

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No: HAC002 of 2013

BETWEEN : **ASIVURUSI WAQAVONOVONO**
Appellant

AND : **THE STATE**
Respondent

BEFORE : **HON. MR. JUSTICE MADIGAN**

Counsel : Mr. K. Tunidau for Appellant
Ms J. Prasad for the State

Dates of hearing : 25 February, 21 March 2013
Date of judgment : 28 March 2013

JUDGMENT

- [1] The appellant originally sought to appeal against a 30 month sentence he was given in the Suva Magistrates' Court on the 5th December 2012. He had entered unequivocal pleas of guilty to 22 charges of forgery, uttering and dishonestly obtaining a gain, all contrary to various provisions of the Crimes Decree 2009. Exact details of the charges are irrelevant as can soon be seen.
- [2] At the first hearing of the appeal against sentence, counsel for the State in an exemplary fair and honest submission, told the Court that the appellant had very good cause to appeal conviction because of irregularities that occurred in the proceedings below at Suva. This Court consequently allowed the appellant enlargement of time to file grounds of appeal against conviction and that was heard before me on 21 March 2013. The State, again quite properly, did not seek to oppose the appeal

against conviction but requested that should the appeal be allowed a re-trial be ordered.

[3] The most unfortunate history of proceedings below can be summarized as follows:

- The appellant first appeared in Suva Magistrates' Court on 13 July 2011, charged with 22 various counts of fraud and obtaining a gain. He understood all charges and waiving his right to counsel entered a plea of guilty to all 22 charges. He was remanded on bail.
- On 12 August 2011 a comprehensive set of facts presented to him was admitted and he was convicted by the learned Magistrate of all 22 charges. The appellant then submitted a plea of mitigation. The State was given 2 different dates to make sentencing submissions.
- On 13 October 2011, the record states that the **"State wishes to draw the court's attention to the first charges"** and the Magistrate noted: **"the plea is vacated – as the charge reads to the accused"** and then **"the early guilty plea and convictions is (sic) vacated – awaiting the amendment of the charges."**
- On 19 September, 2012, the appellant then entered pleas of guilty to 22 (presumably new) charges, agreed the facts that had been already admitted and was therefore convicted as charged.
- On the 5th December 2012 he was sentenced again to 22 concurrent terms of 30 months imprisonment.

[4] This very inadequate record of proceeding reveals the lack of power of the Magistrate to "vacate the earlier pleas and convictions" – he being *functus officio* as soon as the convictions are recorded. There is nowhere a record of the amended charges and the facts peculiar to those charges, if they were indeed different. There is no record of why the State wished to

amend the charges, or even what was wrong with the original charges. If the charges were only cosmetically amended and the facts remained the same, then the defence of “*autrefois acquit*” would have been available to the accused below; but we just do not know because the record is grossly deficient.

[5] This Court recognizes the difficulties that keeping a record of proceedings presents. In the absence of a modern recording system, for which Fiji has never had the resources, a trial Court must keep a proper record of proceedings in that Court, for the purposes of appeal. Special attention should be made by Magistrates and High Court Judges to a record of unusual occurrences before their Court such as applications to change plea, applications to amend charges and applications to withdraw charges for example. These are matters that will very likely come to the attention of an appellate court, and that appellate court will want to know **exactly** what happened and what was said by the parties, and/or by the Magistrate or Judge h/self.

[6] In the instant case, the record of the proceedings on 13th October 2013 is decidedly unhelpful. It is not known what the prosecutor said about “the first charges” or even whether he was referring to the first charges of the original set or the first as opposed to the second set of charges.

[7] By section 145(1) of the Criminal Procedure Code,
“145(1): a person who has been tried once by a court of competent jurisdiction for an offence and convicted or acquitted of the offence shall not be liable, while such conviction has not been reversed or set aside, to be tried again on the same facts for the same offence”

There is nothing on record to say what the amended charges were that were put to the accused and consequently it is not possible to determine whether this defence is available to the appellant or not. In any event

“such conviction” can not be “reversed or set aside” because the Magistrate has no power to do so. A Magistrate may set aside a conviction under section 172 if that accused has been convicted in his absence and it is later shown he was absent due to circumstances beyond his control, but there is no other power given to the Magistrate to set aside a conviction.

- [8] The Magistrate was clearly acting *ultra vires* on 13 October 2011 and “amended charges” should never have been brought against the accused.
- [9] The prosecutor (not the prosecutor appearing here) should shoulder some of the blame for this miscarriage of justice. The accused had entered pleas of guilty to 22 charges and had been convicted on all of them. The State then trying to amend the charges (and presenting 22 “new” charges), was acting in abuse of its role in administering justice fairly and in accordance with legislation and precedent.
- [10] In the circumstances, the appeal against conviction is allowed; the convictions set aside and the sentence quashed.
- [11] Counsel for the appellant does not resist the State’s application for trial *de novo*, and I therefore order that this matter be called again before the Resident Magistrate in Suva on Friday 19th April 2013 at 9.15am for re-commencement of proceedings.

Paul K. Madigan
JUDGE

At Suva
27 March 2013