IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No. 3 of 1983

Between: NEMANI TUELI Appellant

- and -

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

K.C. Ramrakha for the Appellant
A. Gates for the Respondent

Date of Hearing: 14th March, 1983.
Delivery of Judgment: 23rd March, 1983.

JUDGMENT OF THE COURT

Speight J.A.

The Appellant was convicted in the Magistrate's Court at Suva of assault causing actual bodily harm, and was sentenced to 3 years imprisonment. He appealed to the Supreme Court against conviction and sentence and this was dealt with in a summary way by the Chief Justice pursuant to Section 313(2) of the Criminal Procedure Code. The order made reads as follows:-

" ORDER

I certify that I have perused the record in this case and I am satisfied that the appeal has been lodged without any sufficient ground of complaint.

Accordingly it is ordered that this appeal be summarily dismissed pursuant to powers vested under section 313(2) of the C.P.C.

T.U. Tuivaga
Chief Justice "

The Appellont now appeals to this Court against thot order.

The cose reloted to injury sustained by a prisoner in Suva jail who olleged he hod been beaten by the oppellont who was o prison officer. There were numerous witnesses for the prosecution and for the defence. There was shorp conflict of evidence and the case was purely one of ossessing credibility. The learned Magistrate accepted the evidence of the comploinont and of one of the supporting witnesses, and he expressly disbelieved the appellant and other defence witnesses.

Now the grounds in the notice of appeal to the Supreme Court read as follows:-

"1) The learned trial Magistrote erred in not holding thot the colling by the Prosecution of o witness PW3 Jovesa Naitoga (whose evidence was totally ignored by the Magistrote) pervaded the whole prosecution case, ond ought to have left the Magistrate in doubt; and your petitioner complains that the learned Magistrote did not treot the evidence of this PW3 Jovesa Naitoga an the some footing as DW2 Sgt. Jone Vunirobo and the question as to why one Prosecution witness should

turn up to corroborate by false evidence the evidence of PW1 Jone Mateyawa as a matter that should have been resolved, and thus there was a miscarriage of justice.

2) The evidence of PW4 Kalyan Chand was nat inconsistent with the evidence of your petitioner, and the learned triol Magistrate erred in finding to the contrary.

3) The medical evidence indicated no external injury on the arm of the PW1 Jone Mateyowa and the finding that the breaking of the arm by your petitioner stomping on the arm on a rough gravelly surface was nat worronted, and there was a miscarriage of justice.

4) The sentence is harsh and excessive. "

As has been said already the learned Chief Justice dismissed the appeal summarily, pursuant to the powers of the Supreme Court under section 313 which reads as follows:-

313.-(1) When the Supreme Court has received the petition of appeal and the record of proceedings a judge shall peruse the same.
(2) Where an appeal is brought on the grounds that the decision is unreasonable or cannot be supported having regard to the evidence or that the sentence is excessive and it oppeors to the judge that the evidence is sufficient to support the conviction ond that there is no material in the circumstances of the case which could raise a reosonable doubt whether the conviction was right or lead him to the opinion that the sentence ought to be reduced, the appeal may, without being set down for hearing be summarily dismissed by an

order of the judge certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint.
(3) Whenever an appeal is summarily dismissed notice of such dismissal shall forthwith be given by the Chief Registrar of the Supreme Court to the appellant or his advocate.

From this dismissal the present appeal is brought on the ground that the learned Chief Justice had no power in law to dismiss this case summarily.

Contemporaneously with the present appeal the Court has also been considering another also relating to Section 313 - Crim. App. 58/1982 Sashi Suresh Singh v. Reginam. In delivering the judgment of the Court Gould V.P. has there said:-

"The effect of the section where it is applied and implemented, is to deprive the appellant of the ordinary right to a hearing by himself or his advocate and for this reason it is in our opinion a procedure to be used sparingly. Furthermore, the power conferred is in the nature of a special jurisdictian which may only be exercised strictly in accordance with the section.

In Asivorosi Logavatu v. Reginam F.C.A. Crim. App. 16 of 1980 this Court said:

'In our view section 294(2) of the Criminal Procedure Code should be used only where it is patently clear to a judge that the appeal is limited to the grounds that the conviction was against the weight of evidence or that the sentence was excessive. Where there are other matters raised, or which appear on the face of the record indicative that the conviction may be vitiated then the section should not be used and the appeal should be heard and determined in the normal way.'

In the case of appeal against conviction the power may only be exercised where the appeal is brought on the ground that the conviction is unreasonable or cannot be supported having regard to the evidence. As to sentence the ground must be that it is excessive. These provisions are, in our opinion, a condition precedent to the exercise of the power at all, though in exercising it there is a requirement in the latter portion of subsection (2) that the Judge must consider any "material in the circumstances of the case" which would have the effect of widening the scape of his consideration of the matter. The condition precedent has the effect, in our opinion, of limiting the availability of the procedure to the cases where the grounds relied upon are as indicated above. "

The learned Vice President then went on to discuss a number of decisions given by the Court of Appeal for Eastern Africa, and no study of this matter is complete without a consideration of His Lordship's references there. For the soke of brevity we do not repeat those quotations or the conclusions reached but accept what has been there set out as a most useful review. That case however differs somewhat from the present in that it was concluded that grounds had been raised other than that the decision appealed against was unreasonable or could not be supported having regard to the evidence, and accordingly the Court held that there was no jurisdiction to invoke the summary procedure.

In the present case the appeal grounds filed in the Supreme Court, apart from that related to sentence concerned the interpretation which the Magistrate put on

the evidence of various witnesses and challenged the correctness of conclusions reached. That is cleorly a submission that the decision is unreasonable or cannot be supported having regard to the evidence.

Hence the learned Chief Justice had jurisdiction to examine the question of summary dismissal. In so doing he was obliged to consider "whether the evidence was sufficient to suppart the conviction" and whether there was "material in the circumstances of the case which could raise a reasonable doubt whether the conviction was right". In so considering the Judge could take into account all factual matters arising from the evidence and all possible questians of law relating to the propriety of conviction. Having done so the learned Chief Justice certified that he was satisfied that the appeal had been lodged without any sufficient ground of complaint.

Now that decision amounted to a dismissal, just as if there had been a Court heoring.

From such dismissal on appeal lies to this Court only in accordance with Section 22 of the Court of Appeal Act (Cap. 12).

> "Any party to an appeal from a magistrote's court to the Supreme Court may appeal, under this Part, againsl the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeol on any ground of appeal which involves a question of law only (not including severity of sentence)."

The matters for determination therefore are (a) whether there was any question of law decided in the course of the summary dismissal, ond (b) whether any such decision was erroneous.

It is a question of law whether there is evidence to support a decision. But the sufficiency of that evidence is not such a question. If the material before the Magistrate is examined it will be seen that there was evidence - indeed one may add that there was powerful evidence - so that no question of law arose on that aspect nor has any other matter been pointed to which shows there was any error of law relating to the other circumstances of the case.

Accordingly no appeal lies under section 22 from the dismissal by the learned Chief Justice. By a parity of reasoning we also conclude that no appeal lies to this Court on the question of the quantum of sentence. A different situation would arise if the point taken was as to the lawfulness of sentence - but the complaint related only to severity, and that (under section 22) is not a question of law.

The appeal is dismissed.

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Judge of Appeal

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Judge of Appeal

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Judge of Appeal