

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: HAA 036 OF 2017

BETWEEN: **JENA NAREN AUTAR**

Appellant

A N D: **THE STATE**

Respondent

Counsel: Mr. A. K. Singh for Appellant
 Mr T. Tuenuku for Respondent

Date of Hearing: 23rd March 2018

Judgment: 30th April 2018

JUDGMENT

Introduction

1. The Appellant files this Petition of Appeal against the order made by the learned Magistrate of Nausori on the 15th of September 2017, awarding a cost of \$500 against the Appellant, on the following grounds, *inter alia*:

- i) *That the learned Magistrate erred in law awarding cost against the Appellant despite the direction from by the High Court Judge, Justice Hamza to have the Nausori matter adjourned.*
- ii) *That the learned Magistrate erred in law and facts when she failed to allow Appellant through his Solicitors to show cause as to why cost should not be awarded.*

2. Both the parties were directed to file their respective written submissions, which they filed as per the direction. The learned counsel for the Respondent conceded in his written submission that the learned Magistrate has made an error by not allowing the Appellant to show cause why the order of cost should not be awarded against him. The matter was set down for hearing on the 23rd of March 2018, where the learned Counsel for the Appellant and the Respondent made their respective oral submissions. With the leave of the court, the learned Counsel for the Appellant then filed an affidavit stating the grounds that prevented him appearing in Magistrate's Court on the 15th of September 2017.
3. Having carefully considered the record of the proceedings in the Magistrate's Court, the respective written and oral submissions of the counsel, and the affidavit of the Appellant, I now proceed to pronounce my judgment as follows.

Background

4. The Appellant has been charged in the Magistrate's Court in Nausori for one count of Obtaining Financial Advantage by Deception, contrary to Section 318 of the Crimes Act. He was first produced in the Magistrate's Court on the 9th of August 2014. Subsequent to several adjournments, the hearing was commenced on the 13th of October 2016. The matter was then adjourned till 27th of January 2017, for the ruling on no case to answer. Subsequent to the ruling of no case to answer, the matter was adjourned till 15th of September 2017 for the continuation of the hearing. On the 15th of September 2017, the learned Counsel for the Appellant was not present as he was engaged in a trial in the High Court of Suva. Actually, the hearing in the High Court was originally fixed for a week, starting from 4th of September 2017. However, the said hearing had continued beyond the scheduled time. Having realized that the trial in the High Court was heading beyond 15th of September 2017, the learned Counsel has sent a letter to the Senior Court Officer of the Nausori Magistrate's Court, dated 14th of September 2017, informing that he would appear in this matter and seek for adjournment as he has to continue the trial in the High Court. The said letter was copied to the Director of Public Prosecution as well.

5. The learned Counsel for the Appellant had to continue the hearing in the High Court on the 15th of September 2017. Therefore, he had instructed another lawyer, Mr. Nawaikula to appear in this matter and seek an adjournment on the ground that he is still engaged in the trial in the High Court. The learned Magistrate, having heard the application made by Mr. Nawaikula and the objection of the Prosecution, vacated the hearing, but awarded a cost of \$500 against the Appellant on the ground that he is causing delay in finalization of the matter.

The Law and Analysis

6. Section 150 (4) of the Criminal Procedure Act states that:

"A judge or magistrate may make any other order as to costs as may be required in the circumstances to —

- i) defray the costs incurred by any party as a result of an adjournment sought by another party;*
- ii) recompense any party for any costs arising from any conduct by any other party which delays a trial or requires the expenditure of monies as a result of the conduct of that party during a trial;*
- iii) penalise a lawyer for any improper action during a trial, and in such a case the order may be that the lawyer pay the costs personally; and*
- iv) otherwise meet the interests of justice in any case.*

7. In this matter, the learned Magistrate has awarded the cost against the Appellant on the basis of wastage of cost incurred by the State. However, the prosecution has not made an application for cost for the wastage of cost incurred by them. The prosecution has objected to the adjournment on the ground that the outcome of this criminal proceeding would materially important to a civil matter.

8. According to the record of the proceedings, it appears that the learned Magistrate has received the letter sent by the learned Counsel of the Appellant on the 14th of September 2017, informing that he would only appear to seek for an adjournment on the ground that he is still engaged in the trial in the High Court. The learned Magistrate has questioned why the learned Counsel for the appellant was not in the court, stating that the learned Counsel has misinformed the court in that letter. The learned Magistrate then awarded the cost against the Appellant.
9. Order of cost under Section 150 (4) of the Criminal Procedure Act obviously has a punitive impact on the party against whom the order is made. Therefore, it is important for the party concerned to be given an opportunity to show cause why such order should not be awarded. Justice Perera in Vere v State [2017] FJHC 636; HAA17.2017 (30 August 2017) has discussed the importance of providing the party an opportunity to show cause before making an order of cost under Section 150 (4) of the Criminal Procedure Act, where his lordship has found that:

"The State submits that giving an opportunity to be heard on the awarding of costs although desirable is not mandatory. I am unable to agree with this contention. Audi alteram partem or "listen to the other side" is a fundamental principle of natural justice. In this case, the Learned Magistrate should have given an opportunity to the appellant to show cause before making the order of costs against him."

10. I find the failure of the learned Magistrate, to give an opportunity to the Appellant to show cause, before the order of cost was made, has denied the procedural fairness for the Appellant.
11. I accordingly allow this appeal and make the following orders that:
- i) The Appeal is allowed,
 - ii) The order made by the learned Magistrate on 15th of September 2017, awarding cost of \$500 against the Appellant is set aside.

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




R.D.R.T. Rajasinghe
Judge

At Suva
30th April 2018

Solicitors

Messrs. A. K. Singh Law for the Appellant.
Office of the Director of Public Prosecutions for the Respondent.