

IN THE HIGH COURT OF FIJI

AT LAUTOKA

IN THE WESTERN DIVISION

APPELLATE JURISDICTION

CRIMINAL APPEAL NO.: 111 OF 2017

BETWEEN: NADI TOWN COUNCIL

APPELLANT

AND: RENUKA ROSHNI CHANDRA

RESPONDENT

Counsel: A. Turuva for Appellant

J. Singh for Respondent

Date of Hearing : 10th May, 2018

Date of Judgment : 13th June, 2018

JUDGMENT

1. This is an appeal filed against sentence imposed by the Learned Magistrate at Nadi on 18th September, 2017.

2. On 10th July, 2017, the Respondent was convicted on following counts:

FIRST COUNT

Statement of Offence

Constructing an Extension to the Existing Building without Obtaining Permit Authorizing in Writing such Construction: Contrary to Section 15 Part 3 of the Public Health Act (Building) Regulations Cap 111 and Section 128 Part XV of Public Health Act Cap 111.

Particulars of Offence

RENUKA ROSHNI CHANDRA being the owner of land comprised in Lot 18, DP 5848, Vuci Crescent, Waqadra, within Nadi Town Council boundary in the Western Division did on or before the 24th day of August 2011 construct an extension to the existing building without first obtaining from Nadi Town Council a permit authorizing in writing such construction.

SECOND COUNT

Statement of Offence

Failure to Comply with the Stop Work Notice issued by Nadi Town Council: Contrary to Section 11 (1) of the Public Health Act (Building) Regulations Cap 111 and Section 141 of the Public Health Act Cap 111 and Section 56 (1) of the Sentencing and Penalties Decree 2009.

Particulars of Offence

RENUKA ROSHNI CHANDRA 24th day of August 2011 failed to comply with the Stop Work Notice issued by Nadi Town Council in which was forthwith required to stop the construction work.

3. The Learned Magistrate imposed a fine of \$ 200 on count one and \$ 10 on count two payable within 3 days in default of which 21days' imprisonment.
4. Being aggrieved by the said sentence, the Appellant (the Council) filed this appeal on following grounds:
 - i. The Learned Magistrate erred in his sentencing exercise when he failed to impose further fine or orders in relation to the continuing offence, as such, the sentencing exercise miscarried, causing a substantial miscarriage of Justice.
 - ii. The Learned Magistrate erred in his sentencing exercise when imposing a penalty for that count in that he failed to consider Section 56 (1) of the Sentencing and Penalties Act 2009, as such, the sentencing exercise miscarried, causing a substantial miscarriage of Justice.
 - iii. That in relation to both counts, the Learned Magistrate erred by not imposing an appropriate sentence for the continuing nature of the offence, as the mischief was not only the breach but also the continuing breach, that caused the sentencing exercise to miscarry.

The Facts

5. The Appellant is a statutory body responsible for the governance of the affairs of Nadi Town. The Appellant is also responsible for regulating all buildings within its town limits.
6. The Respondent is a resident of the town of Nadi. She constructed an illegal extension to an existing building without first obtaining from Nadi Town Council a permit authorizing in writing, for such an extension. The Respondent constructed a flat as part of the unauthorized construction.
7. The Council Building Inspector while carrying out an inspection discovered the illegal structure and the breach of the appropriate regulations. The Respondent was given Notice to stop work (P121) on or about 24th of August 2011.
8. The Respondent failed to abide by the Notice. The Council then laid three chargers against the Respondent. The third count was dismissed by the Learned Magistrate by his Judgment dated 10th July, 2017.

Analysis

9. On the first count, the Respondent was convicted pursuant to Section 15 part III of Building Regulation Cap. 111 and Section 128 Regulation Part XV of the Public Health Act (Cap 111).

10. This section prevents and prohibits any construction, removal, re-erection, restoration, alteration or repairing a building, or commencement or causing or permitting the commencement of any of these works, without first obtaining from local authority a permit authorizing in writing. If a prohibited act is done without first obtaining the written permit, it is a breach of this section.
11. There is no specific penalty for the above breach of Section 15. Therefore, the Learned Magistrate who convicted the Respondent applied the general penalty under Section 128 Part XV of the Public Health Act Cap 111 which deals with breaches of Regulations and By-laws.
12. The penal provision (Section 128) reads as follows;

“Except in cases otherwise specially provided for by this Act, by-laws or regulations made under this Act may provide for the imposition on offenders against the same of fines not exceeding two hundred dollars for each offence and in the case of a continuing offence a further fine not exceeding four dollars for each day during which the offence continues after a conviction thereunder”.

13. The second count arises out of failure to stop work after the ‘Stop Work Notice’ was issued by the Building Surveyor. The Regulation 11 (1) of Part 2 of Public Health (Building) Regulations reads:

“Powers of the building surveyor

The building surveyor may, if satisfied that any building is being erected in substantial contravention of these Regulations, by notice in writing given to the

builder, require the builder to stop building operations to such extent as the building surveyor may think necessary in each case until the building surveyor is satisfied that the builder can and will comply with the provisions of these Regulations, and every person failing to comply with or observe any such notice shall be guilty of an offence against these Regulations. Immediately the building surveyor takes action to stop work as indicated hereunder he shall report that fact to the local authority with full particulars of the circumstances and with his reasons for stopping the work”.

14. Section 141 of Public Health Act provides for the penalty for any person who fails to comply with the ‘stop work notice’. The section reads;

“Any person who contravenes or fails to comply with any provisions of this Act or regulations, by-law, order or notice made or issued thereunder shall be guilty of an offence and shall, where no specific penalty is provided, be liable to a fine not exceeding ten dollars or in the case of a continuing offence to a fine not exceeding four dollars a day for each day during which the offence continues after conviction and in default of payment of any penalty under this Section to imprisonment for any period not exceeding one month.

15. The Appellant contends that Learned Magistrate failed to consider Section 56 (1) of Sentencing and Penalties Act 2009 (SPA) which provides for enhanced fines and Section 56 (2) which provides penalties for continuing offences.
16. Section 56 (1) (a) of the SPA provides for the amended fine in place of the original fine in the Regulation. The section states:

“In all Acts, Decrees, Promulgations and Regulations now or at any time in the future in force in Fiji —

a reference to the imposition of a fine or maximum fine of less than \$100 shall be deemed to impose a fine or maximum fine, as the case may be, of \$100, unless otherwise specified in Regulations made under section 58;

a reference to a fines expressed as dollars shall become a reference to an amount of penalty units being 1 penalty unit for each \$100 of the fine, and one penalty unit for a remaining amount of a fine that is less than \$100 —and all Acts, Decrees, Promulgations and Regulations are amended accordingly”.

17. Section 56 (2) provides for fines applicable to continuing offences. The section reads as follows:

“Sub-section (1) does not apply to fines that are expressed to be for continuing offences, which shall be set at one-half of the substantive fine for each day that an offence continues, and these shall be expressed as penalty units in accordance with sub-section (1).”

18. It appears that the 1st and 3rd grounds of appeal are based on Section 56(2) and the 2nd ground is based on Section 56 (1) SPA.

19. The Appellant submits that the facts of the case established that the mischief is not only the building of the structure but also the continuing existence of the breach; the mere imposition of the fine is not sufficient to cure the mischief; the Council is created by Parliament to manage the affairs of the town and if

buildings are built without license and mere fine can cure the breach then chaos will result. Therefore the Appellant contends that the sentence must reflect the end of the continuing offence, so that the offender would take measures to remedy the breach.

20. Plain reading of the Section 15 part III of the Building Regulation Cap 111 provides that if the prohibited act, in this case the construction of an extension to the existing building without obtaining permit authorizing in writing, is committed, it is a breach of the regulation. Breach of this Regulation attracts a general penalty under Section 128 Part XV of the Public Health Act Cap 111. It cannot be said that this section does contemplate a continuing offence. Even the charge (count one) does not refer to Section 56 (2) of the SPA which deals with continuing offences.
21. The Counsel for Appellant has cited *Suva City Council v Vimla Wati* [2011] FJHC 338, HAA 065/2010 to support his argument in respect of continuing offence. However, *Vimla Wati* (supra) case is clearly distinguishable from the present case. In that case, the High Court imposed a continuing penalty under Section 137(1) of the Towns (Building) Regulation made pursuant to Public Health Act, (Cap 111) which reads as follows:

“any person who erects a building in contravention of these Regulations shall be liable to a fine not exceeding \$ 100.00 and also a daily fine not exceeding \$ 10.00 per day for continuation of the offence” (emphasis added)

22. In view of the phraseology of the section, the His Lordship in *Vimla Wati* (supra) observed *"I am of the view that there is no discretion given to the Magistrate to refrain from imposing a continuation fine. This Court finds this point of sentencing is inappropriate and also inconsistent..."*
23. Conversely, Regulation 15 under which the Respondent was charged (on count one) does not contemplate a continuing offence and Section 128 Part XV of the Public Health Act Cap 111 does not provide for such a mandatory requirement to impose a daily fine in addition to the substantive fine imposed for the breach of the Regulation.
24. Therefore, there is no basis for the argument advanced in respect of the 1st count.
25. However, it seems that the argument advanced by the Appellant is valid in respect of the 2nd count. Section 141 of Public Health Act clearly provides for the penalty for any person who fails to comply with the 'stop work notice'. This section contemplates continuing offences and requires the court to impose a mandatory penalty in the case of a continuing offence.
26. The section reads: *"Any person who contravenes or fails to comply with any provisions of this Act or regulations, by-law, order or notice made or issued thereunder shall be guilty of an offence and shall, where no specific penalty is provided, be liable to a fine not exceeding ten dollars or in the case of a continuing offence to a fine not exceeding four dollars a day for each day during which the offence continues after conviction and in default of payment of any penalty under this Section to imprisonment for any period not exceeding one month.(emphasis added)*

27. The imposition of the continuing penalty under Section 141 of Public Health Act has to be read with Section 56 of the Sentencing and Penalties Act 2009. The Learned Magistrate erred in not imposing the enhanced penalty under Section 56 (1) of the SPA for the continuing offence.
28. Section 56 (2) of the SPA applies to fines that are expressed to be for continuing offences, and the fines must be set at one-half of the substantive fine for each day that an offence continues, and these shall be expressed as penalty units in accordance with section 52 (1).
29. In view of Section 56 (2) of the SPA, the substantive fine for each day should be calculated on the basis of Section 56 (1) of the SPA which states:

“ In all Acts, Decrees, Promulgations and Regulations now or at any time in the future in force in Fiji —

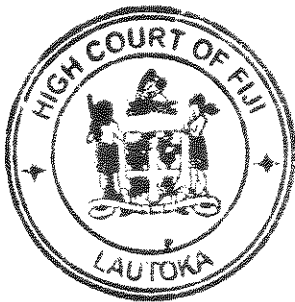
a reference to the imposition of a fine or maximum fine of less than \$100 shall be deemed to impose a fine or maximum fine, as the case may be, of \$100, unless otherwise specified in Regulations made under section 58”

30. Therefore, Section 141 of Public Health Act should be read with Section 56 of the SPA. Accordingly, the substantive fine should now be \$ 100. For continuing offences, the fines must be set at one-half of the substantive fine for each day that an offence continues. Therefore, the Respondent is liable to pay a fine of \$ 50 for each day during which the offence continues **after conviction**.

Conclusion

31. Following Orders are made accordingly.

- I. The fine imposed by the Learned Magistrate on the first count is affirmed.
- II. The fine imposed by the Learned Magistrate on the second count is quashed.
- III. Pursuant to Section 256 (2) of the Criminal Procedure Act, a fine of \$ 50 is imposed on the second count for each day during which the offence continues after conviction and in default 21 days' imprisonment.



Aruna Aluthge

Judge

At Lautoka

13th June, 2018

Solicitors: Anil J Singh Lawyers for Appellant
Legal Aid Commission for Respondent