IN THE HIGH COURT OF FIJI
AT LAUTOKA
CRIMINAL JURISDICTION

CRIMINAL CASE: HAA 14 OF 2014

BETWEEN : ARTI ASHNA DEVI

APPELLANT

AND : THE STATE

RESPONDENT

Counsel : Mr. Nazeem Sahu Khan for the Appellant
Ms. L. Latu for the Respondent

Date of Judgment : 4th of January, 2017

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the Judgment delivered by the learned Magistrate of Lautoka on the 29th of August 2016 on the following grounds *inter alia;*

   i) *THAT Learned Magistrate had erred in law by shifting the burden of proof to the Accused when he held in paragraphs 32 of the Judgment that:*

"The Interim order was with the Accused and there was no evidence addressed in Court if the order was given to another person before the execution."

ii) THAT the Learned Magistrate erred in not directing himself that the falsity of the document should have been proved beyond reasonable doubt for Count 1.

iii) THAT the Learned Magistrate erred in law and in fact in misdirecting himself or not adequately directing himself on the law of circumstantial evidence.

iv) THAT the Learned Magistrate erred in not finding that the absence of the production of the original orders was fatal to the prosecution case.

v) THAT the Learned Magistrate erred in law and in fact by concluding that the Accused had dishonestly falsified the document when he held that:

"The interim order was with the Accused and there was no evidence addressed in Court if the order was given to another person before the execution." The Accused was aware of the 4 orders issued by the court and the 5th order that was inserted in the second page".

"There is circumstantial evidence to link the accused in the commission of the crime. She was the applicant in the Domestic Violence Restraining Order and there was no order for the seizure of the vehicle when it was issued: when there was no documentary evidence adduced by the prosecution and/ or the original order tendered for the Court to confirm the same and when any evidence that was adduced was unsafe and hearsay and inadmissible.

"She handed over the4 interim DVRO to PW3 for execution and she knew that the fifth order is not part of the order in the DVRO. She intentionally allows for the execution of the DVRO and she knew that the fifth order was falsified by her to obtain vehicle registration number FD 782 which is owned by PW2" when there was no real evidence of this.

vi) THAT the Learned Magistrate erred in law and in fact by concluding that the Accused had dishonestly falsified the document when there was no evidence by the Prosecution that the Accused ha in fact falsified the document in question.

vii) THAT the Learned Magistrate erred in law and in fact by holding that the accused was aware of the 4 orders issued by the court and the 5th order that was inserted in the second page when there was no such evidence adduced by the prosecution.

viii) THAT the Learned trial Magistrate erred in law and in fact in finding the Appellant guilty of count 2 when there was no evidence to prove a vital element of the offence namely ownership of the vehicle.

ix) THAT the Learned Magistrate erred in not directing himself as to what was in the law the false pretence for the second count.

x) THAT the Learned Magistrate erred in law and in fact when he held that:

"The acceptance on her part in the seizure of the vehicle had confirmed her intention to dishonestly deprive the owner of the vehicle that is PW2"

xi) THAT the Learned Magistrate's erred in law and fact when he held that:

"There was a clear evidence that the Domestic Violence Restraining order had been altered and was executed in the presence of the accused"

When there was no such evidence adduced by the prosecution and further no evidence that it was in fact the accused that had altered the Order.

xii) THAT the Learned Magistrate had erred in law and in fact when he held that the prosecution had proved beyond reasonable doubt that she had obtained property by deception when according to the evidence adduced the Accused could not possibly be convicted of the alleged offence and in all the circumstances of the case.

xiii) THAT the Learned Magistrate's erred in law and in fact when he held that there was clear evidence that the Accused was with a falsified document as the fifth order was not part of the document and was in a normal bond paper when there was no documentary evidence and/or admissible evidence that it was in fact not part of the domestic violence Restraining Order at the first instance.

xiv) THAT the decision of the Learned Magistrate was unreasonable in all the circumstances of the case.

xv) THAT the decision of the Learned Magistrate cannot be supported having regard to the evidence in all the circumstances of the case.

xvi) THAT the Learned Magistrate erred in law in not adequately/sufficient/referring/directing/analyzing the evidence against the Appellant and as such the verdict is unsafe and unsatisfactory.

xvii) THAT the Learned Trial Judge erred in law and in fact in taking irrelevant matters into consideration when sentencing the Appellant and not taking into relevant consideration.

xviii) THAT the Appellant reserve their right and/or file further grounds of Appeal upon receipt of the Court records in this matter.

2. Pursuant to the service of the Petition of Appeal, the Appellant and the Respondent appeared in court on the 14th of November 2016. The court had to first deal with the correctness of the two orders made by the learned Magistrate in deferring the pronouncement of the sentence of the substantive matter and the granting the Appellant bail. Having heard the submissions made by the learned counsel for the Appellant and the Respondent, I made my decision on that issue on the 25th of November 2016.

3. I then invited the learned counsel for the Appellant and the Respondent to make submissions as to whether the learned Magistrate has conducted a re-trial as ordered by the High Court in its judgment dated 11th of December 2014. Both of the counsels consented that the court must determine this issue exercising its revisionary power under Section 260 and 262 of the Criminal Procedure Decree before it proceeds to determine the main grounds of appeal. I accordingly deliver my ruling as follows.

Background & Analysis

4. The Appellant was initially charged in the Magistrates court of Ba for one count of False Statement on Oath, contrary to Section 177 (a) of the Crimes Decree, one count of Forgery, contrary to Section 156 (1) (a) of the Crimes Decree, one count

of Using Forged Document, contrary to Section 157 (1) (b) of the Crimes Decree and one count of Obtaining Property by Deception, contrary to Section 317 (1) of the Crimes Decree.

5. On 3rd of May 2012, the Prosecution amended the above charges to one count of Falsification of a Document, contrary to Section 160 (1) (a), (b) (i) and (c) (i) of the Crimes Decree and one count of Obtaining Property by Deception Contrary to Section 317 (1) of the Crimes Decree.

6. The Appellant pleaded not guilty for the above two counts. Therefore, the matter had been proceeded for hearing. Having heard the evidence adduced by the prosecution, the learned Magistrate had held that the prosecution has failed to make a sufficient case against the Appellant to make a defence. Accordingly, the learned Magistrate had dismissed the charges and acquitted the Appellant pursuant to Section 178 of the Criminal Procedure Decree.

7. The Prosecution appealed to the High Court against the said ruling of the learned Magistrate. Having heard the submissions made by the parties, Hon Justice De Silva in his judgment dated 11th of December 2014 had allowed the appeal and ordered for a re-trial before another magistrate. In his judgment, Justice De Silva concluded that;

> *"Therefore, there is a material irregularity in the trial proceedings and a miscarriage of justice.*
>
> *There is merit in the first ground of appeal and it succeeds.*

The second and third grounds of appeal are on the evidence adduced at the trail. It is not proper for this court to make any determination on the evidence adduced in the trail so far as it will be binding on the learned Magistrate who will be re-hearing this case.

Appeal is allowed. Order of acquittal set a side. A re-trial is ordered. The case to be mentioned before the Chief Magistrate on 12.1.2015 for nomination of another Magistrate to hear and conclude this case without delay correctness of the procedure adopted by the learned Magistrate"

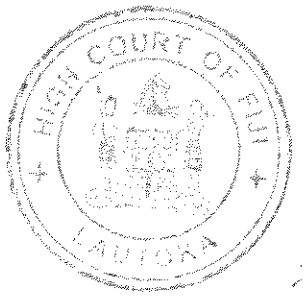
8. The matter was then listed before the Magistrate of Lautoka on the 10th of March 2015. The learned Magistrate instead of having a re-trial, had called the defence case. The Appellant had neither given evidence on oath nor called any witness for her defence. Thereafter, the matter had been adjourned till 17th of April 2015 for the judgment. Subsequent to several adjournments, the learned Magistrate had delivered his judgment on the 29th of August 2016, finding the Appellant guilty for the two counts as charged. On the 28th of December 2016, the Appellant was sentenced for 39 months' of imprisonment for the above mentioned two counts.

9. Justice De Silva in his Judgment has specifically ordered a re-trial and then has directed the Chief Magistrate to nominate another magistrate to hear and conclude the case without delay. Instead of conducting a re-trial, the learned Magistrate has continued the proceedings that has already been determined by the High Court as irregular and miscarriage of justice. Hence, the proceedings that took place before the learned Magistrate of Lautoka is materially irregular

and wrong in principle. Accordingly, I find the conviction and the subsequent sentence delivered by the learned Magistrate are wrong and irregular.

10. In view of the above findings, I set aside the conviction dated 29th of August 2016 and quash the sentence dated 28th of December 2016. I order a re-trial as per the judgment of Justice De Silva dated 11th of December 2014. Furthermore, I direct the Chief Magistrate to allocate this matter before another Magistrate for the re-hearing.

11. Thirty (30) days to appeal to the Fiji Court of Appeal.



R. D. R. Thushara Rajasinghe

Judge

At Lautoka

4th of January, 2017

Solicitors : Nazeem Lawyers

Office of the Director of Public Prosecutions,