

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Criminal Appeal No. HAA 040 of 2013

FILIPE BABA

v

STATE

Counsel: Mr. S. Valenitabua for the Appellant
Ms A. Vavadakua for the State.

Dates of hearing: 15 November, 6 December 2013
7, 25 February, 13 March, 11 April,
5, 27, 28 May, 10 June, 2, 17 July,
9, 12 September, 20 October,
6, 21 November 10 December 2014,
21 January, 19 February 2015

Date of Judgment: 6 March, 2015

JUDGMENT

1. On the 9 September 2013 in the Magistrates Court at Suva, this Appellant was convicted of one count of rape. He was sentenced on the 26th September, 2013 to 8 years' imprisonment for the offence.
2. The appellant now appeals his conviction and sentence, basing his appeal on 13 grounds.
3. These grounds can be distilled into three clear "fields" of complaint.
 - i) That given the history of proceedings, an application for a **trial de novo** should have been granted to the accused at the time he was making his closing submission.
 - ii) That absent an order for **trial de novo** the Magistrate on his own motion should have stayed proceedings on the basis of delay and abuse of process.
 - iii) The weight of the evidence was insufficient to allow the Magistrate hearing the evidence to find the accused guilty beyond reasonable doubt and then proceed to convict him.
4. Both parties have filed detailed submissions on these grounds as well as submissions on an evidentiary matter earlier decided by Kumararatnam J. (referred to later).

The history of proceedings of this matter:

5. The accused /appellant first appeared in the Magistrates Court in Suva on the 27th October 2008 before RM Rokotinaviti. He

was represented by Mr. T. Fa. On the 5th March 2009, a date set for hearing the Prosecution was not ready to proceed.

6. On the 24th August 2009 before RM Elsie Hudson, the accused appears to have sacked Mr. Fa. The accused was given time to apply to Legal Aid.
7. On the 19th January 2010 Mr. Fa re-appeared when the case was called before RM Kaweendra Nanayakkara. Again the prosecution was not ready to proceed to hearing.
8. A new hearing date was fixed for 20 August 2010. That hearing was vacated because the accused had been remanded for another case.
9. On the 17th June 2011, the case was called before RM N. Ratakele who set a new hearing date for the 8th September 2011. On that day, the State announced that they were not ready to proceed. Mr. Fa appearing complained vehemently about the length of time it had taken for the State to bring their evidence before the Court. Mrs. Ratakele vacated the hearing date, warning the State that on the next occasion if they were not ready, she would consider discharging the accused.
10. The matter was next mentioned before RM Bandara (as he then was) on 29 November 2011. He set the hearing for 25 June 2012. At a PTC on 27 February 2012 Mr. Fa withdrew as Defence Counsel, (he only having been instructed to appear for 12 months).
11. On the 25th June before RM Bandara the accused told the Court that he would be representing himself and when told by the Court of his rights to Counsel, it is recorded that he "waived"

those rights. Finally the first witness (the complainant) was called to give her evidence at 2.45pm on the 25th June 2012. The evidence continued over to the 26th June 2012 and then again on the 28th June 2012 and then on the application of the Prosecution the matter was adjourned twice until 23 July 2012 because her last two witnesses had “gone fishing”.

12. On the 23 July 2012 yet another Magistrate took up the case, RM Mataitini. One of the prosecution witnesses was sick and the hearing was vacated and a new date of 30 July 2012 fixed for hearing. On that date RM Bandara was back to hear the evidence. The defence evidence was heard on that day and on the direction of the Magistrate to be continued on the 7th August 2012. On that date the accused’s witness was not available so the final defence witness was heard before RM Bandara on 21 August 2012.
13. On the 13th November 2012, RM Bandara heard the final evidence being a witness called by the prosecution in rebuttal of the defence case.
14. Written submissions on the evidence were filed in Court by the Prosecution on 6 December 2012.
15. On the 28th February 2013 the accused engaged counsel to prepare his submissions.
16. On the 7th May 2013 the matter was taken over by RM C. Ratekele. The defence Counsel was still not ready with the closing submissions.
17. The submissions by the Defence were filed before RM Somaratne on 7 May 2013 and on 9 August 2013 an application

was made by the accused for a *trial de novo*, the hearing Magistrate (Bandara) having been elevated to the High Court. RM Somaratne refused the Application, he ruling that the evidence had been heard and recorded and that it would be unfair to put the victim through the ordeal again of giving evidence. The learned Magistrate said he would give judgment on the evidence as recorded.

18. Judgment was delivered on the 9th September 2013. Sentencing submissions were called for and sentence delivered on the 26th September 2013.
19. Counsel for the accused filed an appeal against conviction and sentence on the 24th October 2013. He filed an amended appeal with perfected grounds on 7th February 2014.
20. Before the appeal proper could be heard the Appellant filed a Notice of Motion on 28th May 2014 to allow him to be medically examined to rebut the evidence of the complainant that he had implants of foreign objects in his penis.
21. The appeal itself was before Kumararatnam J. and he handed down a ruling on the 12th September 2014 dismissing the application that this "new evidence" would have been available at the time of trial, but the appellant, at that time unrepresented by choice made no mention of it nor did he pursue it in cross-examination of the complainant.
22. The appeal was before Kumararatnam J. for several months while State was preparing submissions on the appeal.
23. That learned Judge now having left the bench, this appeal has now come before me for determination.

The Application for Trial de novo

24. The right to have a **trial de novo** is provided for in section 139 of the Criminal Procedure Decree 2009 which reads:

“139 – (1) Subject to sub-sections (1) and (2) , whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeededby another Magistrate, the second Magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by second magistrate, or the second magistrate may re-summon the witnesses and recommence the proceeding or trial.

(2) In any such trial the accused person may, when the second magistrate commences the proceedings, demand that the witnesses or any of them be re-summonsed or reheard and shall be informed of such right by the second magistrate when he or she commences the proceedings.

(3) The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the magistrate before whom the conviction was had, if it is of the opinion that the accused has been materially prejudiced, and may order a new trial. “.

25. The section quite clearly states the second magistrate **shall** inform the accused person of his right to have any witnesses reheard and it is also quite clear from the record that the “second” magistrate did not do so in this case. This occurred at the time that the accused, by this time being represented, was asking for a trial *de novo*. As Goundar J. said in **Jale Baba** HAC 135.2010:

“The learned Magistrate has discretion to either proceed with the case on the record of the previous Magistrate, or de novo. This discretion must be exercised after weighting (sic) all the relevant factors such as sufficiency of earlier court record and whether the accused is disadvantaged by the fact that the new magistrate had no opportunity to observe the demeanour of the prosecution witnesses when they gave evidence. Of course, no exhaustive list can be produced. The right to a fair trial is the ultimate objective.”

26. Such sentiments may well be relevant on the reading of s.139(1) alone however s139(2) would appear to fetter that discretion when the accused is “demanding” that some witnesses be reheard. The subsection refers to that **demand** as a **right** to be informed to the accused person by the second magistrate. When there is no record of the Magistrate have told the accused of this right then there must be a presumption then that any application for a trial *de novo* be granted. Even if the second magistrate does inform the accused of his right to have witnesses recalled, then it being a **right**, it is a demand that cannot be refused.
27. The discretion can only come into play if the accused is informed and doesn’t make an application or demand to have witnesses recalled, in which case it is a discretionary decision of the second magistrate on his own motion whether to act on the record or hear the trial *de novo*.
28. It would appear then that on a reading of s.139 in its entirety, an application for a trial *de novo* in the Magistrates Court can never be refused.

29. This ground of appeal must succeed and the conviction in the Court below is quashed and a new trial is ordered.

The Application for Stay of Proceedings.

30. There can be no doubt that this Court has the inherent jurisdiction to stay proceedings below on the basis either of inordinate delay or of abuse of process. The law on delay is well settled. It is a power of this court that must be exercised only in the most exceptional circumstances and only if there is no other remedy available that would alleviate any prejudice caused to the accused by such delay.
31. It is accepted that the very unfortunate progress of this matter occasioned a delay to the proceedings, but these proceedings are now at an end, save as to the outcome of this appeal. The delay was systemic and as much the fault of the accused as it was of the State.
32. The accused was representing himself by choice, and the fact that he did not make a stay application at any stage of the trial becomes academic. It is certainly not a matter for one of the ten Magistrates dealing with the case to grant a stay of proceedings on his or her own motion.
33. This ground of appeal is frivolous and it is dismissed.

The Evidence was Insufficient to Prove the Case.

34. Present counsel for the accused submits that in the trial below the identification evidence was inadequate and the trial magistrate failed to direct himself properly on the import of circumstantial evidence and also on the burden of proof.

35. Although the grounds of appeal under this heading might be arguable, it is the view of this Court that an experienced Magistrate does not have to be seen always to remind himself or herself of well-known and obvious principles of law applicable to judgments such as a need to find a case proved beyond reasonable doubt.
36. It is also only in exceptional cases that an appellate court would re-visit findings of fact in a court below.
37. However, once more these grounds become superfluous and academic given the orders about to be made by this Court.

Orders.

38. 1. The appeal is allowed and the conviction quashed.
2. The sentence is set aside.
3. A trial *de novo* is ordered and the accused is to appear in the Suva Magistrates Court on Thursday 12th March 2015.



At Suva
6 March 2015

P. Madigan
Judge