IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

CRIMINAL APPEAL CASE NO. HAA 14 OF 2022

BETWEEN:	**TEVITA QAQANIVALU**	**APPELLANT**
A N D:	**THE STATE**	**RESPONDENT**

Counsel: Appellant In Person
Ms. B. Kantharia for Respondent

Date of Hearing: 06th December 2022

Date of Judgment: 24th March 2023

JUDGMENT

1. The Appellant was charged in the Magistrate's Court in Suva with one count of Escaping from Lawful Custody, contrary to Section 196 of the Crimes Act. Consequent to the Appellant's plea of not guilty, the matter proceeded to the hearing. The learned Magistrate who heard the evidence of the Prosecution was transferred. The successor of the previous Resident Magistrate then delivered the ruling of no case to answer pursuant to Section 178 of the Criminal Procedure Act. The new Resident Magistrate then heard the evidence of the Defence and found the Appellant guilty of this offence on his judgment dated 15th of July 2022. The Appellant was sentenced to twelve months imprisonment on the 19th of July,

2022. Aggrieved with the said conviction and the sentence, the Appellant filed this Appeal on the following grounds *inter alia*;

Conviction Grounds of Appeal

a) *That the learned trial Magistrate erred in law when he failed to have stop the trial for going any further. When I saw that the Accused was affected with the psychological trauma throughout the trial. Failure to do so, violated my right to a fair trial.*

b) *That the learned trial Magistrate erred in law when he reject the witnesses for the Defence to give evidence in Court. In doing so, I was denied the right to challenge the evidence presented against me and also violated my right to a fair trial.*

c) *That the learned trial Magistrate erred in law when he use the psychiatric evaluation report to strengthen the Prosecution case without the psychiatrist giving evidence in Court. In doing so, I was denied the right to challenge the evidence presented against me and also violated my right to a fair trial.*

d) *That the learned trial Magistrate erred in law when he proceed further with the trial of the Appellant knowing that the Appellant was not in a better position to proceed with the trial when all his law books and disclosures was seized by the Prison Authority.*

e) *That the learned trial Magistrate erred in law when he fail to carefully assessing the evidence given by PW1 and PW2 which support the line of defense of the Accused. Failure to do so, caused the conviction to be unsafe and unsatisfactory.*

f) That the learned Trial Magistrate erred in law and in fact when unfairly assessing the evidence of DW2, DW4 and the Appellant which surely corroborated at the trial.

2. The Appellant was unrepresented in the Magistrate's Court and filed this Appeal in person. Hence, his articulation of the grounds of Appeal is not perfect as that of a legally qualified lawyer.

3. Having carefully pursued the record of the proceedings in the Magistrate's Court, I invited the parties to make submissions on the correctness of the procedure adopted by the second Resident Magistrate under Section 139 of the Criminal Procedure Code when he commenced the continuation of the proceeding which his predecessor partly heard.

4. Section 139 of the Criminal Procedure Act provides the procedure of continuation of the proceedings that a Resident Magistrate partly heard. Section 139 of the Criminal Procedure Act states that:

> *(1) Subject to subsections (1) and (2), whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in a trial, ceases to exercise jurisdiction in the case and is succeeded (whether by virtue of an order of transfer under the provisions of this Act or otherwise), by another Magistrate, the second Magistrate may act on the evidence recorded by his or her predecessor, or partly recorded by the predecessor and partly by the second Magistrate, or the second Magistrate may re-summon the witnesses and recommence the proceeding or trial.*
>
> *(2) In any such trial the accused person may, when the second Magistrate commences the proceedings, demand that the witnesses or any of them be re-summoned and reheard and shall be informed of such right by the second Magistrate when he or she commences the proceedings.*

(3) *The High Court may, on appeal, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was had, if it is of opinion that the accused has been materially prejudiced and may order a new trial.*

5. Madigan J in **Baba v State (2015) FJHC 156;HAA040.2013 (6 March 2015)** discussed the scope of Section 139 of the Criminal Procedure Act, where His Lordship said:

25. *The section quite clearly states the second magistrate **shall** inform the accused person of his right to have any witnesses reheard and it is also quite clear from the record that the "second" magistrate did not do so in this case. This occurred at the time that the accused, by this time being represented, was asking for a trial de novo. As Goundar J. said in **Jale Baba** HAC 135.2010:*

"The learned Magistrate has discretion to either proceed with the case on the record of the previous Magistrate, or de novo. This discretion must be exercised after weighting (sic) all the relevant factors such as sufficiency of earlier court record and whether the accused is disadvantaged by the fact that the new magistrate had no opportunity to observe the demeanour of the prosecution witnesses when they gave evidence. Of course, no exhaustive list can be produced. The right to a fair trial is the ultimate objective."

26. *Such sentiments may well be relevant on the reading of s.139(1) alone however s139(2) would appear to fetter that discretion when the accused is "demanding" that some witnesses be reheard. The subsection refers to that **demand** as a **right** to be informed to the accused person by the second magistrate. When there is no record of the Magistrate have told the accused of this right then there must be a presumption then that any application for a trial de novo be granted. Even if the*

second magistrate does inform the accused of his right to have witnesses recalled, then it being a ***right,*** *it is a demand that cannot be refused.*

27. *The discretion can only come into play if the accused is informed and doesn't make an application or demand to have witnesses recalled, in which case it is a discretionary decision of the second magistrate on his own motion whether to act on the record or hear the trial de novo.*

6. Accordingly, the discretion given to the second or succeeding Magistrate to have a trial *de novo* or act on the evidence already recorded by the previous Magistrate must be exercised subject to the accused person's right. The second Magistrate must inform the accused person of his right to demand to re-summon and re-hear the witnesses pursuant to Section 139 (2).

7. Section 139 (3) has further provided that the High Court could set aside any conviction entered by the subsequent Magistrate relying on the evidence recorded by his predecessor Magistrate if the High Court is in the opinion that the accused has been materially prejudiced and may order for a re-trial.

8. According to the record of the proceedings in the Magistrate's Court, the second learned Magistrate had not explained to the Appellant his right as required under Section 139 (2) of the Criminal Procedure Act. The Appellant was unrepresented, hence, the second Resident Magistrate had an extra responsibility to explain to the Appellant his right to demand to re-summon and re-hear the witnesses who had already given evidence before the previous Resident Magistrate and ensure that the Appellant was making an informed decision in exercising his said right.

9. The learned Magistrate has erroneously exercised his discretion to rely on the evidence recorded by his predecessor without explaining to the Appellant his right to demand the witnesses or any of them to be re-summoned or re-heard. Since the Appellant was

unrepresented and unaware of this procedural right, he was denied an opportunity to make an informed decision on this elementarily important aspect of a fair trial.

10. The second important ground of Appeal is that the Appellant contends that the learned Magistrate erroneously refused to summon six witnesses of the Defence on the basis that they were irrelevant witnesses for this alleged incident of escape.

11. In her submission, the learned Counsel for the Respondent relied on **Kabakoro v State [2021] FJCA 46; AAU152.2017 (15 February 2021)**. However, the material issue in **Kabakoro v State (supra)** differs from this case. In Kabakoro, the learned trial Judge had refused the application of the Defence to call an expert witness to provide a legal opinion in international law on certain documents. In this case, the six witnesses that the Appellant intended to summon were witnesses of facts. The Appellant wanted to call them to explain the torture and mistreatment he received at the maximum prison centre. These background facts on what happened to the Appellant in the Prison facility are materially relevant to the escaping issue. Hence, this ground of Appeal has merits.

12. I, accordingly, find this is an appropriate case for this Court to intervene under Section 256 of the Criminal Procedure Code. I, therefore, quash the conviction and set aside the sentence. Taking into consideration that the Appellant had already served nearly eight months of his sentence, I do not wish to order a re-trial.

13. The orders of the Court,

    i) The Appeal is allowed,
    ii) The conviction dated 15th of July 2022 is quashed, and the sentence dated 19th of July 2022 is set aside.

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

.....

Hon. Mr. Justice R.D.R.T. Rajasinghe

At Suva
24th March 2023

Solicitors.
Appellant In Person.
Office of the Director of Public Prosecutions for the Respondent.