

**IN THE HIGH COURT OF FIJI AT SUVA**

In the matter of a revision under section 260(2) of the Criminal Procedure Act 2009.

**STATE**

**CASE NO: HAR. 002 of 2020**  
[MC Nadi, Criminal Case No. 619 of 2020]

**Vs.**

**RAVIN ROHIT LAL**

**SHALVIN P CHAND**

**Date of Judgment :** 16 April, 2020

**JUDGMENT**

(In Chambers)

1. Mr. Ravin Rohit Lal (hereinafter referred to as "the 1<sup>st</sup> defendant") and Mr. Shalvin P Chand (hereinafter referred to as "the 2<sup>nd</sup> defendant") were charged before the Magistrates Court at Nadi for the following offence;

***Statement of Offence [a]***

*Fail to Comply with orders: Contrary to section 69(1)(c) of Public Health Act, 1935 and regulation 2 of Public Health (infectious Diseases) Regulation 2020.*

***Particulars of Offence [b]***

*Ravin Rohit Lal and Shalvin Praveet Chand on the 09<sup>th</sup> day of April, 2020 at Nadi in the Western Division without lawful excuse fail to comply with orders of Prime Minister of Fiji by breaching the curfew hours, an order that was deemed necessary for the protection of the public health from an infectious*

*disease namely Novel Corona Virus.*

2. Both defendants pleaded guilty to the charge on 10/04/20. However, the Learned Magistrate in his decision titled 'Sentence' dated 15/04/20 acquitted both defendants based on his conclusion that the charge was bad in law.
3. The relevant record of the proceedings before the magistrate court was called for in order to examine the same in terms of section 260(1) of the Criminal Procedure Act 2009 ("Criminal Procedure Act") pursuant to a directive made under the hand of the Chief Justice in terms of section 260(2) of the Criminal Procedure Act. The said section reads thus;

*260. – (1) The High Court may call for and examine the record of any criminal proceedings before any Magistrates Court for the purpose of satisfying itself as to-*

- (a) the correctness, legality or propriety of any finding, sentence or order recorded or passed; and*
- (b) the regularity of any proceedings of any Magistrates Court.*

*(2) The High Court shall take action under sub-section (1) upon the receipt of a report under the hand of the Chief Justice which requests that such action be taken.*

4. Accordingly, the relevant court record which includes the aforementioned decision dated 15/04/20 will be examined for errors apparent on the face of the record which involves questions of legality, jurisdiction and/or procedural impropriety.
5. At the outset I note that none of the defendants have challenged the legality of the above charge. Their plea was recorded on 10/04/20 and Learned Magistrate had recorded that both defendants have pleaded guilty to the charge on their own freewill. On the same day the Learned Magistrate had convicted each defendant as charged. Thereafter the mitigating factors were recorded and the case was fixed for the sentence on 15/04/20. On 15/04/20 the Learned Magistrate had decided that the charge is bad in law without hearing either party and had acquitted the defendants.
6. On the face of it, there is a clear procedural impropriety where the Learned Magistrate has failed to provide an opportunity for the prosecutor to make

submissions on the legality of the charge.

7. It is pertinent to note that the charge sheet filed before a Magistrate Court is signed by the relevant magistrate presiding in that court in addition to the prosecutor. In fact, in terms of section 56(6) of the Criminal Procedure Act, a magistrate is required to draw up the formal charge when a case is instituted by a private complainant (a person other than a police officer or other officer acting in the course of a lawful duty).
8. Therefore, a magistrate is required to ensure that the charge filed before him/her is valid in law. It follows that a magistrate cannot simply dismiss a case and discharge/acquit an accused for the reason that the said magistrate finds the charge to be defective.
9. The provisions of section 182 of the Criminal Procedure Act reinforces this position. In terms of section 182 of the Criminal Procedure Act if it appears to a magistrate before the close of the case for the prosecution that the charge is defective, the magistrate should make an order for the alteration of the charge.
10. Section 182 of the Criminal Procedure Act reads thus;  
*182. – (1) Where, at any stage of the trial before the close of the case for the prosecution, it appears to the court that the charge is defective (either in substance or in form), the court may make such order for the alteration of the charge, either by –*  
*(a) amendment of the charge; or*  
*(b) by the substitution or addition of a new charge –*  
*as the court thinks necessary to meet the circumstances of the case*
11. In this case, the Learned Magistrate had concluded that the charge is bad in law after he entered convictions in relation to both defendants. In my view, a magistrate does not become *functus* until the sentence is passed and therefore it was within the Learned Magistrate's jurisdiction to vacate the convictions. However, the Learned Magistrate was required to order the charge to be amended if he found it to be defective, after providing an opportunity for the prosecution to be heard on the issue.

12. In my view, in terms of the Criminal Procedure Act, an accused can be acquitted of a charge only after a trial or when the prosecutor withdraws a complaint pursuant to section 169 of the Criminal Procedure Act. Therefore, the Learned Magistrate's decision in the instant case to acquit the two defendants after they pleaded guilty to the charge and after convictions were entered is not supported by the provisions of the Criminal Procedure Act.
13. Therefore, in the light of the foregoing, the acquittals should be quashed and the case should be sent back to the Magistrate Court to proceed with the case according to law.
14. I am mindful of the provisions of section 262(1)(b) of the Criminal Procedure Act which says that the High Court may alter or reverse any order other than an order for acquittal and also the provisions of section 262(4) of the Criminal Procedure Act which provides that the provisions of section 262 does not authorise the High Court to convert a finding of acquittal into one of conviction. In my view, given the fact that the acquittals entered by the Learned Magistrate are not supported by the provisions of the Criminal Procedure Act and provided that the High Court does not convert the acquittals to convictions, the High Court is not seized of the jurisdiction make an appropriate order in this case.
15. Before making such order, I consider it appropriate to examine whether the charge filed before the Learned Magistrate is in fact bad in law.
16. According to the statement of offence, the relevant charge is brought under section 69(1)(c) of the Public Health Act 1935. Section 69(1) of the Public Health Act stipulates the powers of the Minister of Health under the said Act. In terms of section 69(1)(c) the Minister has the power '*to do all such other things as the [Health] Minister may deem necessary for the protection of public health*'.
17. Section 69(3) of the Public Health Act stipulates the power of the Permanent Secretary for the Ministry of Health. In terms of section 69(3)(a)(v) of the said Act, the relevant Permanent Secretary have the power '*to prohibit, order and regulate conditionally or unconditionally the movements of persons, . . . including the assembling*

*together, whether habitual or occasional, of either adults or children', subject to the approval of the Minister [of Health].*

18. It is manifestly clear that the power of the relevant Permanent Secretary is to be exercised subject to the approval of the Minister of Health and the power of the Minister of Health to grant such approval is derived from section 69(1)(c) of the Public Health Act.
19. Extraordinary Gazette No.32 published on 04/04/2020 includes the following notice given by the Permanent Secretary for Health and Medical Services;

*I hereby give notice of the following orders, which were made pursuant to section 69(3) of the Public Health Act 1935 for the protection of public health, approved by the Minister for Health and Medical Services and publicly announced on 2 April 2020 -*

*1. ...*

*...*

*6. Except for the purpose of travelling for work, seeking medical care or an emergency, a curfew from 8 pm until 5 am now applies to the whole of Fiji, with effect from 3 April 2020.*

20. Therefore it is clear that the provisions of the Public Health Act cited in the statement of offence of the relevant charge refers to a curfew imposed for the whole of Fiji from 8.00pm until 5.00am in accordance with the law. The Public Health (infectious Disease) Regulation 2020 makes it an offence to violate the said curfew. The relevant regulation is cited in the impugned decision of the Learned Magistrate and which reads thus;

*"Any person who fails to comply with an order, prohibition, declaration issued pursuant to Section 69(1)(c) or (3) of the Public Health Act commits an offence and is liable to a fine not exceeding \$10,000 or imprisonment of 5 years or both."*

21. However, the particulars of offence of the relevant charge indicates that the Prime Minister has issued the relevant orders and the Learned Magistrate had concluded that the charge is bad in law for the reason that the Prime Minister has no power to issue orders under the Public Health Act. This reasoning of the Learned Magistrate

is flawed.

22. The mere reason that the particulars of the offence indicates that the Prime Minister has issued the relevant order which is allegedly violated by the defendants does not make the charge bad in law. In the case of *State v Jenkins* [2011] FJHC 797; HAR002.2011 (9 December 2011) the court held said thus;

*[15] There is now a line of cases that has established that the failure to specify subsection of the offending statute or an essential element of the offence makes a charge defective but not bad in law (Skipper v. R [1979] FJC 6; Shekar & Shankar v. State Criminal Appeal No. AAU0056 of 2004; State v. Singh Criminal Appeal No. AAU0097 of 2005S and Mudaliar v. State Criminal Appeal No. AAU0032 of 2006). The question that should be asked is whether the accused was embarrassed or prejudiced by the defect?*

23. In the instant case, the statement of offence refers to the correct section of the law under which the defendants were charged and there is no issue regarding an essential element not being disclosed in the particulars.

24. The reference to the Prime Minister in the particulars of the charge in the case at hand would only make the charge defective if at all and this could have been cured by directing the prosecution to amend the charge. However the real question would have been whether the defendants are embarrassed or prejudiced due that purported defect. The said reference to the Prime Minister in the charge does not make the convictions entered on the said charge bad in law.

25. In exercising the powers of revision in this case to examine the relevant court record, I did not find it necessary to hear the parties to the case given the nature of the issue I had to deal with and therefore did not require the presence of the parties in light of the provisions of section 263 of the Criminal Procedure Act which reads thus;

*263. No party has any right to be heard either personally or by lawyer before the High Court when exercising its powers of revision, but the High Court may when exercising such powers, hear any party either personally or by lawyer.*

#### **Orders of the court;**

- i) The order of the Learned Magistrate in Magistrates Court of Nadi Criminal Case No. 619 of 2020 dated 15/04/20 acquitting the respondents are hereby

quashed;

- ii) The convictions entered by the Learned Magistrate in Magistrates Court of Nadi Criminal Case No. 619 of 2020 on 10/04/20 is also quashed and the plea of guilty entered by each defendant is vacated;
- iii) The case is sent back to the Magistrate Court at Nadi to be dealt with by a different Magistrate;
- iv) The case to be mentioned on 21/04/20 before a different Magistrate in the Magistrate Court at Nadi at 9.30am for plea;
- v) Notice should be issued to the defendants accordingly.



A handwritten signature in blue ink, appearing to read "Vinsent S. Perera".

Vinsent S. Perera  
JUDGE