

IN THE HIGH COURT OF FIJI
AT LAUTOKA

WESTERN DIVISION

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL CASE NO. HBA 04 OF 2018

BETWEEN : **ROPATE NAISAU** of Maximum Correction Centre

APPELLANT

AND : **COMMISSIONER OF POLICE**

RESPONDENT

Appearances : **Appellant in person.**
(Ms) Olivie Manuliza Faktaufon, A.G's Chambers, for the respondent.

Date of hearing : **Friday, 22nd March, 2019**
Date of judgment : **Friday, 31st May, 2019**

J U D G M E N T

- (1) This is an **application** filed by the appellant seeking **leave to appeal out of time** the decision of the Resident Magistrate in Action No.161 of 2016 whereby the learned Magistrate dismissed the appellant's Writ of Summons based on the preliminary objections raised by the respondent.
- (2) The ruling of the learned Magistrate was delivered on 08th November, 2017. The dismissal of the appellant's action was purely on point of law that;
 - (A) the appellant's claim for damages for the alleged assault by the police officers and for the injuries sustained in police custody were beyond the time prescribed by sections 4(i)(a) and 4(i)(d)(i), respectively, of the Limitation Act, 1971.

AND

(B) the learned Magistrate was prohibited by section 16(2)(e), of the Magistrates Court Act 1944 to exercise any jurisdiction with regard to the allegation of defamation of character for malicious prosecution raised by the appellant.

(3) As I said in the preceding paragraph, the ruling of the learned Magistrate was delivered on 08th November, 2017.

It is desirable to set out Order 37, rule 1 of the Magistrates' Court Rules in full.

It is as follows;

ORDER XXXVII – CIVIL APPEALS

1. Notice of Intention to Appeal

Notice of intention to appeal

1. *Every appellant shall **within seven days after the day on which the Decision appealed against was given**, give the respondent and to the court by which such decision was given (hereinafter in this Order called “the court below”) notice in writing of his intention to appeal:*

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced.

(Emphasis added)

The wording of Order 37, rule 1 of the Magistrates' Court Rule is perfectly clear to me. The language is clear and distinct; **that the appellant shall within 07 days after the day on which the decision was given, give the respondent the Notice in writing of Intention to Appeal.**

(4) In terms of Order 37, rule 1, the time for giving notice of intention to appeal began to run from 08/11/2017. The notice of intention to appeal was to be filed on or before 17/11/2017. The appellant did not file notice of intention to appeal. On 24th April, 2018, ie, after lapse of 5 ½ months from the date of the judgment, the plaintiff (appellant) filed the current application seeking leave to appeal out of time.

(5) In the Magistrate Court, the plaintiff-appellant appeared in person. He was an inmate at Maximum Correction Centre. He was produced to the Magistrate Court by the Maximum Correction Centre. He was serving a sentence. The appellant says that he came to receive the copy of the ruling on 23rd April, 2018.

The factors which the Court should take into account in considering the appellants application are:

- (1) **the length of the delay**
- (2) **the reasons for the delay**
- (3) **whether grounds of appeal are meritorious**
- (4) **what prejudice to be suffered by the respondent**

- (6) The important point which concerns me is whether there is a reasonable explanation as to why there has been the delay which necessitated this application?
- (7) Turning first to the appellant, his submissions made at the hearing are as follows;

My Lord, as for the leave ground, my submissions is the learned Magistrate never informed me of my right to appeal on that day he gave his Ruling and this Ruling was not given on the day, the same day the Ruling was delivered and I came to receive this Ruling after I enquired in the Magistrates' Court register few months later. That's why I filed the application late. It was not within the time prescribed for appeal. And I ask the Court if I could be granted leave on that basis.

How did you receive the copy of the Ruling? From whom? When did you receive it?

I came in another matter in the Magistrates' Court, then I went and enquired in the Registry and they gave me the copy of the Ruling.

So, the Ruling was pronounced in the open Court, were you handed the copy of the Ruling or not?

No, it was just a learned Magistrates' Ruling and I ask for a written ruling and they said have to wait for the Registry to take the thing so the Registry could not provide the thing within few hours' time, so we waited and went back to Naboro. We were coming all the way from Suva. Cannot wait for that Ruling. So the Ruling was not also sent to Prison and if it was send to Prison I could have lodged the application within the time prescribed and also inside the Ruling, you'll see there is no time prescribed for Appeal given by the learned Magistrate and that is where I am relying my application.

- (8) As I understand the appellant's submissions, he had advanced three grounds for seeking leave to appeal out of time;
- (A) The written ruling was not given to him by the learned Magistrate on the day the ruling was delivered.

- (B) He received the copy of written ruling after lapse of several months.
- (C) The learned Magistrate did not inform the appellant his right of appeal.
- (D) The learned Magistrate did not inform him the time period to appeal.

(9) In response, counsel for the respondent submitted that there is no requirement exists for the learned Magistrate to include in his written ruling the right to appeal and the time period to do so. In the written submissions before this court, counsel for the respondent submitted in paragraph (04) to (10) as follows:

- (4) *The appellant argues that he was not informed by the learned Magistrate of his right to appeal.*
- (5) *We refer this Honourable Court to the Magistrates Court Rules 1945, particularly Order 32 which relates to the delivery of a decision or judgment in any suit by a Magistrate. Order 32 Rule 4 states as follows: [MC 11, 290] Contents of judgment 4*

Every judgment or decision must-

- (a) *be written by the presiding Magistrate in the English language;*
- (b) *contain the points for determination;*
- (c) *contain the decisions and the reasons for those decisions; and*
- (d) *be signed by the Magistrate before delivery.*

[r4 subst LN 10 of 2000 r 9, effective 11 February 2000]

- (6) *The said rule clearly indicates the contents that the learned Magistrate must mandatorily set out in his judgment; and it's safe to note that there was no obligation on the learned Magistrate to indicate to the appellant in his written ruling the appellant's right to appeal or the time period to appeal.*
- (7) *The time for appeal is clearly set out in Order 37 of the Magistrates Court 1945 and in the High Court Rules 1988.*
- (8) *We reiterate that no requirement exists for the learned Magistrate to include in his written ruling the right to appeal and the time period to do so.*
- (9) *The appellant argues that he did not receive a copy of the written ruling at the time of the pronouncement on 8th November, 2017 till the date the appellant allegedly received the ruling (being 24th April, 2018). Upon reflection, we concede that he was not given the written ruling on the date of pronouncement and it was unfair for the*

respondent to have argued that he could still have filed his notice of intention to appeal and later on grounds to appeal.

- (10) *However, the appellant has not indicated any efforts he has made to obtain a copy of the written ruling. He simply states in Court that he had no court matters in Lautoka and was not able to enquire with the Court registry.*

- (10) As I said in paragraph (5) above, in the Magistrate Court, the plaintiff-appellant appeared in person. He was an inmate at Maximum Correction Centre. He was produced to the Magistrate Court by the Maximum Correction Centre. He was serving a sentence.

The appellant has not received a copy of the written ruling at the time of pronouncement on 08th November, 2017. A requirement exists for the learned Magistrate to serve a copy of the written ruling on the appellant at the time of the pronouncement. Could an appeal or notice of intention to appeal be lodged by the appellant without knowing the reasons for the learned Magistrates' decision? The answer should be in the negative. The law does not compel the doing of impossibilities; nor does it compel a person to do that which he or she cannot possibly perform. [*Lex non ad impossibilia*].

It is well-settled that a judge or a Magistrate at first instance in cases has an obligation to serve the written reasons for the judgment on the parties. That obligation arises as a matter of judicial duty. The failure to serve a copy of the written ruling on the parties at the time of the pronouncement of the ruling or judgment can lead to a sense of injustice and a reduced appreciation or understanding of legal rights and obligations and can serve to undermine public confidence in the judiciary and in the judicial system. The appellant should not be penalized for the fault of the Magistrate. The appellant was incarcerated at Maximums Correction Centre at the relevant time. Those who are not imprisoned are able to attend at the court buildings for uplifting orders and for filing documents. Persons who are in prison do not have this liberty. Hence, it seems to me some latitude should be extended to them. There would not be a disadvantage to the respondent in allowing the appellant prisoner such latitude. By reason of imprisonment, persons such as the appellant in this case are disadvantaged relative to persons who are not imprisoned. Those who are not imprisoned who seek to appeal have access to the court system in ways persons who are imprisoned do not. He, the appellant is a litigant in person and he is incarcerated. Therefore, the Magistrate Court Rules and Practice Direction were inaccessible. Thus, he cannot familiarize himself with the rules and practice direction. Therefore, the learned Magistrate has a duty to inform the appellant of his right to appeal and the time period to do so. The appellant's lack of legal representations and incarceration should be considered for the purpose of the exercise of the court's discretion to grant leave to appeal out of time. The court is concerned about the administration of justice. On the facts of this case it would not be unreasonable to give the appellant an indulgence.

- (11) However, for his application for leave to appeal out of time to be successful, the appellant still has the hurdle of satisfying this court that his grounds of appeal disclose a reasonable chance of success. I am bound to consider the grounds of appeal urged by the appellant.

The grounds of appeal were expressed thus;

- (1) *That the learned Magistrate erred in law when he stated at line (4) paragraph (8) page (2) of his ruling that the constitution has no relevance to the matter in question, as the constitution is the Supreme Law of our country and any law or act which does not accord with it is invalid.*
- (2) *That the learned Magistrate erred in law when he did not allow the appellant to adduce the evidence of medical report or the judgment to support his Writ of Summons.*
- (3) *That the learned Magistrate erred in law when he dismissed the matter as he had no power to strike out a matter by written law.*

(12) **Ground (1)**

That the learned Magistrate erred in law when he stated at line (4) paragraph (8) page (2) of his ruling that the constitution has no relevance to the matter in question, as the constitution is the Supreme Law of our country and any law or act which does not accord with it is invalid.

Counsel for the respondent submitted that:

- *There was no need for the learned Magistrate to consider the supremacy of the Constitution of the Republic of Fiji ('Constitution') over the Limitation Act 1971 or the Magistrates Court Act 1945.*
- *The dismissal of the appellant's action was purely on a point of law in that:*
 - ❖ *The appellant's claim for either a tort or trespass by assault damages or for personal injuries was beyond the time prescribed by sections 4(1)(a) and 4(1)(d)(i), respectively, of the Limitation Act 1975; and*
 - ❖ *The learned Magistrate was prohibited by section 16(2) (e) of the Magistrates Court Act 1944 to deal with the allegations of defamation raised by the appellant.*
- *In simple and short response to the appellant's ground 1, we state that there was no clear and logical argument put forward by the appellant that the Constitution was either relevant to his action or that the Limitation Act 1975 or Magistrates Court Act*

1944 contradicted any specific provision of the Constitution. The learned Magistrate made no error of law in this aspect.

(13) The plaintiff alleges that during his arrest by Police on 22nd April, 2009, he had sustained injuries in police custody. He is claiming a sum of \$300.00 as general damages. He also claims a sum of \$5000.00 as general compensatory damages for defamation of his character for malicious prosecution.

- The plaintiff's claim for general damages for the **personal injuries** he sustained as a result of assault by the police is statute barred. Pursuant to section 4(1) (d) (i) of the Limitation Act 1971, damages in respect of personal injuries have a statutory limitation period of 3 years. Given that this cause of action arose on or about 22nd April, 2009, the limitation period would have expired on 22nd April, 2012. Thus, the plaintiff was statute barred when he filed his claim on 14th December, 2016.
- The plaintiff's claim is out of time by 4 years and 8 months.
- Alternatively, the plaintiff's claim for damages for a tort of **assault** is also statute barred. Section 4 (1) (a) of the Limitation Act 1971 provides that the limitation period to issue a claim for an intentional tort (that is, assault) must be within 6 years. That period would have expired on or about 22nd April, 2015.
- The plaintiff's claim is still out of time by 1 year and 7 months.

Allegation of defamation

- The plaintiff also alleges defamation of character and seeks \$5,000 against the defendant for malicious prosecution.
- Section 16 (2) (e) of the Magistrates Court Act, chapter 14 prohibits Magistrate's Court from exercising jurisdiction with respect to any action for malicious prosecution, libel or slander.
- As such, the Magistrate's Court's jurisdiction does not extend to the plaintiff's claim for defamation.

All this, in my opinion, makes it difficult for the appellant to substantiate a submission that "*the learned Magistrate erred in law when he stated at line (4) paragraph (8) page (2) of his ruling that the constitution has no relevance to the matter in question, as the constitution is the Supreme Law of our country and any law or act which does not accord with it is invalid.*"

For the reasons aforesaid, I find no merit in ground (1).

(14) **Ground (2) and (3)**

That the learned Magistrate erred in law when he did not allow the appellant to adduce the evidence of medical report or in the judgment to support his Writ of Summons.

That the learned Magistrate erred in law when he dismissed the matter as he had no power to strike out a matter by written law.

(15) In arguing ground (2) and (3) Counsel for the respondent reiterated that the appellant's claim for either a tort of assault or personal injuries was statute barred. Counsel for the respondent took one step further and brought to the attention of the court the observations in the following decisions.

- The observations of His Lordship Justice Hammet in **Ram Khelawan v. Budh Ram 13. FLR 196** at page 197, paragraphs F and H

A Magistrate Court is a creature of statute and the Magistrate and the Court can only exercise the jurisdiction which is given them by the statute....

Once a summons has been issued in a Magistrates Court of the first class in excess of the jurisdiction which is given to that Court by the Legislature it appears to me that the only order that may be made when the matter is being dealt with by the Magistrate is for him to strike out the cause for want of jurisdiction. The Magistrate does not appear to have any powers either to amend the claim or to transfer the case. He can therefore only decline to entertain the suit on the ground that it is in respect of a matter that is beyond the jurisdiction which has been granted either to the Magistrate or the Court by the Legislature.

- The observations of His Lordship Justice Hettiarachchi in **Wati v. Narayan HBA 14 of 2010,**

“When an action becomes a nullity that means there is no valid action in the court. In other words there exists no valid claim before the Court.”

In the present action, the cause of action founded on tort and breach of duty is statute barred. The claim for malicious prosecution goes beyond the jurisdiction of the Magistrate. The Magistrate can therefore decline to entertain the suit since there exists no valid claim. In these circumstances, it is for him to strike out the cause by the power given to that court by the legislature. Thus, it is incorrect to say “*the learned Magistrate erred in law when he did not allow the appellant to adduce the evidence of medical report*”. The ground (2) and (3) are frivolous and vexatious.

16. Having found no prospect of success in the grounds of appeal put forward by the appellant, I am bound to refuse the application for leave to appeal out of time.

ORDER:

The application for leave to appeal out of time is dismissed without costs.



**At Lautoka
Friday, 31st May 2019**


30/05/2019.
Jude Nanayakkara
[Judge]