IN THE HIGH COURT OF FIJI
AT LAUTOKA
IN THE WESTERN DIVISION
CRIMINAL APPELATE JURISDICTION

CRIMINAL APPEAL CASE NO.: HAA 60 OF 2016

BETWEEN: STATE

Appellant

AND: PITA DAU

Respondent

Counsel: Ms. S. Naibe for the Appellant

Mr. M. Anthony for the Respondent

Date of Hearing: 30th March 2017

Date of Judgment: 01st May, 2017

JUDGMENT

1. Respondent was charged with one count of Failing to Undergo Breath Analysis contrary to Section 103 (1) (1A) (i) of the Land Transport (Amendment) Decree No. 74 of 2012 and Section 114 of the Land Transport Act No. 35 of 2009.

2. Respondent pleaded guilty to the charge, and the summary of facts was read out in Court. Respondent admitted the facts and was thereafter convicted of the charge by the learned Magistrate.

3. The matter was adjourned for sentencing on the 8th day of March 2016, and whilst pronouncing the sentencing Ruling, the learned Magistrate acquitted the Respondent on the basis that the charge is defective.

4. Being dissatisfied with the acquittal, the State filed an application seeking extension of time within which to appeal against the order of acquittal.

5. Leave to appeal out of time was granted by this court on the 25th of October 2016.

6. Appeal is filed on the following ground:

THAT the Learned Magistrate erred in law in acquitting the Accused after conviction had been entered and the matter was set for sentencing.

7. The learned Magistrate in his 'Sentence' Ruling at paragraph 8 and 9 stated;

> *"[8]. The punishment for the charge before this court; as provided in the Statement of Offence, is provided in section 114 of the Land Transport Act No. 35 of 2009. The punishment is provided in Land Transport Act No. 35 of 1998 is provided as above. There is no such punishment as provided in section 114 of the Land Transport Act No. 35 of 2009.*

[9]. The charge against the accused is defective, I order for the accused to be acquitted and he is free to leave."

8. A court can only acquit an accused on two instances; one being at no case to answer stage and another is after a defended hearing.

9. In ***State v Wainiqolo*** [1998] FJHC 175; Haa0117.97 (5 March 1998) with reference to relevant sections in the the Criminal Procedure Code, Pain J observed the following:

> *"However, the learned Magistrate went even further and said, "Both accused No.1 and 3 are acquitted forthwith". I can find no provision in the criminal Procedure Code which enables a Magistrate to acquit an accused because the prosecutor fails to appear. The only provisions for acquittal that I am aware of are Section 210 (which provides for an acquittal if there is no case to answer) and Section 215 (which provides for acquittal after a defended hearing)".*

10. The learned Magistrate erred in law when he acquitted the Respondent after a conviction had been recorded and the matter was set for sentencing. The learned Magistrate should have proceeded to sentencing.

11. It is clear that the learned Magistrate in acquitting the Respondent had mentioned a defect only in the year of the Act.

12. The police officer who filed the charge had cited a wrong year of the Land Transport Act. The learned Magistrate erred in the sense that he should not have acquitted the accused on mere typing error by the police.

13. A charge is adequate if it tells a defendant the nature of the charge against him to enable him to prepare an adequate defense. The statement of the offence incorporated all the essential elements and right particulars of the offence except the correct year of the Act. A wrong citation of year of the Act does not embarrass or prejudice the accused.

14. In ***Shekar & Shankar v. State*** *Criminal Appeal No. AAU0056 of 2004,* the Court of Appeal made the following observations about the purpose of a charge:

> *"The purpose of the charge is to ensure that the accused person knows the offence with which he is being charged. Whilst the particulars should be as informative as is reasonably practicable, it is not necessary slavishly to follow the Section in the Act".*

15. The Respondent pleaded guilty and admitted the summary of facts provided by the Prosecution, and the learned Magistrate had convicted the Respondent.

16. Accordingly, the Magistrate having heard the facts provided by the prosecution and being satisfied that it met all the elements to the offence should have proceeded to sentence the Respondent. The mistake in the year of the Act did not prejudice the Respondent in any way.

17. In ***Skipper v. R*** [1979] FJCA 6, the Court of Appeal considered the circumstances in which a conviction based on a defective charge will be set aside. The Court said:

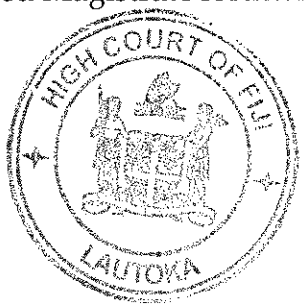
"A line of cases has now established that, if it is clear that no embarrassment or prejudice was caused by an omission to state the required particulars correctly, the proviso would be applied and the appeal would be dismissed. It is sufficient to cite instances in R v. McVitie 44 CAR 201; R v. Power 66 CAR 159; R v. Yule 47 CAR 229 and R v. Miller and Hanomer (1959) Crim. L. R. 50. Clifford Nelson 65 CAR 119 in another case and further reference will be made to it."

18. In the above case, the accused was convicted on a charge that specified a wrong section of the statute creating the offence. The Court of Appeal held that the defect was not a basic defect in the proceedings but was an irregularity.

19. I find that the conclusion of the learned Magistrate that the charge is defective is misconceived.

20. Appeal is allowed. Ruling of the learned Magistrate dated 8th March 2016 is set aside. The learned Magistrate is directed to pass the sentence according to law.

21. I direct the Deputy Registrar to forward a copy of this Judgment and the case record to the learned Magistrate forthwith.



Aruna Aluthge
Judge

At Lautoka
01st May, 2017

Solicitors: **Office of the Director of Public Prosecution for Appellant**
AC Law for Respondent