IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 2 of 1978

Between:

THE DIRECTOR OF PUBLIC PROSECUTIONS

Appellant

- and -

GAJ RAJ SINGH s/o
Jaikaran Singh

Respondent

M. Jennings for the Appellant.
Respondent in person.

Date of Hearing: 3rd March, 1978.
Date of Judgment: 22nd March, 1978.

JUDGMENT OF THE COURT

Marsack, J.A.

The only question involved in this appeal is that of the true construction of section 300(2) of the Criminal Procedure Code as amended by the Criminal Procedure Code Amendment 13/69. That section reads :

> "300(2). At the hearing of an appeal whether against conviction or against sentence, the Supreme Court may, if it thinks that a different sentence should have been passed, quash the sentence passed by the magistrate's court and pass such other sentence warranted in law, whether more or less severe, in substitution therefor as it thinks ought to have been passed. "

In his judgment the learned appellate Judge interprets the phrase "as it thinks ought to have been passed" as meaning "ought to have been passed by the magistrate". The words were inserted in the section for some purpose; and the only way to give effect to them, in his opinion, is to apply this interpretation. In the view of the learned Judge this restricts the powers of the Supreme Court on appeal from a Magistrate's Court in such a case to such powers in the matter of sentence as could have been exercised by the magistrate.

It is clear from his judgment that the learned Judge was of opinion that a higher sentence than 5 years' imprisonment would have been justified on the facts; but he considered himself bound by section 300(2) to pass no greater sentence than 5 years' imprisonment, the maximum which the magistrate could have imposed.

The general principles setting out the jurisdiction of an appeal Court in

the cases of this nature are well expressed in Sohoni's Code of Criminal Procedure 15th Edition page 2230:

> " It is a fundamental principle that every Court of Appeal exists, for the purpose, where necessary, of doing or causing to be done, that which each Court subordinate to its appellate jurisdiction should have but has not done, or caused to be done, and nothing further. Therefore the jurisdiction in appeal is necessarily limited in each case to the same extent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an appellate Court, as such, must be interpreted as subject to the general rule above stated. All jurisdiction starts with the first Court and remains a constant factor throughout all subsequent stages of the suit or proceeding governed by it. "

It is true that the Indian Criminal Procedure Code is not worded in precisely the same terms as that of Fiji but the statement of principle cited is, as we see it, strictly applicable to the provisions of our own law. Moreover section 300(2) expressly limits the powers of the Supreme Court in such cases to passing such other sentence "warranted in law as it thinks ought to have been passed". Unless that last phrase is interpreted to mean "passed by the magistrate", that is the Court from which the appeal is brought, the words would be meaningless.

This same question came before the New Zealand Court of Appeal in R. v. Barr

(1973) 2 N.Z.L.R. 1, where the Court was concerned with the interpretation of a provision in the Summary Proceedings Act 1957 which is worded in substantially the same terms as our section 300(2). Under section 121 of that Act, in the case of an appeal against sentence the Supreme Court may :

> "Quash the sentence and either pass such other sentence warranted in law (whether more or less severe) in substitution therefor as the Supreme Court thinks ought to have been passed or deal with the offender in any other way the Court imposing sentence could have dealt with him on the conviction. "

It will be seen that the phrase "thinks ought to have been passed" is in identical terms with that in our Criminal Procedure Code. The Court in R. v. Barr held that under that section the jurisdiction of a superior Court to impose sentence on appeal from a lower Court is limited, in the matter of length of sentence, to the jurisdiction held by the lower Court. The reasoning leading to that conclusion is set out in full in the judgment.

In the argument before us Counsel for the appellant pointed out that under section 212 of the Criminal Procedure Code the trial magistrate, may, in certain circumstances set out in detail in that section, commit the accused to the Supreme Court for sentence. In that case the Supreme

Court would not be limited to the sentence which the magistrate could have imposed. His submission was that the Supreme Court could, on an appeal like the present, consider the question as to whether the magistrate's discretion, in deciding to pass sentence himself, had been correctly exercised; and if the appellate Court decided that the trial magistrate had not exercised his discretion correctly, the Supreme Court could so hold and would then be at liberty to deal with the matter as if the offender had been committed to the Supreme Court for sentence.

This point was dealt with by the New Zealand Court of Appeal in R. v. Barr (supra), and that Court ruled :

> " We find it impossible to construe the very general words of s.121(1) as empowering the Supreme Court to re-examine the discretion given to a Magistrate to sentence, or not to sentence. A much more positive expression by the Legislature would be necessary to produce such a consequence, as to which the well known presumption in favorem libertatis must incline the Court to a construction of the statute in favour of the subject. "

We fully concur in the principles laid in R. v. Barr and are of opinion that they can properly be applied to the present case. We are satisfied that an appellate Court is not entitled to review the exercise by the Magistrate of his discretion in the matter of imposing sentence himself, or sending it to the Supreme Court under s.212

where the conditions set out in that section are present. We are also satisfied that the construction placed on section 300(2) by the learned Judge was correct. Section 300(2) must in our view be interpreted to mean that on appeal against sentence from a Magistrate's Court the Supreme Court may increase the sentence up to, but not beyond, the limit of the magistrate's jurisdiction in that respect.

Accordingly the appeal is dismissed.

(Sgd.) T.J. Gould
VICE PRESIDENT

(Sgd.) Charles C. Marsack
JUDGE OF APPEAL

(Sgd.) T. Henry
JUDGE OF APPEAL

SUVA,

22nd March, 1978.