IN THE FIJI COURT OF APPEAL

Civil Jurisdiction

Action No. 45 of 1982

Between:

1. HIMMAT LODHIA
   s/o Shanti Lal
2. MOHAMMED JANNIF
   s/o Bira Prasad
3. PRAVIN CHANDRA
   s/o Naran Bhai
4. MAHESH KUMAR
   s/o Raman Lal
5. BEMENDRA KUMAR NAGIN
   s/o Nagin Dass Devchand

Appellants

and

SUVA MAGISTRATE'S COURT Respondent

S.M. Koya for the Appellants
A. Gates for the Crown

Dates of Hearing: 3rd & 4th November, 1982
Delivery of Judgment: 19th November, 1982

JUDGMENT OF THE COURT

Gould V.P.,

The appellants filed notice of appeal to this Court asking to have et aside a decision by the Chief Justice in the Supreme Court dated the 23rd July, 1982, refusing the appellants' application for Orders of Certiorari and Prohibition in respect of proceedings in the Suva Magistrate's Court.

The proceedings in question were a preliminary inquiry in respect of criminal charges against the

appellants in Suva Criminal Case 419/81. There were six counts in all. Count 1 against the first appellant, was for official corruption (Penal Code s.98(b)); Counts 2 and 3, against the second appellant, were respectively for official corruption (s.98(a)) and forgery (s.379(3)(g)); Count 4, against the third appellant was for forgery (s.372(g)); Count 5, against the fourth appellant, was for personation (s.404); and Count 6, against all five appellants, for conspiracy to defeat the cause of justice (s.123(a)).

The proceedings were protracted as the following passage from the judgment of the learned Chief Justice shows :-

> " The committal proceedings in this matter which commenced as far back as 24th February 1981 had for one reason or another dragged on intermittently until on the 7th May, 1982: the record of proceedings at page 34 noted what happened as follows :-
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> 'Court:
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> I find here that there is no case to answer against Accused 1 on Count 1 and Accused 3 on Count 4. I find a case to answer against all accused on the other counts i.e. Counts 2, 3, 5, 6 and 7.
>
> Singh (for Koya):
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> Mr. Koya wishes to say that, on behalf of the Accused 1 and Accused 5 he wishes to call evidence.
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> Court:
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> I had not appreciated that. I withdraw the committals I have just made and the two discharges.
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> Defence Counsel:
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> I say the discharge of Accused 1 on Count 1 the Accused 3 on Count 4 should stand and trial only proceed on the remaining counts.

Court:

It is an enquiry not a trial so I, surely, decide them all at the end.

Defence Counsel:

Could we have time to prepare legal submissions on the point.

Court:

Adjourned to 16.6.82 for legal submission.

(Sgd.) F.G.R. Ward
Chief Magistrate "

It is necessary to augment this brief record and there is no dispute over those facts which are essentially relevant. We take them from an affidavit dated the 1st July, 1982, sworn by the Chief Magistrate, Mr. G. Ward. On the 22nd April, 1982 the prosecution closed its case and Mr. Koya, counsel for the first and fifth appellants, made a submission on their behalf. The case was then adjourned to the 29th April, 1982, on which date Mr. Patel made a submission on behalf of the second appellant and Mrs. Hoffman, on behalf of the third and fourth appellants. Mr. Bulewa, counsel for the prosecution, replied and the matter was adjourned for ruling to the 7th May, 1982. On the 7th May, at the learned Chief Magistrate's request, Mr. Bulewa addressed further on Counts 1 and 4.

According to Mr. Ward's affidavit, he then said that there was no evidence against the first appellant on Count 1 and the third appellant on Count 4 and discharged them on those counts; he found a case to answer against all the accused on the remaining counts (i.e. 2, 3, 5, 6 and 7) and stated that he was committing them for trial to the Supreme Court. It would appear that this was all that transpired concerning these particular orders: nothing formal was drawn up. There was no delay. As soon as Mr. Singh (appearing for Mr. Koya) made it known

that it was desired to call evidence the Chief Magistrate withdrew the orders he had made.

After that Mr. Singh made his submission that the discharges on Counts 1 and 4 should stand but that the committals should be withdrawn. The matter was adjourned for further argument with this matter undecided. It was not in fact decided, as the present certiorari and prohibition proceedings were embarked upon, and in them, contrary to the stand taken by Mr. Singh in the Magistrate's Court, it has been contended that the Chief Magistrate was functus officio and unable to withdraw the committals.

At this stage it will be convenient to set out sections 229(1), 230(1) and (4) and 231 of the Criminal Procedure Code :

> "229(1) If, after examination of the witnesses called on behalf of the prosecution, the court considers that on the evidence as it stands there are sufficient grounds for committing the accused for trial, the magistrate shall satisfy himself that the accused understands the charge and shall ask the accused whether he wishes to make a statement in his defence or not and, if he wishes to make a statement, whether he wishes to make it on oath, or not. The magistrate shall also explain to the accused that he is not bound to make a statement and that his statement, if he makes one, will be part of the evidence at the trial. "

> "230(1) Immediately after complying with the requirements of section 229 relating to the statement or evidence of the accused person, and whether the accused person has or has not made a statement or given evidence, the court shall ask him whether he desires to call witnesses on his own behalf.
>
> (2) .....
>
> (3) .....
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> (4) In any preliminary inquiry under this Part, the accused person or his barrister and solicitor shall be at liberty to address the court -

(a) after the examination of the witnesses called on behalf of the prosecution;

(b) if no witnesses for the defence are to be called, immediately after the statement or evidence of the accused person;

(c) if the accused person elects -

(i) to give evidence or to make a statement and witnesses for the defence are to be called, or

(ii) not to give evidence or to make a statement, but to call witnesses,

immediately after the evidence of such witnesses. "

"231. If, at the close of the case for the prosecution, or after hearing any evidence in defence, the court considers that the evidence against the accused person is not sufficient to put him on his trial, the court shall forthwith order him to be discharged as to the particular charge under inquiry; but such discharge shall not be a bar to any subsequent charge in respect of the same facts:

Provided always that nothing contained in this section shall prevent the court from either forthwith, or after such adjournment of the inquiry as may seem expedient in the interests of justice, proceeding to investigate any other charge upon which the accused person may have been summoned or otherwise brought before it, or which, in the course of the charge so dismissed as aforesaid, it may appear that the accused person has committed. "

The position is that immediately after the close of the prosecution evidence it becomes the duty of the magistrate to consider it and decide whether it provides sufficient ground, as it stands, for committing the accused person for trial. We say this because section 229(1) makes an affirmative answer to that question a pre-requisite to the magistrate's proceeding to ascertain whether the accused wishes to make a statement and whether or not on oath. In making up his mind at that stage it is the duty of the magistrate to consider such submissions as may then be made by accused or his counsel, as is his right by

virtue of section 230(4)(a) of the Code. Thus the nature of the magisterial duties is two fold, unless he decides upon discharge (under section 231) at the conclusion of the prosecution. First he must at that stage consider the evidence and make up his mind whether it alone is strong enough to justify committal. If that is his view, he must give the accused the opportunity of putting forward such evidential material as he desires, and then apply his mind to the totality of the evidence and decide the same question.

The extreme narrowness of the point sought to be taken in these proceedings so far as Counts 2, 3, 5, 6 and 7 are concerned at least, is readily apparent. It was the Chief Magistrate's duty under section 229(1) to convey to counsel that it was his opinion (if that was the case) that the evidence justified committal orders. He might have done so in a number of different ways. With counsel present, a word or two would have sufficed and the election by the defence whether to call evidence would have followed. It is in these proceedings claimed that the difference between a magistrate saying "I commit," followed by immediate retraction, and saying "I propose to commit - do you call evidence?" in some way disables the magistrate from effectively applying his mind to the problem at the two stages of the proceedings, as the law requires him to do wherever an accused person gives or calls evidence.

In the Supreme Court the learned Chief Justice in his judgment said that the findings of the Chief Magistrate of no case to answer on Counts 1 and 4 were properly made at the end of the prosecution case under section 231 of the Code. The Chief Magistrate was therefore functus officio and could not withdraw the orders of discharge; when he purported to do so on those counts he was without jurisdiction.

As to the committal orders on Counts 2, 3, 5, 6 and 7 they were made by an oversight in breach of the mandatory procedural requirements of sections 229 and 231 of the Code, and therefore, being made without jurisdiction, were null and void and of no legal effect. They could properly be withdrawn when the mistake was realized. This having been done he was not functus officio and it was his duty to continue the proceedings on these counts. The application for judicial review was premature. He relied upon the judgment in R. v. Carden (1879) Q.B.D. 1.

At the outset of the argument in the proceedings before this court the question was raised by the court itself whether on the facts of the case as presented to the Supreme Court any appeal to this court was authorised by law. This point was not raised by counsel and in fact in the case of Shiu Ram v. Magistrate's Court at Labasa (Civil Appeal No.52 of 1980) this court adjudicated upon an appeal in which very similar considerations were present. The question of whether an appeal lay was not raised or dealt with in that case and as it goes to jurisdiction we consider it incumbent upon the court to raise it now and dispose of it.

The court adjourned briefly to enable counsel to consider the matter, after which Mr. Gates, appearing for the Crown, supported the proposition that no appeal lay and Mr. Koya, for the appellants, took the opposite view.

The brief point is this. There is no dispute that appeals to this court can lie only if authorised by law. Some appeals are authorised by the Constitution of Fiji (Cap. 1 - 1978 Edition) and some by individual statutes. Mr. Koya however does not submit that any of these affect the matter in issue, but relies upon the general powers of the court conferred by the Act which constitutes it; the Court of Appeal Act (Cap. 12 - 1978). Part III of that Act is headed "Appeals in Civil Cases" and Part IV "Appeals in Criminal Cases". It is common ground in the

argument that nothing in Part IV confers a right of appeal in the present circumstances. Section 21, the main general section, is confined to persons convicted on a trial held before the Supreme Court. There is nothing of relevance in the sections concerning appeals to the Supreme Court from Magistrates Courts. The question of determination therefore is whether Part III confers a right of appeal in a case such as the present, and that turns upon the wording of section 12(1) which reads :

> " 12(1) - Subject to the provisions of sub-section (2), an appeal shall lie under this Part in any cause or matter, not being a criminal proceeding, to the Court of Appeal -
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> (a) from any decision of the Supreme Court sitting in first instance, including any decision of a judge in chambers;
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> (b) from any decision of the Supreme Court under the provisions of the Matrimonial Causes Act;
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> (c) on any ground of appeal which involves a question of law only, from any decision of the Supreme Court in the exercise of its appellate jurisdiction under any enactment which does not prohibit a further appeal to the Court of Appeal. "

This section carries its own subheading in the same terms as that of the whole Part i.e. "Appeals in civil cases" and it is plain enough that the general intention was to deal with appeals in criminal cases in Part IV and with civil appeals in Part III. The words in section 12 "in any cause or matter, not being a criminal proceeding," lend emphasis to that approach, and if the proceedings before the Supreme Court were criminal proceedings appeal to this court is excluded; no other basis can be found for it.

The approach in Fiji to such matters as prerogative orders has been modelled upon that of the United Kingdom. Indeed the Supreme Court itself under section 18 of the Supreme Court Act (Cap. 13 - 1978) "..... shall ..... possess and exercise all the

jurisdiction, powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England."

The change from prerogative writs to prerogative orders has been followed in Fiji and procedurally, when Order 53 of the Rules of the Supreme Court was amended to assimilate the prerogative orders with the matter of judicial review the same amendment was made in Fiji - see the Supreme Court (Amendment) Rules, 1981 (L.N. No 3). As to the Supreme Court's jurisdiction to supervise proceedings in the Magistrates Court there is section 98(1) of the Constitution of Fiji, as follows :

> "98(1) The Supreme Court shall have jurisdiction to supervise any civil or criminal proceedings before any subordinate court and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by any such court."

By section 127 "subordinate court" is defined to mean any court of law established for Fiji other than the Supreme Court, the Court of Appeal or a court established By a disciplinary law.

We have made these references as a preliminary to seeking the aid of cases decided by the English courts in construing section 12(1) of the Court of Appeal Ordinance. In England the words restrictive of appeals have been "in a criminal cause or matter" and those words were taken from the Supreme Court of Judicature (Consolidation) Act, 1925, section 31(1)(a) - see 11 Halsburys Laws of England (4th Edition) para. 1570. That paragraph indicates that an appeal from the Divisional Court to the Court of Appeal does lie in a case involving prerogative orders "except in a criminal cause or matter".

It is a possible argument (and we think that Mr. Koya endeavoured to rely on it here) that applications

for prerogative orders are always civil matters, originating in the Supreme Court. We find that authority is definitely contrary to such an argument and that an application for certiorari or whatever prerogative order is sought takes its character from the proceedings in respect of which it is brought. This is clearly said in the House of Lords by Lord Sumner in Clifford and O'Sullivan /1921/ 2 A.C. 570 at pages 586-7 :

> " An application for a writ of prohibition is in itself no more and no less criminal than it is the contrary. This quality of the matter of an application for that writ must be decided according to the subject matter dealt with on the application. The same is true of certiorari (Reg. v. Fletcher 2 Q.B.D. 43) and of habeas corpus (Ex. parte Woodhall 20 Q.B.D. 832). Nor is there anything peculiar about prohibition for this purpose. Prima facie a writ of prohibition is one to be directed to an inferior Court, its members and officers; habeas corpus on the other hand is not specially concerned with the jurisdiction or officers of an inferior Court, and therefore in habeas corpus no such question determines the issue of criminal or not criminal for the purpose of an appeal. I think the real test is the character of the proceedings themselves which are the subject matter of the particular application, whatever it be, that constitutes the cause or matter referred to. "

His Lordship continued, and this touches upon the criminal nature of proceedings generally:

> "Can it be, when an inquiry is held under regular forms of criminal judicial procedure into the commission by accused persons of acts, which could lawfully be charged as crimes before another body, and the result of the inquiry on conviction may be a sentence of death, that this is not an inquiry of a criminal character? "

The leading case may be Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government /1943/ A.C. 147 (in which the Clifford and O'Sullivan case was considered). Its effect is summarised in the headnote as follows :

" Held, that the case came within section 31, subsection 1(a), of the Supreme Court of Judicature (Consolidation) Act, 1925, as the judgment appealed from was in 'a criminal cause or matter,' and that, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

The distinction between cases in which it is possible to appeal from a refusal to grant a writ of habeas corpus, and cases in which no appeal i possible, turns on the nature and character of the proceedings in which habeas corpus is sought. If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for an alleged offence by a court claiming jurisdiction to do so, the matter is criminal, and there can be no appeal from a refusal to grant the writ. "

In the following passage from the judgment of Lord Wright, at page 162 he deals with the Clifford and O'Sullivan case (in which the facts concerning the military type tribunal have no relevance in the present case) and expresses his general view on "criminal cause or matter":

"I must, however, cite In re Clifford and O'Sullivan /1921/ 2 A.C. 570, where the appeal was dismissed on the ground that the order impeached was not made in proceedings before a military court or court martial or, it appears, any court at all, and could not be described as made in a criminal cause or matter. Viscount Cave Ibid 580 said there must be two conditions fulfilled to satisfy the word 'criminal'. There must be the consideration of some criminal offence charged under criminal law, and the charge must be preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. What I think Viscount Cave was particularly emphasizing was the latter condition. In his opinion, the military officers who purported to try the men and pass sentence, were in no possible sense a court martial or a court of any kind.

The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the convictior of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is

a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by Ex parte Woodhall 20 Q.B.D. 832 and Rex v. Brixton Prison (Governor of) Ex parte Savarkar /1910/ 2 K.B. 1056. These conditions are fulfilled by the order in the present case. "

To the authorities quoted there might be added a decision of the Court of Appeal for Eastern Africa in Kenya, where the Criminal Procedure Code is not identical with but resembles closely that used in Fiji. It is the case of In re Keshavlal Punja Parbat Shah (1955) 22 E.A.C.A. 381. The Kenya code had classified the prerogative writs under the Criminal Procedure Code and the question again was whether an appeal lay to the Court of Appeal. If the writ was civil an appeal lay as it resulted in a 'decree,' which was appealable. If it was criminal, appeal lay, as in Fiji, only from conviction after a trial. It was held that the Supreme Court had jurisdiction to entertain prerogative writs on either its civil or its criminal side according to the nature of the proceeding. On the civil side an appeal lay but not on the criminal.

No point has been taken in this court that because a preliminary inquiry does not terminate of itself in a conviction or acquittal it is not a criminal proceeding. Had it been, it would have been effectively negative' by Amand's case in which the court of final adjudication was a Dutch court.

In our opinion the proceedings before the Chief Magistrate were criminal in nature and on the authorities their criminal nature resulted in the cause

or matter in the Supreme Court being a criminal proceeding. We do not think that anything turns on the difference in language. Section 31(1) of the Supreme Court of Judicature (Consolidation) Act, 1925, was couched in the negative: "No appeal shall lie except as provided by the Criminal Appeal Act, 1907, or this Act from any judgment of the High Court in any criminal cause or matter." The Fiji wording we have quoted above; it is affirmative. To use the phrase "cause or matter" twice in the same line would have been thought objectionable by the draftsman, and in our view by using the word "proceedings" he did not intend to introduce any new refinement of meaning.

In the result we are satisfied that no appeal lies and we have no option but to dispose of the proceedings on that basis.

Counsel have described the appeal as an important one but we take leave to doubt whether similar circumstances are likely to recur. We have adverted to the narrowness of the point relied upon by the appellants.

We were informed by counsel (by agreement) that after the Supreme Court decision the learned Chief Magistrate did continue the committal proceedings confining himself to Counts 2, 3, 5, 6 and 7. Such defence evidence as was desired was put in. Submissions were made and on the 28th September, 1982 all appellants were committed for trial on those counts.

In the circumstances we think it would be wrong for us to discuss the arguments or express any view on the probable outcome of the appeal had we had jurisdiction to entertain it. Any such discussion or view would be binding on nobody. We leave the matter with one comment. Had the Supreme Court indeed decided in relation to Counts 2, 3, 5, 6 and 7 that there was an order which should be quashed (as indicated, we do not say it should

have done so) it had jurisdiction under Rule 9(4) of the Supreme Court (Amendment) Rules, 1981, having quashed the order, to remit it for re-consideration and decision of the matter in accordance with the findings of the Supreme Court. The Chief Magistrate in fact conducted himself as if such an order had been made.

The appeal is struck out for want of jurisdiction.

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Vice President

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Judge of Appeal

.....
Judge of Appeal