IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 43 of 1980

Between:

ROBERT TWEEDLE MACAHILL — Appellant

and

REGINAM — Respondent

S.M. Koya for the Appellant
A. Gate for the Respondent

Date of Hearing: 10 September 1980
Date of Judgment: 30th September 1980

JUDGMENT OF THE COURT

This is an appeal from a decision of the Chief Justice sitting in appeal from an Order made by the Magistrate dismissing "for want of prosecution" a series of informations laid against the appellant for 13 offences under the Copyright Act, 1976, (United Kingdom) and one count for the offence of conspiracy under section 21 of the Penal Code.

The relevant facts may be shortly set out.

The cases were first called before the Magistrates Court, Suva on the 7th May, 1979. Fourteen counts in all were charged and the appellant entered a plea of "Not Guilty" to each charge. The prosecutor stated that at the trial he would need to call a witness from the United States. The case was then adjourned to 4th June, 1979 "for mention only". On the suggestion of

both counsel for the prosecution and for the accused, the case was adjourned to the 9th July for hearing. On that date counsel for the defence informed the Court that as proceedings for breach of copyright were pending in Washington, U.S.A. he would apply for an adjournment. Counsel for the prosecution agreed, and the hearing was adjourned "for mention only" to 27th August, 1979. On that date the Court was informed that the case in Washington was still continuing; and by consent the matter was further adjourned "for mention only" to the 24th September, 1979. On that date a fixture was made for hearing the cases against the appellant for the 29th October, 1979.

When the case was called on 29th October, counsel for the prosecution asked for an adjournment as

> "The exhibits are the core of the matter and they have to be further prepared."

The Court was informed that the defence had no objection to an adjournment. The appellant was present at the hearing on that date.

The learned Magistrate stated that he did not feel that an adjournment should be granted as the case had been going on for months; and no mention of exhibits had been made when the fixture was made on 24th September. Counsel for the prosecution then asked for an adjournment so that he might give the matter further consideration. The record then proceeds:

"Court: Not prepared to grant adjournment.

Prosecution Counsel:
Leave to Court.

Court:
Dismissed for want of prosecution if prosecution not able to go on.

Prosecution Counsel:
Leave to Court.

Court:
Dismissed for want of prosecution."

On 13th December, 1979 the learned Magistrate heard in Chambers an ex parte application by the Director of Public Prosecutions "to have finality reached in the proceedings," as in his submission the Court had made an Order which it had no power to make and accordingly the case was not yet concluded. His argument was lengthy. When he had finished the learned Magistrate ruled that he must hear the other side on the application. He made a fixture for this purpose for the 9th January, 1980. On that date, as service has not been effected on respondent who was said to be in New Zealand at the time, the learned Magistrate stated that he would give his decision on the 11th January. On this last date, when neither respondent nor his counsel was present, he gave a lengthy decision quoting a number of authorities. In the course of that decision he stated:

> "In saying that the case is dismissed for want of prosecution what the Court is really saying is that it appears to the Court that a case is not made out against the accused person sufficiently to require him to make a defence and he is entitled to be acquitted in conformity with section 200 of the Criminal Procedure Code."

Finally the learned Magistrate ruled that the ex parte application was dismissed and his original Order was to stand.

The grounds of appeal against the Order of the learned Chief Justice may be shortly summarised as follows:

1. that the learned Chief Justice had erred in giving consideration to the decision of the 11th January, 1980 which was a nullity in law;

2. that the learned Chief Justice erred in holding that the effect of the decision in the Magistrate's Court was not an acquittal of appellant on all charges.

We are of opinion that the learned Magistrate had no jurisdiction to deal further with any question concerning the effect or meaning of his purported determination of the charges against appellant after he had dismissed them in the manner stated. The effect of his decision is a matter for an appellate Court. Both the appeal in the Supreme Court and in this Court fall for determination on the record as it appeared on the relevant date, namely the 29th October, 1979. This disposes of the first ground of appeal.

There are, in our opinion, two questions, namely:

(a) Was the learned Magistrate right when he refused the application for adjournment? and,

(b) If so, what was the effect, if any, of the order made?

For the answer to these questions the relevant provisions of the Code of Criminal Procedure must be examined. The Magistrate's Court is a creature of statute. It has no inherent jurisdiction and so is confined to its statutory powers.

Section 191 deals with the case where, as in this instance, all parties are before the Court. There is a mandatory direction that "the Court shall proceed to hear the case". This direction is, of course, subject to the power of adjournment contained in section 193. The course taken in the present case was that the charges had been read and pleas of not guilty had been taken in accordance with the provisions in that behalf. The case was then adjourned. Subsequent adjournments followed and the hearing was fixed to take place on October 29, 1979. All parties were then present. An application for adjournment was made and refused. Hence section 191 applied and the mandatory direction to proceed with the case applied.

The case might have been disposed of under section 192 which ought to be set out in full. It reads:

> "(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 made 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 200 of this Code, 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 the last preceding subsection shall not operate as a bar to subsequent proceedings against the accused person on account of the same facts."

However, no application was made under section 192. That being so the case must then proceed by virtue of section 191. Section 199 applied. The relevant part reads:

> "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 section 200. If witnesses are called then sections 201 and 202 apply and judgment will be given under section 206. The Code is thus complete and there is no failure to provide for the case where the prosecution does not call evidence.

We have dealt, at some length, with the relevant statutory provisions applicable. It is essential that the presiding magistrate ought to

state explicitly the decision which he is pronouncing, either by referring to the particular statutory provision, or, by using the precise terms prescribed by the statute. Such a procedure would have avoided the doubts raised and consequent argument on the effect of the order made. There is no statutory provision for dismissing for want of prosecution. We find it unnecessary to discuss this topic any further and hope that the Courts concerned will give this due attention in the future.

We proceed now to deal with the first question, namely, was the learned Magistrate correct in refusing to grant the adjournment sought. Such a refusal is a matter of law. The granting of an adjournment is always the exercise of a judicial discretion. Although the Court of Appeal is slow to interfere with the exercise of that discretion, yet, as is said by Atkin L J in Maxwell v. Keun (1928 1 K.B. 645,653 CA):

> "I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does do so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the court has power to review such an order, and it is, to my mind, its duty to do so."

Similar orders, overruling a judgment denying an adjournment, were made in re M (1968) 1 W.L.R. 1897; Priddle v. Fisher (1968) 1 W.L.R. 1478; and Royal v. Prescott Clarke (1966) 1 W.L.R. 788.

There were fourteen charges of which thirteen involved United Kingdom copyright law. The other charge was one of conspiracy under Fiji law. Numerous exhibits were involved. Both counsel agreed to the adjournment for the reason that difficulties had arisen in respect of the exhibits. They were taken by surprise by the turn of events. Earlier adjournments were capable of explanation. They have already been referred to in this judgment. Further in the event of conviction important ancillary questions were involved concerning the disposal of articles which were alleged to infringe the copyright claimed. Counsel for the prosecution was placed in an embarrassing position. Even a short adjournment was refused. The defence had no complaint about delay. The only substantial reason given for dismissal was the convenience of the Court. The delay was not in the circumstances of this case a proper ground for a peremptory dismissal without a prior warning. We are of opinion that the refusal to grant an adjournment was not a proper exercise of judicial discretion and that an adjournment ought to have been granted. This disposes of the appeal. The second question as to the effect of the order made by the learned Magistrate does not now arise because the setting aside of that order will be approved.

For the reasons given we hold that the learned Chief Justice was right in setting aside the Order made on the 29th October, 1979 and providing that the case should be remitted to the Magistrate's Court at Suva for a continuation of the hearing according to law.

The order made by the learned Chief Justice is affirmed, and, accordingly the appeal is dismissed.

(Sgd.) C.C. Marsack
Judge of Appeal

(Sgd.) T. Henry
Judge of Appeal

(Sgd.) B.C. Spring
Judge of Appeal.