

IN THE HIGH COURT OF FIJI
AT LAUTOKA
[APPELLATE JURISDICTION]

CRIMINAL APPEAL NO. HAA 19 OF 2022

IN THE MATTER of an Appeal from the Decision of the Magistrate's Court of Sigatoka, in Criminal Case No. CF 1 of 2022.

BETWEEN : **THE STATE**

APPELLANT

AND : **SHIVNIL KARTIK LAL**

RESPONDENT

Counsel : Ms. Sheenal Swastika for the Appellant
Mr. Jasveel Singh with Mr. Nitesh Madhwan for the Respondent

Dates of Hearing : 27 September 2022 and 3 February 2023

Judgment : 28 March 2023

JUDGMENT

- [1] This is an Appeal by the State against the decision made by the Learned Magistrate, Magistrate's Court of Sigatoka, on 19 April 2022.
- [2] In the Magistrate's Court of Sigatoka, the Respondent was charged with one count of Dangerous Driving, contrary to Section 98 (1) and 114 of the Land Transport Act No. 35

of 1998 (Land Transport Act) and one count of Escaping from Lawful Custody, contrary to Section 196 of the Crimes Act No. 44 of 2009 (Crimes Act), as follows:

FIRST COUNT

Statement of Offence (a)

DANGEROUS DRIVING: Contrary to Section 98 (1) and 114 of the Land Transport Act No. 35 of 1998.

Particulars of Offence (b)

SHIVNIL KARTIK LAL, on the 9th day of January 2022, at Sigatoka, in the Western Division, being the driver of a motor vehicle registration number KJ 394, drove the said vehicle on Kulukulu Road in a manner dangerous to the public having regards to all circumstances of the case.

SECOND COUNT

Statement of Offence (a)

ESCAPING FROM LAWFUL CUSTODY: Contrary to Section 196 of the Crimes Act 2009.

Particulars of Offence (b)

SHIVNIL KARTIK LAL, on the 9th day of January 2022, at Sigatoka, in the Western Division, being in the lawful custody of **POLICE CONSTABLE 5245 JOLAME TAMANIVULAGI** at the Sigatoka Police Station, escaped from such lawful custody.

- [3] The Respondent was first produced in the Sigatoka Magistrate's Court on 13 January 2022, on the above charges [The charges are found at page 7 of the Copy Record of the Magistrate's Court]. On that day it is recorded that the Respondent is a Police Officer and he was enlarged on bail. The matter was adjourned for mention on 19 April 2022.
- [4] On 19 April 2022, it is noted that there is no appearance by the Director of Public Prosecutions (DPP). The Counsel for the Respondent had raised objections that since there is no instructions from the DPP, that the charges against the Respondent be

dismissed under Sections 166 and 170 of the Criminal Procedure Act No. 43 of 2009 (Criminal Procedure Act).

- [5] On the same day, the Learned Magistrate had upheld the objection taken up by the Counsel for the Respondent and made order dismissing the charges against the Respondent in terms of Section 166 of the Criminal Procedure Act.
- [6] Aggrieved by the said Order, on 16 May 2022, the State filed a timely appeal in the High Court by way of a Petition of Appeal.
- [7] This matter was taken up for hearing before me on 27 September 2022 and (briefly) on 3 February 2023. The Learned Counsel for the State and the Respondent were heard. The Learned Counsel for the State and Respondent filed written submissions and further written submissions, and referred to case authorities, which I have had the benefit of perusing.
- [8] As per the Petition of Appeal filed the Ground of Appeal taken up by the Appellant (State) is as follows:
- (a) THAT the Learned Magistrate erred in law and in fact when he dismissed the accused (Respondent) of all the charges pursuant to Section 166 of the Criminal Procedure Act.
- [9] The State seeks an order from this Court to set aside the order for dismissal passed by the Magistrate's Court and to reinstate the proceedings.

The Law and Analysis

- [10] Section 246 of the Criminal Procedure Act deals with Appeals to the High Court (from the Magistrate's Courts). The Section is re-produced below:

“(1) Subject to any provision of this Part to the contrary, any person who is dissatisfied with any judgment, sentence or order of a Magistrates Court in any criminal cause or trial to which he or she is a party may appeal to the High Court against the judgment, sentence or order of the Magistrates Court, or both a judgement and sentence.

(2) No appeal shall lie against an order of acquittal except by, or with the sanction in writing of the Director of Public Prosecutions or of the Commissioner of the Independent Commission Against Corruption.

(3) Where any sentence is passed or order made by a Magistrates Court in respect of any person who is not represented by a lawyer, the person shall be informed by the magistrate of the right of appeal at the time when sentence is passed, or the order is made.

(4) An appeal to the High Court may be on a matter of fact as well as on a matter of law.

(5) The Director of Public Prosecutions shall be deemed to be a party to any criminal cause or matter in which the proceedings were instituted and carried on by a public prosecutor, other than a criminal cause or matter instituted and conducted by the Fiji Independent Commission Against Corruption.

(6) Without limiting the categories of sentence or order which may be appealed against, an appeal may be brought under this section in respect of any sentence or order of a magistrate's court, including an order for compensation, restitution, forfeiture, disqualification, costs, binding over or other sentencing option or order under the Sentencing and Penalties Decree 2009.

(7) An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case, but no right of appeal shall lie until the Magistrates Court has finally determined the guilt of the accused person, unless a right to appeal against any order made prior to such a finding is provided for by any law."

[11] Section 256 of the Criminal Procedure Act refers to the powers of the High Court during the hearing of an Appeal. Section 256 (2) and (3) provides:

"(2) The High Court may —

(a) confirm, reverse or vary the decision of the Magistrates Court; or

*(b) remit the matter with the opinion of the High Court to the Magistrates Court;
or*

(c) order a new trial; or

(d) order trial by a court of competent jurisdiction; or

(e) make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrates Court might have exercised; or

(f) the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the Appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(3) At the hearing of an appeal whether against conviction or against sentence, the High Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the Magistrates Court and pass such other sentence warranted in law (whether more or less severe) in substitution for the sentence as it thinks ought to have been passed."

The Ground of Appeal

- [12] The Ground of Appeal taken up by the State is that the Learned Magistrate erred in law and in fact when he dismissed the accused (Respondent) of all the charges pursuant to Section 166 of the Criminal Procedure Act.
- [13] In this case the Respondent was first produced in the Sigatoka Magistrate's Court on 13 January 2022. Although, the date is not clearly reflected in the Court Record [See page 8 of the Copy Record of the Magistrate's Court], this must be so, because the Charge filed in the Magistrate's Court is dated 13 January 2022.
- [14] On the said day it is recorded that Sergeant Devi appears for DPP. The Respondent had appeared in person (and informed that a Private Lawyer will be appearing for him). The Respondent was enlarged on bail and the matter was adjourned for mention on 19 April 2022.
- [15] On the 19 April 2022, it is recorded as follows: *Prosecution: Not present for DPP (no instructions).*
- [16] The Learned State Counsel submits that although no officer from the Office of the Director of Public Prosecutions (ODPP) was present on 19 April 2022, a Prosecuting Officer from the Police was present in Court that day. This is confirmed by the fact that it is recorded that there are no instructions. It would have been the Prosecuting Officer from the Police who would have stated this fact to Court (that he/she has no instructions from the ODPP).

[17] This is the stage at which the Learned Counsel for the Respondent had raised objections that since there is no instructions from the ODPP, that the charges against the Respondent be dismissed under Sections 166 and 170 of the Criminal Procedure Act.

[18] For ease of reference, Section 166 of the Criminal Procedure Act (which is titled *Non-appearance of complainant at hearing*) is re-produced below:

166. — (1) This section applies to any case in a Magistrates Court, where —

(a) the accused person —

(i) appears in obedience to the summons at the time and place appointed in the summons for the hearing of the case; or

(ii) is brought before the court under arrest; and

(b) the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear—

(i) in person; or

(ii) by his or her lawyer.

(2) In the circumstances stated in sub-section (1), the court shall —

(a) dismiss the charge; or

(b) adjourn the hearing of the case until some other date, upon such terms as it determines if there are reasons for not dismissing the case; and

(c) upon any adjournment the court shall—

(i) admit the accused to bail; or

(ii) remand the accused to prison; or

(iii) take such security for his or her appearance as the court determines.

(3) The expression "lawyer" in this section and in this Part shall in relation to a complaint include any prosecutor.

[19] Section 170 of the Criminal Procedure Act is titled "*Adjournment*". Section 170 (1) and (2) states as follows:

170. — (1) *During the hearing of any case, the magistrate must not normally allow any adjournment other than from day to day consecutively until the trial has reached its conclusion, unless there is good cause, which is to be stated in the record.*

(2) *For the purpose of sub-section (1) "good cause" includes the reasonably excusable absence of a party or witness or of a party's lawyer.*

[20] Section 171 of the Criminal Procedure Act (which is titled *Non-appearance of parties after adjournment*) provides as follows:

171. — (1) *If at the time or place to which the hearing or further hearing is adjourned*
—

(a) *the accused person does not appear before the court which has made the order of adjournment, the court may (unless the accused person is charged with an indictable offence) proceed with the hearing or further hearing as if the accused were present; and*

(b) *if the complainant does not appear the court may dismiss the charge with or without costs.*

(2) *If the accused person who has not appeared is charged with an indictable offence, or if the court refrains from convicting the accused person in his or her absence, the court shall issue a warrant for the apprehension of the accused person and cause him or her to be brought before the court.*

[21] The Learned State Counsel has submitted that Section 166 of the Criminal Procedure Act is reserved for first call matters only, and is not applicable to the present case. From the wording of Section 166, she may be right in her assertion. As per the Learned State Counsel's submission any further adjournments of the case, will be in terms of Sections 170 and 171 of the Criminal Procedure Act.

[22] However, this Court will not make a judicial pronouncement on this view taken up by the Learned State Counsel. This is more so due to the fact that the term "hearing" has not been duly defined. The term "hearing" seems to be used synonymously with actual trial and even for mention dates.

[23] In any event, it is clear that in terms of Section 166 (2) of the Criminal Procedure Act, that there is a discretion granted to the Magistrate either to dismiss the charge or to adjourn the hearing of the case to another date, where the complainant, having had notice of the time and place appointed for the hearing of the charge, does not appear.

- [24] It must be borne in mind that the 19 April 2022, was only the second day for which this matter had been fixed. The first call date being 13 January 2022.
- [25] The Learned Magistrate had gone on to uphold the objection taken up by the Learned Defence Counsel and dismiss the charges against the Respondent, since there was no appearance from the ODPP.
- [26] In his ruling (at pages 9 to 11 of the Copy Record of the Magistrate's Court) the Learned Magistrate has stated that on the 13 January 2022 (which was the first call date for this case) the Prosecuting Officer of Sigatoka (PO) had appeared on instructions of the ODPP. However, when the matter was called on 19 April 2022 there was no appearance from the ODPP.
- [27] The Learned Magistrate has gone on to say that there has been a recurring apprehension caused by ongoing absence of the ODPP in this jurisdiction. He seems to have based his order to dismiss the charges on this recurring apprehension.
- [28] It is my view that the Learned Magistrate was unreasonable in dismissing the charges against the Respondent in the said manner. It must be borne in mind that the Respondent is a Police Officer and is charged with two serious offences. It is a gross miscarriage of justice to deny the State the opportunity to lead all the evidence available against the Respondent to determine the charges against him.
- [29] It is further my view, by granting an adjournment to the prosecution, on the 19 April 2022, no prejudice would have been caused to the Respondent. If the Learned Magistrate desired he could have even called upon the Respondent to take his plea to the two charges (since this had not been done on the first call date) and then adjourned the matter for a future date. However, the Learned Magistrate has failed to do so.
- [30] In *State v. Karalo* [2018] FJHC 1173; HAA 63.2018 (10 December 2018); His Lordship Justice Madigan set aside an order of dismissal made by the Learned Magistrate, Magistrate's Court of Sigatoka, under Section 166 (2) of the Criminal Procedure Act, in a matter where the facts and circumstances were similar. In fact, in his ruling the

Learned Magistrate has made reference to the said case authority, but has acted contrary to the *ratio decidendi* in the said case.

[31] For the aforesaid reasons, I find that the Ground of Appeal has merit and that this Court should set aside the order of dismissal made by the Learned Magistrate.

Conclusion

[32] Accordingly, I conclude that this Appeal should be allowed and the order of dismissal be set aside.

FINAL ORDERS

[33] In light of the above, the final orders of this Court are as follows:

1. Appeal is allowed.
2. The order of dismissal made by the Learned Magistrate, Magistrate's Court of Sigatoka in CF 1 of 2022 is set aside.
3. This matter is fixed for mention in the Magistrate's Court of Sigatoka, on 18 April 2023, at 9.00 a.m.
4. The Respondent can remain on the same bail terms and conditions imposed by the Learned Magistrate, Magistrate's Court of Sigatoka, on 19 January 2022.



AT LAUTOKA
This 28th Day of March 2023


Riyaz Hamza
JUDGE
HIGH COURT OF FIJI

Solicitors for the Appellant :
Solicitors for the Respondent:

Office of the Director of Public Prosecutions, Lautoka.
JK Singh Lawyers, Barristers and Solicitors, Sigatoka.