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IN THE COURT OF APPEAL: FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0056 OF 1999S
(High Court Criminal Appeal No. HAA0064 of 1999)

BETWEEN:	RAJESH CHAND SHAILESH KUMAR *Appellants*
AND:	THE STATE *Respondent*
Coram:	Eichelbaum JA Presiding Judge Sheppard JA Tompkins JA
Hearing:	Wednesday, 21 November 2001, Suva
Counsel:	Mr. G.P. Shankar for the Appellant Mr. P. Ridgway for the Respondent
Date of Judgment:	Thursday, 22 November 2001

JUDGMENT OF THE COURT

The appellants were charged with larceny. They appeared in the Magistrates' Court at Tavua on 30 April 1998. They pleaded not guilty. They were acquitted without a hearing on the ground that an adjournment was refused and the prosecution was not in a position to call all the witnesses.

The State appealed. The appeal came before Townsley J on 17 September 1999. By his judgment delivered that day, he allowed the appeal, quashed the acquittal and ordered

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that the matter be remitted to the Tavua Magistrates' Court to be heard. From that decision the appellants have appealed.

The course of the proceedings

The complaints containing the charge against the appellants were issued on 7 September 1998. On that day the charge was read and explained to the appellants who both pleaded not guilty. The case was adjourned to 13 October 1998 for mention only. On that day the case was adjourned to 21 December 1998 for hearing. Later on 13 October counsel for the appellants sought a change of date because he was engaged in another court. The prosecutor consented. It was adjourned to 11 January 1999 for mention only. On that day it was adjourned to 20 April 1999 for hearing.

When it was called on 20 April 1999 the prosecutor advised that there were six witnesses to be called for the prosecution. Of those four were available but two were not, although they were both on subpoena. He said that the case could be part heard and a warrant issued for two absent witnesses. Counsel for the appellants strongly opposed any adjournment. He was also opposed to a part hearing. He said that he regarded one of the missing witnesses to be a key witness whom he wanted to cross-examine.

The decision of the court as recorded was:

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"I have considered the submissions of both sides. The Prosecution two witnesses who are not here are from here in Tavua. Prosecution should have found out from them well before hand their availability or otherwise and inform this Court and the Defence Counsel of their difficulties. To come to court on the morning of the trial and ask for an adjournment is not accepted by this Court. I've said in Suva, Ba and am saying it now in Tavua.

As for the part-heard it is out of the question to be entertained by this Court because I am here only as a Relieving Resident Magistrate. I've been given instructions also by the Chief Magistrate not to take any part heard case as it will cost us a lot of time and money.

As to the length of time this case has taken I agree it was first called on 7/9/98. But as the Defence Counsel submitted, this offence has been hanging around his clients necks for over 6 months. It is their right to ask quick disposal of their Cases. Section 29(3) of the Constitution.

In view of the above, I find that it is very late to come to Court now and ask for an adjournment and I order that the application for adjournment be refused."

The charges were then read to the appellants who again pleaded not guilty. The prosecutor advised that he could not proceed unless it is part heard. The magistrate then ordered that both appellants be acquitted under s 210 of the Criminal Procedure Code. He referred to authorities in support of that decision.

The decision in the High Court

In his decision the judge reviewed the history of the case. He considered an authority to which counsel for the appellants referred, Macahill v Regina FCA Crim App. No 43/1980, where the Court of Appeal, on the facts of that case, came to the conclusion that the refusal to grant an adjournment was not a proper exercise of judicial discretion.

He expressed his conclusion as follows:

> "In this case therefore it is this Court's view that the Magistrate was far too anxious to refuse an adjournment and acquit the respondents. He did not exercise a judicial discretion; did not look at the previous history of the case; did not inquire whether witness summonses had been served, and when; or when the prosecutor first got knowledge of disobedience to the Court's process. All had to be subservient to the Court's and the defence's predilection not to have a part heard case. The case was quite a serious one. Justice was not done to the State."

Conclusion

The principles upon which an appellate court should act when reviewing a decision by a judge or magistrate to grant or refuse an adjournment are well settled. The judge or magistrate has a discretion as to the proper mode and time of trying an action. The exercise of that discretion should be interfered with by an appellate court only in exceptional cases. If it appears that the result of the order made in the court below is to defeat the rights of the parties altogether or to do an injustice to one or other of the parties, the appellate court has a duty to review such an order. Where the refusal of an adjournment would seriously prejudice a party, the application should be granted. If not granted, an appellate court will intervene if the discretion has not been exercised judicially or where its exercise was based on a wrong principle or resulted in an injustice: Maxwell v Keun [1928] 1 K.B. 645; GSA Industries Pty Ltd v NT Gas Ltd 24 NSWLR 710.

In the present case we are satisfied that the Magistrate exercised his discretion on a wrong principle. It is apparent from his decision that we have reproduced above that he

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was primarily concerned at the administrative inconvenience and cost to the Court of part hearing the case, and the Magistrate then being required to return to Tavua to complete the hearing. This was not a proper reason for denying the State the right to have the charges heard and determined by the Court. We accept that financial considerations and the convenience of the Court can be taken into account in determining how and when a case is to be heard, but that can never over-ride the interests of justice. In the present case, if these factors were considered to be relevant, with the result that a part hearing was inappropriate, the correct course was to adjourn the hearing to a date and time when it could be properly heard and determined. By refusing either to part hear the case, or to adjourn it, the Magistrate's decision resulted in an injustice to the State.

There had been no undue delay in bringing the case to conclusion. A hearing fixture had been adjourned only once, and that was at the request, and for the convenience, of counsel for the appellants.

For these reasons we are satisfied that the decision reached by the judge in the High Court was correct.

Result –

The appeal is dismissed.

Eichelbaum JA, Presiding Judge

Sheppard JA

Tompkins JA

Solicitors:

Messrs. G.P. Shankar and Company Ba, for the Appellant
Office of the Director of Public Prosecution, Suva for the Respondent

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