

IN THE HIGH COURT OF FIJI
AT SUVA
REVISIONAL JURISDICTION

Cr. Revisional Case No: HAR 001 of 2008

Between: THE STATE Applicant

And: ASHWIN AKASH Respondent

Hearing: 4th April 2008
Ruling: 11th April 2008

Counsel: Ms S. Hamza for State
Respondent in person

RULING

The accused person was charged with failing to supply sample for breath analysis contrary to section 103(1)(b) and 114 of the Land Transport Act 1998. The charge reads as follows:

Statement of Offence

FAILED TO SUPPLY SUFFICIENT SAMPLE TO BREATH
ANALYSIS ON THE DIRECTION OF A POLICE OFFICER:
Contrary to section 103(1)(b) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence

ASHWIN AKASH s/o Bal Ram, on the 24th day of August, 2007 at Suva in the Central Division, upon being required by Police Officer namely Cpl. 413 Cavusikoa Vakamoce to submit sufficient sample to breath analysis under section 103(1)(b) of the Land Transport Act No. 35 of 1998, failed to submit to that analysis in accordance with the direction of the said Cpl. 413 Cavusikoa Vakamoce.

The matter was first called in the Suva Magistrates' Court on the 18th of December 2007. It was adjourned to the 16th of January 2008. The charge was read and explained. The accused pleaded guilty.

The facts were that on the 24th of August 2007 Sergeant Kasim was on mobile patrol on Victoria Parade when he saw the accused driving a taxi, registration number LT349. The taxi stopped opposite the Holiday Inn. Sgt. Kasim approached the accused to question him in relation to another case, when he smelt alcohol on the accused's breath. He arrested the accused and escorted him to the Central Police Station. At the Police Station, Corporal Cavusikoa Vakamoce tested the accused's breath with the Dragger Alcotest . 7110 but he failed to supply sufficient sample for the test. He was locked in the cell and charged the next day.

These facts were admitted by the accused. He also admitted one previous conviction in 2004. In mitigation he said he was a part-time taxi driver earning \$25.00 a week. He apologized to the court.

On the 1st of February 2008, the presiding magistrate found that she could not proceed to sentence, because in her opinion, the charge did not allege an offence known to law. She said that section 103(1)(b) of the Land Transport Act only created an offence of "failing or refusing to undergo a breath test or analysis when required to do so by a police officer." She said that the accused was charged with "failing to supply sufficient sample." In the circumstances she thought it proper to state a case to the High Court for its opinion on the following questions:

- 1) Whether or not the charge against the accused person discloses an offence known in law?
- 2) If yes, what would be the proper wording of the statement and particulars of the offence under section 103(1)(b) of the Land Transport Act?
- 3) If not, should the charge be withdrawn by the prosecution forthwith?
- 4) Following from no. 3 above, what would be the consequences to those who have been charged, convicted and sentenced for the same offence?

At the hearing of this case stated application the accused was nonplussed at the nature of the proceedings and said that his time was being wasted as a result of the frequent court appearances.

State counsel submitted that there was nothing improper about the wording of the charge, that the words "failing to supply sufficient sample" appeared in the penalty section of the Act and was a valid charge, and that the case stated procedure

could not have been used by the magistrate in this case because neither of the parties had asked for referral to the High Court.

Case Stated Procedure

Section 329(1) of the Criminal Procedure Code provides:

"After the hearing and determination by any magistrates' court of any summons, charge or complaint, either party to the proceedings before the said magistrates' court may, if dissatisfied with the said determination as being erroneous in point of law, or as being in excess of jurisdiction, apply in writing within one month from the date of the said determination, including the day of such date, to the said magistrates' court to state and sign a special case setting forth the facts and the grounds of such determination for the opinion thereon of the High Court."

Section 329(2) provides that upon hearing any such application, the magistrate shall draw up the special case and transmit it to the Chief Registrar with the court record.

The scope of this section was discussed in the decision of this court in Land Transport Authority v. Hemendra Vishwa, Ilango & Kailesh Prasad [2003] HAA 031/03S. In that case, it was held that there is no procedure for referring a matter to the High Court of the magistrates' own notion. The conditions precedent to a case stated referral are firstly that there must have been the determination of the charge or complaint, and secondly that one of the parties must apply for a case stated referral. As was said in that decision, these are unfortunate limitations, because a magistrate may wish to have a matter of

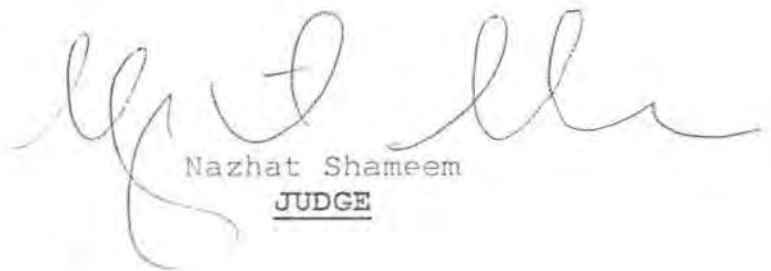
law clarified before or in the course of, the trial. I can only assume that the limitation exists to prevent delay, and of the fragmentation of the criminal trial.

Clearly therefore the magistrate had no powers to refer this matter to the High Court in the absence of an application.

I do however accept that the matters raised by the learned magistrate are of practical importance to the courts and should be determined by the High Court. However, the correct procedure would be to invite submissions from both parties, to rule on the matter and await appeal. In this particular case, if the learned magistrate is of the view that the charge is not known in law, she should vacate the plea and proceed to trial. Clearly her suggested option of inviting the Director of Public Prosecutions to withdraw the charge is not viable because counsel for the State has made submissions that the charge is a valid one.

I am therefore unable to hear this application and I must remit the matter back to the Magistrates' Court to complete the hearing.




Nazhat Shameem
JUDGE

At Suva
11th April 2008