

IN THE ANTI CORRUPTION DIVISION OF THE MAGISTRATE'S COURT AT SUVA

Criminal File No: MACD 34/2021 SUV

BETWEEN : FIJI INDEPENDENT COMMISSION AGAINST CORRUPTION

Prosecution

AND : SEMI SALAUCA MASILOMANI

Accused

Appearances

For the State : Mr. Hicks

For Accused : Mr. D. Toganivalu (*Toganivalu Law*)

Date of Ruling : 7th April 2021

RULING

1. This is a matter where the entire trial was conducted before Senior Resident Magistrate Ms. George.
2. Whilst awaiting Judgment the *High Court Amendment Act 2021* was enacted and came into force via Gazette on 12th February 2021.
3. Consequentially, the *High Court Amendment Act 2021* introduced the Anti-Corruption Division of the Magistrates Court, wherein via Section 61M all pending proceedings were to be transferred to the Magistrate Court responsible for the Division.
4. As a result Senior Resident Magistrate Ms. George seized to have jurisdiction over this matter pursuant to Section 61M of the *High Court Amendment Act 2021*.
5. Following on from the same, Section 61M (2) the *High Court Amendment Act 2021* bestows upon this court the discretion to consider Section 139 of the *Criminal Procedure Act 2009*, upon the transfer of proceedings.
6. When this matter was called on 9th March 2021 the court enquired of the parties on the same.
7. Prosecution opted that this court continue on from where the former judicial officer left off whilst learned counsel for the accused opted for a trial de-novo.

8. The right to have a trial de-novo is provided for in section 139 of the **Criminal Procedure Act 2009** which reads:

"139 – (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 succeededby 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-summonsed or 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 the opinion that the accused has been materially prejudiced, and may order a new trial. "

9. **Goundar J.** elucidated this consideration in **Jale Baba** HAC 135.2010 as follows:

"The learned Magistrate has discretion to either proceed with the case on the record of the previous Magistrate, or de novo. This discretion must be exercised after weighting (sic) all the relevant factors such as sufficiency of earlier court record and whether the accused is disadvantaged by the fact that the new magistrate had no opportunity to observe the demeanour of the prosecution witnesses when they gave evidence. Of course, no exhaustive list can be produced. The right to a fair trial is the ultimate objective."

10. The consideration by Goundar.J has been adopted in **Baba v State** [2015] FJHC 156; HAA040.2013 (6 March 2015) and later in **Khan v State** [2016] FJHC 226; HAA44.2015 (7 April 2016).

11. **Madigan J** (as he then was) in **Baba v State** (supra) adjudged that the right under Section 139 of the **Criminal Procedure Act 2009** was all encompassing and he stated it in this manner:

*"28. It would appear then that on a reading of s.139 in its entirety, an application for a **trial de novo** in the Magistrates Court can never be refused."*

12. However, **Aluthge J** in **Khan v State** (supra) alluded to the following consideration that is:

*"30. If **trial de novo** is ordered, Prosecution will be placed at a disadvantage of having to call the witnesses again after a passage of nearly four years. Some witnesses may be missing or, even if they are available, their memory may have been faded away. It would be unfair to put the victim and witnesses of Prosecution through the ordeal again of giving evidence. The right to a fair trial is the ultimate objective. Fairness is not only for the accused but for everybody involved in the trial process."*

13. This court now has carriage of the matter and from the transcript available it notes that the trial had intermittently progressed beginning on 21st August 2019 until the close of Defence case on 26th January 2021.
14. A total of four (4) prosecution witnesses and two (2) Defence witnesses have given evidence. A total of twenty (20) prosecution exhibits have been tendered.
15. It appears from perusing the trial transcript and the exhibits, that the question which this court will have to ascertain in terms of being satisfied of the legal burden is not so much on the demeanour of witnesses but rather documentary evidence which has been tendered.
16. In this light this court therefore adopts the position established in *Khan v State (supra)*, which means that all things considered, a trial de novo is not proper in circumstances.
17. The court so orders.


JEREMALA N.L SAVOU
Resident Magistrate

