

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

Criminal Appeal No: AAU 0031 of 2011
(High Court No: HAC 119 of 2010)

BETWEEN : **VERENIKI BATIKALOU**

Appellant

AND : **THE STATE**

Respondent

Coram : Calanchini P
Basnayake JA
Goundar JA

Counsel : Mr. J. Savou for the Appellant
Mr. M.D. Korovou for the Respondent

Date of Hearing : 9 September 2014

Date of Judgment : 2 January 2015

JUDGMENT

Calanchini P

- [1] I have read the draft judgment of Basnayake JA and agree that the appeal should be allowed and the conviction quashed.

Basnayake JA

- [2] The appellant was convicted under section 310 (1) (a) (i) of the Crimes Decree 2009 in the High Court, for robbery on his own plea. The robbery was committed on 11 June 2010. The appellant was sentenced on 16 March 2011 to eight years' imprisonment with a seven years' non-parole period. By letter dated 16 March 2011 (pg 4 of the High Court Record) the appellant sought relief against the sentence on the ground that it was manifestly excessive. On 28 March 2013, a single Judge of the Court of Appeal (pgs. 2-3 HCR) granted leave under section 35 (1) (a) of the Court of Appeal Act.
- [3] On 3 September 2014 the appellant indicated through his counsel by letter, of his wish to appeal against the conviction as well. Written submissions were tendered in support of the same. The learned counsel for the respondent had originally filed written submissions with regard to the appeal against sentence. A reply was filed thereafter in response to the written submissions of the appellant.
- [4] When this case was taken up for argument on 9 September 2014 an oral application was made by the learned counsel to consider the merits and to quash the conviction. The appellant should have sought leave first as the appeal against the conviction is out of time. The appellant has also failed to make a formal written application challenging the conviction.
- [5] Apart from the fact that the appellant is out of time [S. 26 (1) of the Court of Appeal Act], the appellant has not formally applied for an enlargement of time, although no objection was taken by the Respondent.
- [6] The Court of Appeal, however, having considered the period the appellant was in prison, the fact that the appellant had appealed against the sentence within time, that the

appellant did not have legal representation until now and the fact that there is a ground of merit justifying the appellate court's consideration, granted leave to appeal against the conviction as well. (Kumar v State; Sinu v State [2002] FJSC 17; 2 CAV 0001 of 2009 (21 August 2012)). Again in Nalave v State [2008] FJCA 56; AAU 4 and 5 of 2006; (24 October 2008) leave to appeal was granted in an untimely appeal (appeal made about 16 months after the conviction) to prevent a miscarriage of justice. In that case, a plea entered was found to be equivocal as it was entered without a full understanding of the nature of the trial. Leave to appeal against the sentence was allowed on the ground that the judge had erred in failing to impose a minimum term.

The facts

- [7] The victim in this case is a 42 year old lady of German nationality. On 11 June 2010 she had left home at about 6.40 a.m. to go for a jog. She had an I-pod and earphones, a small blue shoulder bag containing her house keys, a \$20 note and sun glasses, all to the value of about \$60. While she was walking she had noticed the accused from time to time at different places along her path. Sometimes she had passed the appellant and *vice versa*. Suddenly she had realised the appellant wrapping his arms firmly around her, locking both her arms. He had carried her across the road more than a metre into the bush area and pinned her down to the ground with his arms and legs. She could not free herself and had screamed for help. She had also begged him not to do any harm. Then he had stood up and walked away and returned to snatch her shoulder bag and disappeared. He was arrested on the following day and had confessed to the robbery. His statement under caution was recorded on 13.6.2010 (pgs 104-107 of HCR). He was produced before the Magistrate on 16.6.2010 (pg. 134). On the same day the learned Magistrate had transferred the case to the High Court.

The Judgment

- [8] The appellant had pleaded guilty to the charge of robbery in the High Court. The learned Judge proceeded to fix the tariff at between suspended sentences to 10 years

imprisonment for robbery. The learned Judge has relied on the cases of Seru v The State [2002] FJHC 183; HAA 0084 of 2002S (22 November 2002) (Shameem J). The learned Judge thereafter considered sections 10 and 11 of the Sentencing and Penalties Decree 2009, and having perused the previous record of the appellant, declared the Appellant to be a habitual offender and fixed the starting point at 8 years imprisonment.

[9] The learned Judge has considered the following as aggravating factors and increased the sentence by 4 years:

1. Using force on a lady who was jogging alone.
2. Bringing fear into her life.
3. Injuries suffered.
4. Bringing fear in to the public who go jogging.

The following matters have been considered as mitigating factors to reduce the sentence by 4 years, thus allowing the sentence to stand at 8 years. The mitigating circumstances are as follows:-

1. Pleading guilty at the very start.
2. Claiming to be remorseful.
3. Period in remand.
4. Married with a child.

Submissions of the learned Counsel for the Appellant with regard to the conviction

[10] The appellant was produced in the Magistrate's Court at Suva on 16 June 2010. The learned Magistrate having observed that the appellant was charged with indictable offences, transferred the case to the High Court in terms of section 35 (2) (b) (ii) of the Criminal Procedure Decree 2009 (pg 134 HCR). On 10 February 2011 (pg. 50 of HCR) the appellant pleaded guilty to the charge of robbery and was sentenced on 16 March 2011 (pgs. 4 to 9 of HCR) to a term of 8 years imprisonment with a non-parole term of 7 years.

- [11] The learned counsel submitted that the appellant was not given the statutory option laid down by the law, which allows an accused to choose the court of his choice to stand trial. The appellant was convicted for the offence of robbery contrary to section 310 (1) (a) (i) of the Crimes Decree of No. 44 of 2009. The section is as follows:-

“310-(1) A person commits an indictable offence (which is triable summarily) if he or she commits theft and-(a) immediately before committing theft, he or she-(i) uses force on another person; or.....”

- [12] “Indictable offence triable summarily” means any offence stated in the Crimes Decree 2009 or any other law prescribing an offences to be an indictable offence triable summarily, and which shall be triable – (a) in the High Court in accordance with the provisions of this Decree; or (b) at the election of the accused person, in a Magistrate Court in accordance with the provisions of this Decree; (section 2 (a) and (b) of the Criminal Procedure Decree 2009).
- [13] Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b)). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court (section 35 (2) (b) (II) of the Criminal Procedure Decree 2009).
- [14] The learned counsel submitted that although the charge is one triable summarily, an inquiry was not made with regard to the wish of the appellant whether he would prefer to be tried in the Magistrate Court or the High Court. The learned counsel submitted that the appellant would have opted to be tried in the Magistrate Court if an inquiry was made. If that is so, the appellant would have had the opportunity of an early hearing.

[15] The learned counsel submitted that the appellant had admitted his guilt at the very first opportunity that he got during the caution interview. The learned counsel submitted that the appellant would have pleaded guilty in the Magistrate Court too and would have commenced his term much earlier. If the appellant pleaded before the learned Magistrate he may have received a lesser sentence. The learned counsel submitted that the appellant was greatly prejudiced due to being deprived of the option in the Magistrate Court and that the failure of the statutory obligation would make the entire proceedings a nullity. The learned counsel submitted that in Cerevakawalu v The State [2001] FJCA 60; [2001] 2 FLR 409 (22 November 2001) the proceedings were declared a nullity due to a defective charge. The learned counsel conceded that no such defect was found in the charge in this case.

[16] The learned counsel made submissions with regard to the sentence as well. However, considering the ultimate decision of this court, that is to quash the conviction, the sentence will not be an issue to discuss.

Submissions of Counsel for the Respondent

[17] The learned counsel for the respondent humbly admitted to the failures on the part of the learned Magistrate and the High Court Judge to offer the statutory option to the appellant. However, the learned counsel submitted that no prejudice has been caused as a Magistrate has the power to impose a sentence of 10 years for the offence charged. The learned counsel further submitted that the learned Judge had given a discount of 4 years while considering the mitigating circumstances, although he did not consider the early guilty plea and the period of remand separately. The learned counsel submitted that the appellant fully understood the offence to which he pleaded guilty and did so of his own freewill and hence the guilty plea is unequivocal. The learned counsel relied on the case of R v Clarke (Ronald Augustus) [2006] EWCA Crim 1196, [2006] Crim LR 1011, a decision of the Court of Appeal of England, in the written submissions as well as oral

submissions. The learned counsel for the respondent also tendered to court a copy of the judgment of the Court of Appeal along with his bundle of authorities.

[18] R v Ronald Augustus Clarke & James Andrew Francis McDavid (supra) is a case where the accused were convicted for causing bodily harm etc. They were sentenced to 12 years and 14 years imprisonment. The sentences had been already served. The question for determination was, when a trial proceeds on an unsigned indictment, whether the trial and the conviction are rendered a nullity. The grounds of appeal after conviction were based mainly on identification and mis-directions in the summing-up. The question with regard to an unsigned indictment was raised after the dismissal of the appeal. These questions were raised before the Criminal Cases Review Commission.

[19] In the Court of Appeal Pill LJ considered the case of Ashton and Others v Ors.[2007] 1 WLR 181. One of the issues on appeal in that case was whether the absence of a signed indictment was fatal to the validity of the proceedings; The court in that case referred to cases, including Haye [2002] EWCA Cr 2476, [2003] Crim. L. R. 287 (CA) in which a strict view had been taken of procedure to be followed in the criminal courts. In the Ashton decision (supra), Fulford J stated “*that each of those cases predate the decisions of the House of Lords in Soneii [2005] UKHL 49, [2005] 3 WLR 303 and Sekhon [2003] 1 Cr App R 34, [2003] 1 WLR 1655. We are confident that if Haye was decided now, the result would have been the other way. We are keenly aware of the extent to which this constitutes a significant departure from the way in which these issues have been dealt with and decided in the past, but have no doubt that a new test and a new approach is now to be applied*”. The court further held that (Para 72) “*the facts of this case provide a good illustration of how an inflexible invalidity rule is contrary to the interests of the accused and the prosecution as well as running contrary to the public interest in the fair administration of criminal justice*”.

- [20] The learned counsel submitted that this Court adopt the test in Ashton (supra) where the court is required to take a wide assessment of the interests of justice to determine whether there is any prejudice to the appellant due to the non-compliance of the statutory provision, instead of automatically declaring the proceedings a nullity.

The House of Lords Judgment in R v Clarke [2008] 2 All ER 665

- [21] It is unfortunate that the learned counsel for the respondent was unaware of the existence of an appeal against the Court of Appeal decision which is disastrous to the respondent's case. In an appeal from the judgment of the Court of Appeal, the House of Lords, on 6 February 2008, allowed the appeals and quashed the convictions, reversing the decision of the Court of Appeal.
- [22] Lord Bingham at the outset explains the question to be decided on appeal as follows; (pg. 668), *"It is accepted that when the trial of the appellants began in April 1997 there was no signed indictment before the Crown Court."* The question to be resolved was, *"whether the absence of a signed indictment at the outset of and during most of the trial had the legal effect of invalidating the proceedings? And if so, whether such invalidity was cured by the late signature of the proper officer?"*
- [23] Lord Bingham quoting Sir James Fitzjames Stephen in "A History of the Criminal Law of England" (1883) Vol. 1 p 274 that *"the indictment is the foundation of the record in all criminal cases"*, stated that (671), *"until recently, the jurisdictional requirement of S. 2 of the 1933 Act was strictly insisted upon."* His Lordship relied on a large number of cases including R v Gee [1936] 2 All ER 89, [1936] 2 KB 442; In that case the document purporting to be an indictment was not an indictment and the proceedings were held to be so defective that there was no lawful committal. The convictions were quashed. In R v Thompson [1975] 2 All ER 1028 the trial had taken place upon an invalid indictment.

The conviction was quashed. In R v Cairns (1983) 87 Cr App Rep 287 too, the conviction was quashed. In R v Newland [1988] 2 All ER 89, [1988] QB 402 the appeal was allowed and the conviction was quashed as the trial had proceeded on an invalid indictment; this, in spite of the fact that there was no merit at all, the appellant having pleaded guilty.

[24] In R v Morais [1988] 3 All ER 161 Lord Lane CJ held that “*a necessary condition precedent to the existence of a proper indictment is that the bill should be signed, and only then thereupon does it becomes an indictment...Therefore in the present case there was no valid indictment, there was no trial, no valid verdict and no valid sentence*”. Lord Bingham also relied on Crawford v HM Advocate [2005] HCJAC where the omission of the words ‘By Authority of Her Majesty’s Advocate’ was found fatal to the indictment. R V Jancesi [2005] NSWCCA 281 92005) 223 ALR 580 cited by Lord Bingham is a decision of the Court of Appeal of New South Wales where the indictment was held to be invalid for not containing the signature of an authorised officer.

[25] Lord Bingham thereafter considered the decisions of the Court of Appeal in R v Ashton, R v Draz and R v O’ Reilly [2006] EWCA Crim 794, [2007] 1 WLR 181. It is the judgment in Ashton (supra) that influenced Pill LJ in the Court of Appeal to uphold the conviction. Lord Bingham quoted Fulford J (Ashton’s) in paragraphs [4] and [5] which are self explanatory;

[4] ‘*The outcome of each of these cases essentially depends on the proper application of the principal or principles to be derived from the decision of the House of Lords in R v Soneji ([2005] UKHL 49, [2005] 4 All ER 321) [2006] AC 340, together with the earlier decision of this court in R v Sekhon ([2002] EWCA Crim 2945, [2003] 3 All ER 508) [2003] 1 WLR 1655. Indeed, these three applications demonstrate how far-reaching the effect of those authorities is likely to be whenever there is a breakdown in the procedures whereby a defendant’s case progresses through the courts (as opposed to the markedly different situation when a court acts without jurisdiction). In our judgment it is now wholly clear that whenever a court is confronted by failure to take a required step, properly or at all, before a power is exercised (“a procedural failure”), the court should first ask-itself whether the intention of the*

legislature was that any act done following that procedural failure should be invalid. If the answer to that question is no, then the court should go on to consider the interests of justice generally, and not particularly whether there is a real possibility that either the prosecution or the defence may suffer prejudice on account of the procedural failure. If there is such a risk, the court must decide whether it is just to allow the proceedings to continue.

[5] *On the other hand, if a court acts without jurisdiction—if, for instance, a magistrates' court purports to try a defendant on a charge of homicide—then the proceedings will usually be invalid.'*

- [26] Disapproving the above reasoning, Lord Bingham held that (pg 677), “*It is always, of course, lamentable if defendants whose guilt there is no reason to doubt escape their desserts, although the present appellants, refused leave to appeal (on other points) by the single judge in 1997 and the full court in 1998, have now served the operative parts of their sentences. Technicality is always distasteful when it appears to contradict the merits of a case. But the duty of the court is to apply the law, which is sometimes technical, and it may be thought that if the state exercises its coercive power to put a citizen to trial for serious crime a certain degree of formality is not out of place. In this case, as in *Crawford v HM Advocate* 2005 SCCR 628, the duty in question was easy to perform, although here the failure to perform it was entirely the fault of the proper officer*” (emphasis added).
- [27] Lord Bingham states thus, (pg. 678) “*What did Parliament intend the consequence to be if there was a bill of indictment but no indictment? The answer, based on the language of the legislation and reflected in 70 years of consistent judicial interpretation, is again inescapable; Parliament intended that there could be no valid trial on indictment if there was no indictment*”.
- [28] Referring to *R v Sekhon* (supra) and *R v Soneji* (supra) Lord Bingham said that those two cases are “valuable and salutary, but the effect of the sea change which they wrought has

been exaggerated and they do not warrant a wholesale jettisoning of all rules affecting procedure irrespective of their legal effect”.

Judgements of Fiji in favour of the decision of the House of Lords in Clarks’

- [29] There are a series of cases in which the Fiji courts have also adopted the strict view applied in cases such as R v Haye (supra). In Aca Koroi v The State [2013] FJHC 306; HAM 186 of 2012S (21 June 2013), the proceedings before the Magistrate Court was declared a nullity due to the failure of the Magistrate to provide the option available under section 4 (1) (b) of the Criminal Procedure Decree 2009. Again in The State v Ilaitia Ravuwai (2014 FJHC 487; HAC 118 of 2014S; 3 July 2014) the proceedings before the Magistrate Court were declared a nullity and the case was remitted to the Magistrate Court for election to be put to the accused in conformity with section 4 (1) (b) of the Criminal Procedure Decree 2009.
- [30] It is not disputed that the appellant was deprived of a statutory requirement. The appellant possessed a legal right to choose to be tried either in the Magistrate’s Court or the High Court, a right given by law. Can this right arbitrarily be taken away? The intention of the relevant sections in the Criminal Procedure Decree 2009 is clear and unambiguous. And when the law is clear and unambiguous as this, it is not the role of the judge to make or even modify the law but rather to apply it as it is.
- [31] The learned counsel for the respondent, relying strongly on the Court of Appeal decision in Clark (supra), submits that the court should take a wider assessment of the interests of justice to determine whether there is any prejudice to the appellant due to the non-compliance of the statutory provision, instead of automatically declaring the proceedings a nullity. It clearly illustrates the relegated position that procedural law takes, procedural errors being bypassed or even overlooked if no prejudice is caused to either party. On the

contrary, it is my firm opinion that, especially in the realm of criminal law, procedural law holds as important a place as substantive law as it infringes upon the life and liberty of the person.

- [32] A champion of the Rule of law, Dicey explains in the 'Introduction to the Study of the Law of the Constitution' (Eighth edition at pg.vii) thus, "The primary duty of the judge is to act in accordance with the strict rules of law. He must shun, above all things, any injustice to individuals. The well-worn and often absurdly misapplied adage that "it is better that ten criminals should escape conviction than that one innocent man should without cause be found guilty of crime" does after all remind us that the duty of a judge is not to punish crime but to punish it without doing injustice". In any case, having pleaded guilty in the High Court, can one really say that no prejudice has been caused to the accused? Considering all the decisions mentioned above I am of the view that this court has but one direction and that is to declare the entire proceedings null and void. Hence we allow the appeal and quash the conviction and set aside the sentence.

Re-trial

- [33] Section 23 (2) (a) of the Court of Appeal Act is as follows:

"(2) Subject to the provisions of this Act, the Court of Appeal shall-

(a) If they allow an appeal against conviction, either quash the conviction and direct a judgment and verdict of acquittal to be entered, or if the interests of justice so require, order a new trial;

The appellant in this case admitted to having committed the crime in his caution interview. Thereafter he pleaded guilty in court. Having discovered the procedural defect, the court has decided to allow the appeal and quash the conviction. Is there any justification in ordering a re-trial now? The appellant was arrested on 12 June 2010. He has been in confinement ever since that is more than 4 years and 3 months. Considering the facts of this case, the accused could be found guilty of committing simple robbery.

Although taking into account that the appellant has been declared a habitual offender, I am of the view that there is no justification in ordering a re-trial.

Goundar JA

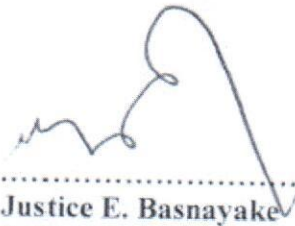
[34] I have also read the draft judgment of Basnayake JA and agree that the appeal should be allowed and the conviction quashed.

The Orders of the Court are:

1. Appeal allowed.
2. Conviction quashed and sentence set aside.



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Hon. Justice W. Calanchini
PRESIDENT, COURT OF APPEAL



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Hon. Justice E. Basnayake
JUSTICE OF APPEAL



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Hon. Justice D. Goundar
JUSTICE OF APPEAL