IN THE HIGH COURT OF FIJI

AT LAUTOKA

APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO: HAA 37 OF 2018

BA CRIMINAL CASE NO: 441 OF 2016

BETWEEN	:	SAIRUSI TULAVA
		Appellant
AND	:	STATE
		Respondent
Counsel	:	Appellant in Person
		Ms. R. Uce for Respondent
Date of Hearing	:	11 October 2018
Date of Judgment	:	29 October 2018

JUDGMENT

1. This timely appeal has been filed by the Appellant against his conviction and sentence recorded by the Learned Magistrate at Ba in criminal case No. 441 of 2016.

2. The Appellant was charged with one count of Criminal Intimidation under Section 375 (1) (a) (iv) of the Crimes Act 2009.

3. On the 8th March, 2017, the Appellant pleaded 'not guilty' to the charge when he was not being represented by a counsel. Disclosures were served after the plea was taken and, on 4th October, 2017, the Learned Magistrate fixed the matter for hearing on 30th May, 2018.

4. The Appellant was present when the matter was fixed for trial.

5. On 30th May, 2018, the Appellant failed to appear in Court and the Learned Magistrate, having issued a bench warrant, proceeded to trial *in absenta*. Upon conclusion of trial, the Learned Magistrate convicted the Appellant and fixed the matter for sentence on 6th June, 2018.

6. The Appellant appeared in court when he was sentenced on 6th June 2018 to 13 months and 13 days imprisonment. The Learned Magistrate ordered the sentence to run consecutive to Appellant's existing sentence in CF 137/16. The total imprisonment period imposed is 18 months and 17 days' imprisonment.

7. The State Counsel has filed a helpful written submission and concedes that the Appellant was not afforded a fair trial in his absence at court below. The Appellant also filed his written submission albeit not fully addressing the issues he has raised in his appeal. I have considered all the submissions filed in court.

GROUNDS OF APPEAL

8. The Appellant filed following grounds of appeal against conviction and sentence: (A verbatim reproduction of the grounds of appeal filed by the Appellant in person)

I. That the Learned Trial Magistrate erred in law when he granted the application for Prosecution to proceed the trial in absent it's a miscarriage of justice;

II. That there is a 100% chances that the conviction of the appellant will surely be set aside, acquitted or quashed on the reason that the appellant has chances to win his case and ready to go for a trial but the Learned Trial Magistrate failed to consider the fact and proceed the trial in absence of the accused and found him guilty. That's the erred of law and miscarriage of justice;

III. That the Learned Trial Magistrate erred in law when he failed to taking attention in mitigating factors which that the appellant right under constitution where the Learned Trial Magistrate has been breached the appellant right and convicted him which is wrong in all the circumstances of the case;

IV. That the Learned Trial Magistrate erred in law when he gives the consecutively sentence which without any reason at a miscarriage of justice;

V. That the Learned Trial Magistrate erred in law when he failed to give the concurrently sentence it a interest of justice;

VI. That the sentence is imposed on me is manifestly harsh and excessive;

VII. That the Learned Trial Magistrate erred in law that he mistook the facts and imposed the sentence which is wrong in principle in all the circumstances of the case;

VIII. That in the criminal case no. 137 of 2016, the Learned Trial Magistrate failed to consider that the accused and the victim was reconciled;

IX. That the Learned Trial Magistrate erred in law when he failed to taking the reconciliation when the complainant and the appellant was reconciled and the complainant willing to withdraw the charged against the appellant that a interest of justice;

X. That the fact is that the Learned Trial Magistrate erred in law and never give the appellant's right in the trial Court and proceed the trial in absence and failed to consider the facts of the case both side and convicted the appellant which is miscarriage of justice.

ANALYSIS

Appeal against Conviction

9. It appears that out of 10 grounds filed by the Appellant, only grounds 1, 2 and 10 raise issues in relation to appeal against conviction. All these grounds can be considered together because they challenge Learned Magistrate's decision to proceed to try the Appellant *in absentia* and violation of his rights to a fair trial.

10. The Appellant submits that the Learned Magistrate fell into error when he allowed the application of the prosecution to try the Appellant *in absentia.*

11. There is no indication in the Court Record that the Prosecution had made an application to precede to trial *in absentia.* It appears that the Learned Magistrate acted on his own motion. Therefore there is no basis for this complaint. The

question is whether the Learned Magistrate fell into error when he decided to proceed to try the Appellant in his absence.

12. Section 15(1) of the Constitution of the Republic of Fiji guarantees the right to a fair trial to every person charged with an offence.

13. Section 14 of the Constitution sets out the rights of an accused person charged with an offence and guarantees the right to call witnesses, present evidence, and to challenge evidence presented against him or her [Section 14 (2) *(l)*] and to be present when being tried [14(2) (h)].

14. Proviso to Section 14(2) (h) allows a court to proceed with the trial in the absence of the accused *if the court is satisfied that the person has been served with a summons or similar process requiring his or her attendance at the trial, and has chosen not to attend.*

15. Even before the promulgation of the present Constitution, Section 171 (1) of the Criminal Procedure Act 2009 invested magistrates with discretion to proceed with a hearing *in absentia*:

> *"If at the time or place to which the hearing or further hearing is adjourned —(a) the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present;"*

16. The offence of Criminal Intimidation is not an indictable offence and therefore the Learned Magistrate under Section 171(1) has discretion to proceed to trial *in absentia.*

17. However, Section 171 (1) of the Criminal Procedure Act should be read in the spirit of the constitutional provision [14 (2) (h)]. Accordingly, two requirements must be satisfied before an accused person can be tried *in absentia.* Firstly the court must be satisfied that the accused has been served *with a summons or similar process requiring his attendance at the trial.* Secondly, the court must be satisfied that the accused had *chosen not to attend.*

18. The Appellant was present when the case was fixed for trial and therefore he is deemed to have been served *with a summons or similar process requiring his attendance at the trial.*

19. When the word *'satisfy'* comes into play, the law requires the court to be satisfied as to the fact concerned on the basis of evidence. In this case, the court should have been satisfied that the accused had chosen not to attend court. The court must have some evidence (police report /affidavit from a warrant officer) before it so that the court could be satisfied that the accused had deliberately chosen not to attend court. There is none in this case. The Learned Magistrate decided on his own motion to proceed to trial *in absentia* without any application from the prosecution and evidence that the accused had chosen not to attend. The trial conducted in the absence of the Appellant has no legal validity and therefore the judgment and sentence ought to be set aside.

20. The Appellant submits that he mixed up the dates and when he attended court on the 31st May, 2018 (on following day), he was taken by surprise to learn that his case was not listed. When he went to the Ba Magistrates Court's Registry for inquiry, he was informed that his case had been called on the previous day. (30th

May, 2018). Then he had gone to the Prosecutor's office to get his bench warrant cancelled. However, he was locked up in the cell and was charged for absconding bail and produced before Lautoka Magistrates Court on 1st June, 2018.

21. There is no evidence to support the claim of the Appellant. However, the Counsel for State in her submission has not challenged the version of the Appellant. The Appellant further submits that he had an arguable defence if he were given an opportunity of being heard and defend.

22. The Court Record of magistracy shows that the complainant and his father had given evidence at trial. Complainant had gone to Appellant's house with two others to get a 'FEA pole' which he had allegedly given to the Appellant during hurricane. The Appellant had refused to give the pole back. The incident had occurred in Appellant's compound. The Appellant says that he was intimidated and due to fear he had to display a knife in his self-defence.

23. It appears that there had been a reasonable basis for an arguable defence if he were given an opportunity to participate in the trial and defend. He could have made an application under Section 172 of the Criminal Procedure Act to get his conviction set aside by satisfying the two tests in the section that (1) the absence was from causes over which he had no control and (ii) there is an arguable defence on merits, if he was made aware of the legal position.

24. There is no indication in the Court Record that the unrepresented Appellant was given an opportunity when he appeared in court before the sentence to explain the reason/s as to why he failed to attend court and whether he had an arguable defence.

25. It appears that even if it is held that the trial *in absentia* had proceeded on a valid legal basis, the judgment entered cannot stand because the Learned Magistrate had failed to ensure fair trial guarantees at the trial held in the absence of the Appellant.

26. In ***Lekima Rokolisio v State*** Criminal Appeal No. HAA 024 of 2017, the Court made the following observation: -

> *"When conducting trial in absentia the court must exercise caution reason being such a trial will have to be fair to the absent accused as the circumstances permit resulting in a just outcome. The rights of the absent accused had to be safeguarded so that the principles of fair trial are not compromised."*

27. It is crucial therefore to consider whether the Learned Magistrate had exercised caution in conducting the trial in the absence of the Appellant.

28. On page 14 of the Court Record, it is noted that the Prosecution had called PC Roneel as their third witness and had tendered the Appellant's record of interview as a prosecution's exhibit. This implies that the Prosecution was relying on the admissions recorded at the caution interview to prove the charge against the Appellant.

29. At the close of the Prosecution's case, the Learned Magistrate made the following orders:-

> *"I find on basis of evidence adduced that accused was not forced, threatened or assaulted to admit the offending. I find that accused gave his statement freely. I rule interview of accused admissible as evidence."*

30. Upon perusal of the Court Record, it can be noted that at no stage of the proceeding before the scheduled trial date did the Prosecution advise the Court that it was relying on the caution interview as part of the Prosecution's case. Hence the court had not conducted a *voir dire* proceeding before the trial proper.

31. In ***Rokonabete v The State*** (Criminal Appeal No. AAU0048 of 2005 (14 July 2016), the Court of Appeal has given the following guideline where his Lordship at paragraph 24 and 25 observed:-

> *"Whenever the court is advised that there is challenge to the confession, it must hold a trial within a trial on the issue of admissibility unless counsel for the defence specifically declines such a hearing. When the accused is not represented, a trial within a trial must always be held. At the conclusion of the trial within a trial, a ruling must be given before the principal trial proceeds further. Where the confession is so crucial to the prosecution case that its exclusion will result in there being no case to answer, the trial within a trial should be held at the outset of the trial. In other cases, the court may decide to wait until the evidence of the disputed confession is to be led.*

32. In light of the above, it is obvious that the Learned Magistrate had failed to exercise caution when he relied upon a confession not tested for its admissibility at a *vior dire* hearing. This is a fatal irregularity in a case where the accused is unrepresented and the trial is conducted in his absence.

33. The conviction recorded by the Learned Magistrate is not safe. There are merits to the grounds advanced against the conviction. The outcome of the conviction appeal will invariably have a bearing on the grounds of appeal against sentence. Therefore, both conviction and sentence ought to be set aside.

34. It is noted that the Appellant had sought a re-trial in this matter. The Court should therefore consider whether a re-trial should be ordered in this case.

35. Section 256 (2) of the Criminal Procedure Act 2009 outlines the remedies that can be granted by the High Court sitting as an appellate court which include an order for a re-trial.

36. In ***Josateki Cama and others v The State*** **(Criminal Appeal No. AAU 61 of 2011),** the Court observed:-

> *"It has been held that the exercise of the discretion to order a retrial requires the consideration of several factors, some of which may favour a retrial and some against it...*
>
> *Public interest to prosecute offenders without terminating criminal proceedings due to a technical error by the trial judge and the availability of sufficient evidence against the accused are factors that could be considered in favour of an order for a new trial. Considerable delay between the date of offence and the new trial and the prejudice caused to the appellant due to non-availability of evidence at the new trial may favour an acquittal of the appellant."*

37. It is noted that the Prosecution is relying on the direct evidence of the complainant and his father who had been present at the time of the alleged offending and also, the confession of the Appellant. The allegation in this case occurred in 2016. When the matter had proceeded to trial *in absentia* on the 30th of May, 2018. The witnesses were available.

38. Availability of the prosecution witnesses and the interest of justice outweigh the prejudicial impact on the Appellant if an order for a re-trial is granted.

CONCLUSION

39. There is substance in grounds raised by the Appellant against his conviction and Sentence.

Following Orders are made

The conviction and sentence of the Learned Magistrate at Ba are set aside.

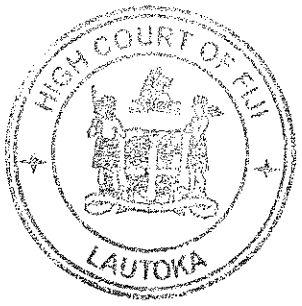
A retrial is ordered before a different Magistrate.

The Learned Magistrate is directed to give priority to this case and conclude the trial within reasonable time.

Accused is ordered to appear in Magistrates Court at Ba on 13th of November, 2018.

Accused is enlarged on bail of $1,000.00 FJD with two sureties.

40. 30 days to appeal.



Aruna Aluthge

Judge

At Lautoka

29th October, 2018

Solicitors: **Appellant in Person**

Office of the Director of Public Prosecution for Respondent