IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 7 of 1988

Between:

SHINODRA f/n Enkanna — Appellant

- and -

STATE — Respondent

Dr. Sahu Khan for the Appellant
Mr. I. Mataitoga for the Respondent

Date of Hearing: 16th November, 1988.
Delivery of Judgment: 2nd December, 1988

JUDGMENT OF THE COURT

This is an appeal from the judgment of Mr. Justice Fatiaki sitting in his appellate capacity on an appeal from the judgment of the Magistrate's Court Lautoka.

The learned Magistrate convicted the appellant of the offence of causing death by dangerous driving contrary to Section 238 of the Penal Code. The learned Judge quashed the conviction and ordered a retrial.

From this order for retrial the appellant now appeals on the following grounds :

(a) The appellant was not given the chance to make submission on the question of retrial.

(b) The learned appellate Judge considered extraneous matters and omitted to consider relevant matters when making the Order for retrial.

(c) The learned appellate Judge erred in law in not applying the necessary principles relating to the Order for the retrial and/ or misapplying the principles thereof.

Dr. Sahu Khan argued (b) and (c) together.

The only issue we have to consider, is whether, in law, the order for retrial was properly made.

Dr. Sahu Khan relies on two authorities for his argument that the learned Judge erred in law in making an order for retrial. He relies on R. v. Wareham Magistrates Court ex parte Seldom (1988) 1 All E.R. 746. This was a case concerning the change of venue of maintenance proceedings. The Magistrate transferred the proceedings to another court without giving either of the parties an opportunity to be heard. On the facts it was held the respondent was seriously inconvenienced and that it was not fair that she was not given an opportunity to object to the transfer.

The relevant Magistrate Court Rule in that case empowered the Magistrate to make the order. The order for transfer was quashed on the grounds that there was a breach of the rules of natural justice in that the respondent had no opportunity of being heard before the order was made.

McCullough, J. in that case appears to have been influenced by the fact that under the Magistrates Courts (Matrimonial Proceedings) Rules 1980 (which had no application) the respondent had the right to apply to have the case heard in another court. The applicable 1981 rule of the

Magistrate's courts on the other hand, contained no such provision giving a party the right to be heard.

McCullough, J. was of the view that on the facts there was real hardship and it was unfair for the respondent (a wife with two young children and with a very small income) to have to travel 300 miles on a round trip without the opportunity of being heard on the issue of venue.

We do not consider that Wareham's case can be taken as an authority for the proposition that where an appellate Judge allows an appeal and quashes a conviction and exercises his statutory power to order a retrial he must have a hearing on the issue of a retrial before making his order. The situation in the instant case is quite different.

The powers of an appellate Judge are very extensive - Section 319 of the Criminal Procedure Code provides as follows :

> "1. At the hearing of an appeal, the Supreme Court shall hear the appellant or his barrister and solicitor, if he appears, and the respondent or his barrister and solicitor, if he appears, and the Supreme Court may thereupon confirm, reverse or vary the decision of the magistrate's court, or may remit the matter with the opinion of the Supreme Court thereon to the magistrate's court, or may order a new trial, or may order trial by a court of competent jurisdiction, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrate's court might have exercised:
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> Provided that -
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> (a) the Supreme 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;

(b) the Supreme Court shall not order a new trial in any appeal against an order of acquittal.

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

The section does not require a hearing where a Judge orders a retrial. The question remains however, "was it unfair on the appellant not to be given the opportunity of being heard before the order for retrial was made?".

Counsel appearing for an appellant on an appeal against conviction should be aware of the appellate Judge's powers. He has the opportunity, if he considers there is a likelihood of an order for a retrial being made, of addressing the appellate Judge urging that if the learned Judge is minded to quash the conviction, the case was not one where an order for retrial should be made. He should anticipate such a situation arising.

The second authority is R. v. KIZA (1938) (1938) 5 EACA 42. That case dealt with the issue of an order for retrial made on a revision which was to the prejudice of the accused and where the accused was not given the opportunity of being heard.

Dr. Sahu Khan, however, did not mention that in that case the relevant Section of the Criminal Procedure Code (Tanganiyika) specifically provided that "no order shall be made to the prejudice of an accused person unless he has an opportunity of being heard....". The case is of no assistance to the appellant.

Somewhat akin to the situation in the instant case were the facts referred to in WISEMAN v. BORNEMAN (1969) 3 All E.R. 275 :

> "That case was concerned with the exercise by the Inland Revenue Commissioners of their duty under S. 28(5) of the Finance Act 1960 to determine whether or not a prima facie case for proceedings against a taxpayer had been made out. The taxpayer had contended that natural justice required the tribunal to let him appear through counsel to make representations before the determination was made. It was the unanimous view of their Lordships that the procedure specified in S. 28 gave the taxpayer a sufficient opportunity to advance his contentions on paper, and that there had been no breach of natural justice in denying him the right to appear by counsel."

In the instant case Counsel could have raised the issue of retrial before the learned Judge made his order.

There is no merit in the first ground of appeal.

Dr. Sahu Khan argued the second and third grounds together. He listed in his skeleton argument four authorities for the proposition that in a criminal trial a retrial should not be ordered in order to allow the prosecution to plug a gap in its case against the accused which might have been filled at the first trial. We state at once that we accept that proposition. It would be contrary to fair play and justice to order a retrial for the sole or primary purpose of allowing the prosecution an opportunity to fill a vital gap in its case at the retrial.

On the facts in the instant case none of the five cases assist the appellant. In the case of NIRMAL v. R. (1970) Privy council Appeal No. 46/1970, a case which is not reported, the Fiji Court of Appeal ordered a retrial. Their Lordships allowed the appeal expressing the opinion that an order for a new trial could not be upheld.

That case was one where the Court of Appeal reversed the trial Judge and rejected the confession without which the prosecution had no case.

That is not the situation in the instant case. The learned appellate Judge's main conclusion was that the learned Magistrate had failed to evaluate the evidence and make findings thereon. The evidence was there but there was an alleged failure by the Magistrate to evaluate it.

Ross v. Reginam (1957) 1 All E.R. 451 is another Privy Council case where their Lordships dismissed an appeal from the Eastern African Court of Appeal ordering a retrial.

The power to order retrial in that case was contained in the rules of the Court. They were very full powers and in effect were as wide as Section 319 of the Criminal Procedure Code. Their Lordships said :

> "The only other question can be briefly dealt with. The order for a new trial having been competently made will not be set aside on an appeal to Her Majesty in Council unless the case can be brought within the principles which have been too often stated to need repetition. Their Lordships have given careful consideration to the arguments of learned Counsel who urged that the power to order a new trial, admittedly a discretionary jurisdiction, had been exercised on wrong principles. The gravamen of his plea was that the purpose, or at least the result, of a retrial was, or would be, to enable the prosecution to fill a gap in the evidence which had been due to its own default. He was far from satisfying their Lordships on this point."

The other three cases are all Eastern African appeal cases.

In Rex v. Sirasi Bachumira (1936) 3 EACA 40 the prosecution failed to establish that the person stabbed by the accused was the same person as later died in hospital. The Court refused a request by counsel for an order for retrial. In Rex v. Mpande (1938) 5 EACA 44 there was a similar situation. The person struck with a panga was not identified as a person who died 4 days later. A retrial was not ordered but the appellant was convicted of attempted murder as there was evidence of the striking with a panga.

The last case Rex v. Suke and Others (1947) 14 EACA 134 supports the respondent more than the appellant.

It was a case where the trial Judge erred in a number of respects. The trial was irregular. To that extent that case was similar to the instant case. The court found that because of the irregularities the entire joint trial was a nullity. They stated :

> "In our opinion, as we have already indicated, the effect in law of the wrong course taken by the learned Judge is that the entire joint trial - including the convictions and sentences - is a nullity.
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> We have come to the conclusion that this is a proper case for this Court to order a new trial. This Court will not exercise this power in order to allow a prosecution to fill a gap in its case against an appellant which might have been filled at the first trial and it would hesitate to do so where a nullity was declared on account of an irregularity for which the prosecution was responsible. Neither of the above considerations applies to the present case. Had the joint trial of the three appellants proceeded on its proper course it is probable that all three of them would have been adjudged guilty by both Judge and Assessors. We therefore order that the convictions of the three appellants be quashed and the death sentences set aside. The three appellants are remanded in custody to be retried in the High Court by a different Judge."

The Judges in that case appear to have followed the same course as the learned Judge in the instant case. In particular they expressed an opinion that the accused would probably have been adjudged guilty.

The learned Judge in the instant case went somewhat further than he was required to go and expressed his own views as regards the evidence. In quashing the conviction he stated :

> "I cannot accept that had the learned trial Judge/Magistrate correctly applied his views to the various matters raised in this judgment he would have been driven to a different conclusion."

We treat this statement as obiter and accordingly not binding on any Magistrate who may later have to deal with the case. The learned Judge's statement that the evidence if properly evaluated would not have led to a different conclusion, must be ignored.

We are precluded from considering the evidence by virtue of the fact that there is no appeal from the order made by the learned Judge quashing the conviction.

We are satisfied that the learned Judge had the jurisdiction to order a retrial, and are satisfied that the instant case is not one where there has been an order made for a retrial in order to enable the prosecution to remedy a failure to adduce relevant evidence.

The interests of justice dictate that there be a retrial.

The appeal is dismissed.

Before leaving this appeal we feel we ought to draw attention to an important point of practice concerning the exercise by the High Court of its appellate jurisdiction. An appellate Court is primarily concerned to satisfy itself that the conclusion reached by the trial Court can reasonably be supported on the evidence adduced and upon the applicable law.

Where a case depends essentially, as the present case does, on the credibility of witnesses and findings of fact connected therewith, an appellate Court ought to be guided by the impression made on the Magistrate who saw and heard the witnesses and not by its own evaluation of the printed evidence which can be misleading.

The principle on which an appellate Court should proceed is conveniently stated in Watt v. Thomas (1947) 1 All.ER 582 at 587 (as per Lord Thankerton) in these terms:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge' conclusion.
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> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
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> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

In that case Lord Tankerton also noted that the value and importance of having seen and heard the witnesses would vary according to the class of case, and, it might be, the individual case in question.

With respect we believe that all courts exercising appellate jurisdiction would do well to be guided by the above principle.

President, Fiji Court of Appeal

Judge of Appeal

Judge of Appeal