IN THE COURT OF APPEAL, FIJI
On Appeal from the High Court

CRIMINAL APPEAL NO. AAU 0062 OF 2019
In the High Court at Suva Case No. HAA 55 of 2018

BETWEEN : **AJAY SHASHIKANT PALA**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**
Mataitoga, JA
Qetaki, JA

Counsel : **Mr Heritage. S. for Appellant**
Mr Singh A. Respondent

Date of Hearing : **12 September, 2023**

Date of Judgment : **28 September, 2023**

JUDGMENT

Prematilaka, RJA

[1] I agree that the appeal has no merits and should be dismissed.

Mataitoga, JA

[2] The Appellant has filed a notice of motion for leave to appeal against conviction and sentence.

[3] The Appellant was charged with one count of receiving stolen property contrary to section 306(1) of the Crimes Act, 2009 before the Magistrate's Court at Nausori.

[4] After trial, the Appellant was found guilty, convicted and sentenced on 28th September 2018 to 26 months imprisonment with a non-parole term of 20 months. The appellant had served his sentence.

High Court

[5] The Appellant appealed against his conviction and sentence by the Magistrates Court to the High Court.

[6] There were a total of 11 grounds of appeal submitted by the appellants to the High Court in its appellate jurisdiction. It is not necessary to set out these grounds for this appeal hearing. They are set out in pages 3-5 of the High Court Judgement dated 8 May 2019 [Pages 228-230 Copy Record].

[7] The learned High Court Judge sitting in appeal took the position that a no case to answer submission would only be given if it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence . In the present case it would not have appeared so to the Learned Magistrate.

[8] These submissions show that the Learned Magistrate has not given the Appellant an opportunity to make a no case to answer submission in terms of section 179 of the Criminal Procedure Act. This point was conceded by counsel for the respondent.

[9] Section 179 of the Criminal Procedure Act reads as follows:

> *179. — (1) At the close of the evidence in support of the charge, if it appears to the court that a case is made out against the accused person sufficiently to require the making of a defence, the court shall —*
>
> *(a) again explain the substance of the charge to the accused; and*
>
> *(b) inform the accused of the right to —*
>
> *(i) give evidence on oath from the witness box, and that, if evidence is given, the accused will be liable to cross-examination; or*
> *(ii) make a statement to the court that is not on oath; and*
>
> *(c) ask the accused whether he or she has any witnesses to examine or other evidence to adduce in his or her defence; and*
>
> *(d) the court shall then hear the accused and his witnesses, and other evidence (if any).*
>
> *(2) If the accused person states that he or she has witnesses to call but that they are not present in court, and the court is satisfied that —*
>
> *(a) the absence of the witnesses is not due to any fault or neglect of the accused person; and*
>
> *(b) there is a likelihood that they could, if present, give material evidence on behalf of the accused person —*
> *the court may adjourn the trial and issue process, or take other steps in accordance with this Decree to compel the attendance of the witnesses.*

[10] Section 178 of the Criminal Procedure Act is clear, it states

> *"If at the close of the evidence in support of the charge it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence, the court shall dismiss the case and shall acquit the accused."*

[11] It is clear from the terms of section 178 that an opportunity to make submissions of No Case to Answer at the close of the Prosecution evidence (or close of the Prosecution case), would only be given "*.... if it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence.*" An opportunity to make submissions on No Case to Answer is usually granted where Court is of the opinion that no prima facie case has been made out by the Prosecution. In this case, it would not have appeared so to the Learned Magistrate.

[12] The Appellant is seeking leave to appeal against the decision of the High Court which dismissed his appeal. This application would therefore be governed by Section 22(1) of the Court of Appeal Act 2009

Court of Appeal

Before Judge Alone

[13] The Appellant in his application for leave to appeal, in his submission dated 20 July 2020, have set out 12 grounds of appeal against conviction and 4 grounds against sentence. It should be pointed out the exact grounds submitted to the High Court in its appellate jurisdiction had mutated in its redraft into new grounds from those that were submitted before the Judge Alone, when considering the application for leave to appeal.

[14] These submissions claims that the Learned Magistrate has not given the Appellant an opportunity to make a no case to answer submission in terms of section 179 of the Criminal Procedure Act.

[15] Since grounds 1, 2 and 12 raise questions of law, the Appellant has an automatic right of appeal on these grounds under section 22(1) of the Court of Appeal Act.

[16] The other grounds 3 to 11 urged by the appellant before the judge alone raise questions of mixed law and fact do not confer a right of appeal. They are dismissed.

Full Court

[17] Before the full court, the appellant written submissions pursuant to section 35(3) of the Court of Appeal Act were filed on 20 July 2020. There were 12 grounds of appeal. This is a renewal application of the grounds of appeal should be similar to those urged before the single judge at Leave to Appeal hearing. New grounds of appeal may be submitted only if they have been submitted and process through the court registry in accordance with rules of court.

[18] The 3 grounds of appeal out of the 12 submitted, that raise issues of law are:

(i) The learned trial judge erred in law and in fact in not taking into consideration that the Magistrate did not give an opportunity to the appellant to make a submission of no case to answer at the end of the prosecution case – Ground 1

(ii) The learned trial judge erred in law in holding that the Magistrate in not complying with section 179 of the Criminal Procedure Act was not fatal to the conviction and as such there has been a substantial miscarriage of justice – Ground 2

(iii) The learned trial judge erred in law and fact in not taking into consideration that the Magistrate did not comply sections 178 and 179 Criminal Procedure Act and as such there was a substantial miscarriage of justice. – Ground 12

[19] The above 3 grounds of appeal may be consolidated into 1 ground, namely, whether the failure of the Magistrate to give the appellant the opportunity to make a 'no case to answer' submission was fatal and result in miscarriage of justice and Section 179 of the Criminal Procedure Act is relevant in that determination of the court.

[20] Mr Heritage for the Appellant submits that his client was not advised of his rights granted by Section 179 of the Criminal Procedure Act. This was an error of law, that was a fatal omission giving rise to miscarriage of justice and the conviction of appellant should be quashed.

[21] The Respondent in their submission referred to section 178 of the Criminal Procedure Act and said it should be read with section 179 wherein the critical issue is that a submission of no case to answer would only be given '*...if it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence.*' In this regard the respondent rely on the view of the judge who observed in his ruling at the appeal hearing in the High Court that:

> *'[22] Section 178 of the Criminal Procedure Act is very clear. An opportunity to make submissions on No Case to Answer at the close of the Prosecution evidence (or close of the Prosecution case), would only be given ".... if it appears to the court that a case is not made out against the accused person sufficiently to require him or her to make a defence." An opportunity to make submissions on No Case to Answer is usually granted where Court is of the opinion that no prima facie case has been made out by the Prosecution. In this case, it would not have appeared so to the Learned Magistrate.'*

[22] In **Firoz v. State** [2018] FJHC 802; HAA10.2015 (28 August 2018); the High Court held that non-compliance with Section 179 of the Criminal Procedure Act is not fatal to the conviction. The court held as follows:

> *"30. Counsel claims that the accused's rights in defence were not put to him as mandated by section 179(1) of the Criminal Procedure Act 2009.*
>
> *31. This appears to be true, however it is not fatal to the conviction.*
>
> *32. This matter has been dealt with previously by the Court of Appeal in **Ovini Tuitoga** [2007] FJCA 44; AAU63/06 (25 June 2007) (Ward, P. Ellis J.A. and Penlington JA) in discussing the same section (s.211) in the then Criminal Procedure Code.*
>
> *33. The Court held:*
>
> *"We are of the opinion that a failure to comply with s.211 does not of itself necessarily invalidate the trial. That would be so, however if the trial was otherwise unsatisfactory and that would result in the quashing of the conviction"*
>
> *and later....." While there was an error of law on the part of the Magistrate there has not been a substantial miscarriage of justice"*

34. There being no other unsatisfactory manner relating to these proceedings these dicta must prevail."

[23] In ***Archbold Criminal Pleading Evidence and Practice*** 39th Edition para. 505 states:

> *"The defendant ought to be distinctly told by the court of trial that he has a right to give evidence on his own behalf: R v Warren (1909) 2 Cr.App.R.194; but failure so to inform him does not itself necessarily invalidate the trial: R v. Saunders (1899) 687 L.J.Q.B. 296; R v Yeldham (1924) 17 Cr.App.R. 18, though, where the trial is unsatisfactory in other respects, such a failure may lead to the conviction being quashed: R v Graham (1924) 17 Cr.App.R. 40."*

[24] On the basis of these authorities it is clear that a failure to comply with s.179 of the Criminal Procedure Act does not, of itself, necessarily invalidate the trial, that would result in the quashing of the conviction. For the conviction to be quashed there must be further unsatisfactory aspects of the trial that the appellant can refer to in the trial.

[25] The appellant's submission did not address any other unsatisfactory issues that would make the proceedings in the Magistrate's court amount to substantial miscarriage of justice to warrant the court quashing the conviction of the appellant in the Magistrate Court. The court requested Counsel for the appellant if there were other aspects of the trial in addition to the omission by the Magistrate to warn the appellant of rights under section 179 of the Criminal Procedure Act. There were no additional submission on that specific point.

[26] In conclusion, the court's determination is that there was an error by the Magistrate in not allowing the appellant to make a no case to answer submission, but it is not fatal particularly because the Appellant was represented by counsel and the Appellant gave evidence showing that in any event there was a case to answer. There being no further submission from Appellant's counsel. The court is also satisfied that there are no other aspects of the trial that was unsatisfactory, to require the quashing of the conviction. This ground is dismissed.

Grounds 3 to 11

[27] Apart from the grounds of appeal referred to in paragraph 18 and 19 above, the other 9 grounds do not raise issues of law only and as a result the court shall not consider them. Section 22(1) Court of Appeal Act restricts the Court to determining appeal from the High Court in its appellate jurisdiction to issues of law only.

[28] All the grounds would necessitate a review of the evidence without any solid basis on the issue of law that the Magistrate erred in. For example for grounds 7 and 8 the appellant's submission claims that they raise question of law. The supporting submission does not specify the issue of law where the error of the Magistrate is claimed and there was no submission on case-specific passages from the court ruling that would substantiate the appellant's claim.

[29] These grounds suffer from similar defects and outrageous claim. Cases are cited without explanation as to how they are relevant to the issues before the court. The grounds of appeal are poorly drafted to be of any assistance to the court to make a fair determination of the issues that maybe complained of.

[30] Grounds of appeal 3 to 11 [inclusive] have no merit and are dismissed.

[31] In conclusion, all the grounds of appeal submitted on behalf of the appellant have no merit and are dismissed.

Qetaki, JA

[32] I am in agreement with the judgment, its reasons and the orders made.

ORDER:

1. *Appeal is dismissed*

The Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

The Hon. Mr. Justice Isikeli Mataitoga
JUSTICE OF APPEAL

The Hon. Mr. Justice Alipate Qetaki
JUSTICE OF APPEAL

SOLICITORS:
Iqbal Khan & Associates, Suva, for the Appellant
Office of the Director of Public Prosecutions, Suva, for the Respondent