s 201(2)(b)(ii) of Criminal Procedure Code. Withdrawal of Complainant. Application
>
> Withdrawal. Prosecution not ready to proceed for Hearing.'

[8] The issue that has concerned the various tiers of appellate courts has been whether this ruling should in outcome have resulted in a discharge or an acquittal under s 201 of the Criminal Procedure Code.

[9] Section 201 reads as follows:

> *Withdrawal of complaint*
>
> '**201.** (1) The prosecutor may with the consent of the court at any time before a final order is passed in any case under this Part withdraw the complaint.
>
> (2) On any withdrawal as aforesaid
>
> *(a)* where the withdrawal is made after the accused person is called upon to make his defence, the court shall acquit the accused;
>
> *(b)* where the withdrawal is made before the accused person is called upon to make his defence, the court shall subject to the provisions of section **210**, in its discretion make one or other of the following orders:
>
> (i) an order acquitting the accused;
>
> (ii) an order discharging the accused.
>
> (3) An order discharging the accused under paragraph *(b)* (ii) of subsection (2) shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts. *(Section substituted by 24 of 1950, s 11.)*

[10] To decide the question as to whether there had been a correct exercise of the magisterial discretion it would be necessary to have before any appeal court the full record of the proceedings in the trial court. Unfortunately the only material from such proceedings submitted was the ruling of the magistrate. The record therefore was incomplete and inadequate. It would appear the court officer

of the Magistrates Court did not provide the record of the proceedings. Surprisingly this was not referred to before.

[11] It seems common ground that the prosecution had failed to be ready for trial on at least three, and arguably four, occasions when the matter was set down for hearing.

[12] In the absence of the record, I called for the original magistrates court file [Tailevu Case No 30/04]. The charge against the Respondent was serious in the sense that it alleged possession of 457.7 grams of Indian hemp. The Respondent was allowed bail on 3.3.04 though it was alleged the offence had been committed whilst the Respondent had been on bail.

[13] By the next court date the Respondent had been served with the prosecution disclosures and the matter was set down for trial to proceed on 12.8.04 [Trial Date No 1].

[14] On 12.8.04 the prosecution sought an adjournment since the two main police witnesses were attending a UN sponsored course at the Police Academy. The Accused asked for clearer disclosures which the magistrate directed should be provided to him. Trial was re-fixed for 14.10.04 [Trial Date No 2]. Subsequently the magistrate's note fails to record why the matter was adjourned on 14.10.04, and also on 22.10.04. 20.12.04 was fixed as the new date for trial [Trial Date No 3].

[15] On 20.12.04 the Respondent complained he had not been given the Summary of Facts. The magistrate records that the prosecutor then asked for another date. The Accused was not entitled to a Summary of Facts. If it were to be a plea of guilty an Accused might wish to assess whether he was in agreement with all of the facts to be brought to the court's attention. But if, as here, it was to be a trial after the entry of a not guilty plea, then a Summary of Facts was a non-essential disclosure. Provided the Accused received relevant prosecution witness statements and copies of documentary exhibits he could prepare his defence. The case should have proceeded on Trial Date No 3 and the prosecution were not at fault.

[16] The lack of the Summary of Facts should not have de-railed the commencement of the trial. The prosecutor should have insisted on the trial proceeding. On this occasion all of his witnesses, who were also all Police Officers, were present at court. Incorrectly the magistrate thought the Accused's objection to the trial proceeding that day was valid and allowed the matter to be adjourned. The new hearing date was 22.2.05 [Trial Date No 4].

[17] On 22.2.05 the prosecutor found that all 4 of his prosecution witnesses had failed to attend. They had been personally warned to attend by the magistrate on the last occasion. The magistrate stood the case down in case the witnesses were delayed in arriving.

[18] By 10.45 am the witnesses had still not arrived. The prosecutor sought an adjournment. The Respondent sought an acquittal under s 210 of the CPC. Then the magistrate gave his ruling and discharged the Respondent.

[19] That ruling confused the applicable sections of the Criminal Procedure Code. But from it, one can deduce that the magistrate was refusing the prosecution's application for an adjournment.

Trial to Proceed after Refusal of Adjournment

[20] In the Ruling the magistrate had referred to s 198 [now s 166 Criminal Procedure Decree]. That section applied to the first appearance of the Accused and not to the circumstances of this case where there had already been several adjournments: *Ministry of Labour, Industrial Relations and Productivity v Merchant Bank of Fiji Ltd* Cr App HAA011.2002S, 26th April 2002 [per Shameem J]. In any event the power is one of dismissal not discharge.

[21] The directive to the court is provided by s 200, where both parties attend by legal practitioners (here a police prosecutor for the prosecution). That directive is that 'the court shall proceed to hear the charge' [now s 168 CPD].

[22] The magistrate had written in the record that the prosecutor was 'seeking for another hearing date.' This was therefore not an application for withdrawal under s 201 [now s 169 CPD] but an application for adjournment under s 202 [section 170 CPD]. In the circumstances here, the magistrate realised correctly he ought not to adjourn again the hearing and should have gone on to consider the matter pursuant to s 203 [section 171 CPD] which deals with non-appearance after adjournment. The discretion should have been exercised judicially balancing the interests of both the prosecution and the defence.

[23] The procedure of the Magistrates Court was governed then by the Criminal Procedure Code [now Criminal Procedure Decree]. This problem was settled some 32 years ago in *Macahill v Reginam* Court of Appeal No 43 of 1980, 30th September 1980. Applying then different though equivalent s numbers the court set out the procedure at page 6 of its judgment:

> ' However, no application was made under s 192. That being so the case must then proceed by virtue of s 191. Section 199 applied. The relevant part reads:
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> 'If the accused person does not admit the truth of the charge, the court shall proceed to hear the witnesses for the prosecution and other evidence (if any).'
>
> This section overcomes a difficulty expressed at the Bar because it applies not only to the actual hearing of witnesses but also, by the use of the term '(if any)', it covers the situation where no witness is called. Whether evidence is called for the prosecution or not the Court must proceed to judgment under s 200. If witnesses are called then sections 201 and 202 apply and judgment will be given under s 206. The Code is thus complete and there is no failure to provide for the case where the prosecution does not call evidence.'

[24] If the magistrate exercises his or her discretion to refuse the adjournment, the case must proceed to trial. In this case the prosecutor would have had to inform the court he was not going to call any witnesses in support of the charge. The Accused would submit there was no case to answer. Thereafter the magistrate would rule that the case was not made out against the Accused on the charge, and pursuant to s 210 [section 178 CPD] the court is obliged to dismiss the case and forthwith acquit the Accused. By following the procedure laid down for each step of the proceedings in the CPC the magistrate is provided with an answer to the dilemma. After adjournment is refused, the trial commences. Following the lack of some, or all, of the evidence from the prosecution, the magistrate must give judgment on the case brought against the Accused. The resultant orders are inevitable, namely dismissal and acquittal.

[25] In this case, it was almost inevitable that an adjournment would be refused. With the prosecutor forced onto trial and being unable to offer any evidence, judgment would follow that there was no case against the Accused. In those circumstances the result would have been acquittal not discharge. Neither s 198 or s 201 applied.

[26] In *Director of Public Prosecutions v Vikash Sharma and 3 Others* , HAA0011 of 1994S, 1st November 1994, Pain J set out the simple steps to be followed:

> ' For clarity I record the formal steps that should be taken by a Magistrate in this situation. These rulings by him must be formally noted in the record.
>
> (i) The application for an adjournment is refused;
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> (ii) The hearing then proceeds by the Magistrate calling upon the Defendants to plead (if they have not already done so) and then calling upon the prosecutor to begin;
>
> (iii) If no evidence is called by the Prosecutor, then the Defendant or Defendants can be acquitted under s 210 of the Criminal Procedure Code.'
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> [See too *Director of Public Prosecutions v Neumi Kalou & Anor* [1996] 42 FLR 126 and the full discussion of the cases in *Ministry of Labour* (supra).]

[27] Unfortunately none of these authorities were drawn to the attention of this court or the previous panel that had to interpret the magistrate's purported procedure. Either way the result was the same, namely acquittal not discharge, which was what had been bothering the Respondent.

[28] The State's petition had it proceeded would have been unlikely to have met the criteria of s 7(2) for the grant of Special Leave. It was a point of well settled law, and no substantial and grave injustice were likely to eventuate from the procedural error.

Second Petitions to Supreme Court

[29] There remains the question of second appeals in the same matter to the Supreme Court.

[30] In this session the court has had 3 matters listed for review, that is the Supreme Court is being approached again by a Petitioner seeking review of the court's earlier decision. In the instant case the previous Respondent is now the Petitioner. But no circumstances have changed since the first decision.

[31] In *Silatolu* CAV0002.06, 17th October 2008, this court made plain that though it recognised that a power of review existed under s 122(5) of the Constitution – now s 8(5) of the Administration of Justice Decree 2009 – the court of final appeal could only exercise such powers 'in truly exceptional circumstances' or 'to avoid irremediable injustice.' In some jurisdictions no statutory power to recall or review is provided: *Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70, and the court can resort to inherent powers only. But 'the inherent powers of a court are adjuncts to existing jurisdiction to remedy injustice. They cannot be made the source of new jurisdictions to revise a judgment rendered by court' per Amerasinghe J in the Supreme Court at p.132.

[32] In *Makario Anisimai* CAV0006.08S 23rd February 2012 Marshall JA with the concurrence of other members of this court, found not only that no petition had ever succeeded at a second attempt in Fiji in a Criminal Appeal, but went on to say that there was no jurisdiction provided by s 8(5) to permit second appeals. Upon further reflection it appears to this court as constituted that this may have overstated the position. There is no referral procedure in Fiji via the Attorney-General as in England to this or any other court. However the plain wording of s 8(5) does not impose such a limitation upon criminal petitions to the Supreme Court. It must be construed therefore to permit appeals in criminal matters also, albeit in the very limited circumstances as referred to in *Silatolu*.

[33] The bar no doubt is extremely high but nonetheless may yet be overcome in a rare case.

[34] The State's petition to the Supreme Court in this matter, albeit its first as petitioner, did not meet the requirements of *Silatolu's* criteria for second petitions. It sought some corrective statement of the court's judgment in answer to the first petition, but its circumstances were not 'truly exceptional' nor was there demonstrated any 'irremediable injustice', requiring this court's intervention.

Procedure for Second Petitions

[35] This is what the court had to say in *Silatolu* (at 7):

> " The Court will now have heard and dismissed five applications for review under s 122(5) of the ***Constitution***, one in the July session, and the other four in this session. All were without substance because they attempted to rerun arguments which had already been considered and rejected by the Court, although in some cases the argument has been presented in a more detailed and focused fashion. All five applications were therefore vexatious and an abuse of the process of this Court. They involved an unnecessary waste of time and resources by the Prison Department, the Director of Public Prosecutions, and the Court.
>
> A court has an inherent jurisdiction to prevent the abuse of its process by the making of unwarranted and vexatious applications in existing proceedings: *Commonwealth Trading Bank of Australia v Inglis* (1974) 131 CLR 311. A petition for special leave to appeal to this Court that has been dismissed remains an existing proceeding for this purpose while the decision remains subject to review under s 122(5).
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> Applications by an unrepresented litigant for review, under s 122(5) of the ***Constitution***, of this Court's decision to dismiss his or her petition are proceedings which are likely to constitute an abuse of process whether the underlying proceedings are civil or criminal. In order to prevent such abuses in future such applications are at risk of having their proceedings summarily dismissed on the papers.
>
> The Court in the first instance will deal with such applications without an oral hearing. The applicant must lodge written submissions in support of the application, and the respondent will be given an opportunity to answer those submissions in writing, and the applicant may lodge a written reply. If the application is not summarily dismissed on the papers it will be listed for an oral hearing at the same or a later session of the Court."

[36] This will mean therefore that any applicant, whether represented or not, bringing a second hearing petition may not receive a hearing. The papers with submissions will be considered by a full court panel during one of the gazetted sittings or at any other convenient time. The full court will decide whether to list the matter for a hearing or whether to dismiss the matter summarily without a hearing. The petitioner must be able to convince the court by his or her petition and by written submissions that he or she has a case to be listed for further hearing and oral argument.

[37] The second petition in this case, this time that of the State, is therefore rejected for the reasons set out above, and stands dismissed.

Chandra J. I agree.

Sundaram J. I agree.

Gates P. The orders of the court are:

(a) The State's petition for Special Leave seeking review, the second petition in this matter, is rejected.

(b) The petition is dismissed.

Petition dismissed.