IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.58 of 1982

Between:

SASHI SURESH SINGH s/o Sashi Mahendra Singh — Appellant

and

REGINAM — Respondent

S.D. Sahu Khan for the Appellant
A. Gates for the Respondent

Date of Hearing: 15th March, 1983
Delivery of Judgment: 23rd March, 1983

JUDGMENT OF THE COURT

Gould V.P.,

This is an appeal from a conviction by a Magistrate of the offence of disorderly behaviour contrary to section 4 of the Minor Offences Act, Cap. 18. The appellant appealed against his conviction and sentence to the Supreme Court and his appeal was on the 16th of June, 1982, summarily dismissed by the learned Chief Justice. The appellant now brings a second appeal to this Court and in it he is limited to grounds of law.

In view of the increasing frequency of second appeals to this Court after an appeal to the Supreme Court has been dismissed summarily we propose to say a word concerning the procedure and principles involved, though not the whole of what we say is strictly applicable to the case before us.

The procedure on appeal from a Magistrate is dealt with in sections 312, 313 and 314 of the Criminal Procedure Code, Cap. 21. When he receives a petition of appeal a Magistrate must forward it together with the record of proceedings to the Chief Registrar of the Supreme Court. When the Supreme Court has received these documents it is required by section 313(1) that they be perused by a Judge of the Supreme Court. Section 313(2) is the section which empowers a Judge, subject to certain conditions, summarily to dismiss the appeal, certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint. If the appeal is summarily dismissed the Chief Registrar must forthwith give notice thereof to the appellant or his advocate. If there is no summary dismissal section 314 applies and the Chief Registrar shall -

" (a) enter the appeal for hearing;

(b) serve a notice of hearing on the parties;

(c) supply the respondent with a copy of the petition and a copy of the judgment or order appealed against;

(d) except when the appeal is against sentence only, supply the respondent with a copy of the proceedings;

(e) where additional grounds of appeal are filed by the appellant under the provisions of subsection (4) of section 311, serve notice on the respondent of such filing and supply the respondent with a copy of the document containing such additional grounds of appeal."

The provisions for invoking the summary procedure are contained, as we have already mentioned, in section 313(2) which reads :

" 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 appears to the judge that the evidence is sufficient to support the conviction and that there is no material in

> the circumstances of the case which could raise a reasonable 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. "

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 jurisdiction 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 could have the effect of widening the scope 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.

It may be mentioned that the various codes in East Africa include similar provisions. In Karioki v. Rex (1950) 17 E.A.C.A. 141 the Court of Appeal for Eastern Africa said :

> " This is a second appeal against a conviction under the Defence (Control of Prices) Regulations, 1945. The appellant appealed to the Supreme Court of Kenya acting in its appellate jurisdiction but his appeal was dismissed summarily by the learned Judge, who purported to act under section 352(2) of the Criminal Procedure Code. Under that provision of the Code it is open to one Judge of the Supreme Court to reject an appeal summarily if, after perusing the record, he considers that there is not sufficient ground for interfering, but he can only do so in cases where an appeal is brought on the ground that the conviction is against the weight of evidence, or that the sentence is excessive. In this case the memorandum of appeal did submit that the sentence was excessive, but it also submitted that the learned Magistrate had wrongly construed the appellant's plea as a plea of guilty. However little merit there may, or may not, be in this ground of appeal, it is not one of the two grounds on which a Judge can dismiss an appeal summarily. We therefore set aside the order dismissing the appeal and remit the case to the Supreme Court of Kenya with the direction that it be admitted for hearing. "

The judgment in Rajabu v. Rex (1951) 18 E.A.C.A. 294 was concerned more with the final words of the Tanganyika section, which are the same as those of Fiji - "certifying that he has perused the record and is satisfied that the appeal has been lodged without any sufficient ground of complaint". The judgment in that case contains this passage, at p.295 :

> " We observe that this order does not fully comply with the provisions of subsection (1) of section 317 which requires the Court to certify

that after perusing the record the Court is satisfied that the appeal has been lodged without any sufficient ground of complaint. Having ourselves carefully perused the record in this case we would express our surprise that the learned Judge should have summarily rejected the appeal. We would respectfully suggest to the Judges of the High Court of the Territory that the procedure under section 317 should only be used when the correctness of the conviction is plain beyond argument, and we would further suggest that strict compliance with the provisions of that section as to certification on summary rejection, would impress upon the mind of the Judge that he must be satisfied that the appeal is frivolous or without substance. As will appear later in this judgment, these appeals were far otherwise."

In Kenya, in Mulakh Raj Mahan v. Reginam (1954) 21 E.A.C.A. 383, the Court of Appeal again said :

" The appeal was not brought solely on the ground that the conviction was against the weight of evidence or that the sentence was excessive, and it is only when an appeal is limited to these grounds that use can be made of the subsection. In the present case the memorandum of appeal contained at least three other points raising matters which, if points of substance, would vitiate conviction. We must therefore set aside the order dismissing the appeal and remit the case to the Supreme Court of Kenya with the direction that it be admitted for hearing. "

The indication in two of the extracts last quoted is that where there has been a departure from the authorised procedure the proper order to be made on second appeal is that the matter be remitted to the Supreme Court with the direction it be admitted for hearing. We agree that where the non-observance has been that the grounds of the appeal to the Supreme Court were not limited to the grounds specified in the opening part of section 313(2) that is the appropriate order. Such a matter would go to jurisdiction. Where, however, there is no fault in respect of those matters, but it is alleged that the Supreme Court Judge made an error in law in considering the material

mentioned in the subsequent words of the subsection, it may be open to this Court to take some other course. That was done in the case of Asivorosi (supra) in which the Supreme Court Judge found that the grounds of appeal amounted to no more than that the decision was unreasonable or cannot be supported by the evidence. There was thus no breach of what we have referred to as the conditions precedent. The case of Rajabu v. Rex (supra) appears to have been similar in nature.

As we have indicated above the present case does not appear to hinge entirely on any of the principles mentioned above, but is the result of an unfortunate misunderstanding on procedural matters. We were informed from the bar and this was confirmed by counsel both for the appellant and for the Crown that on the 16th of June, 1982 when the learned Chief Justice made the order summarily dismissing the appeal the Chief Registrar had already acted under section 314 of the Criminal Procedure Code and entered the appeal for hearing. That presupposes that a Judge of the Supreme Court had already considered the appeal under the provisions of section 313 and it had not been disposed of summarily.

In the circumstances we have referred to the record in the custody of the Chief Registrar and find that the appellant's appeal to the Supreme Court was indeed listed for hearing on the 26th March, 1982 on the instructions of the learned Chief Justice. Messrs Sahu Khan and Sahu Khan then entered into the matter on behalf of the appellant and requested a later date, in order to enable them to file amended grounds of appeal. This was granted and on the 15th June, 1982, the amended petition of appeal was filed.

We will not set out this document, but, the grounds relied upon, unlike those of the original petition of appeal, were not limited to the decision being "unreasonable or cannot be supported having regard to the evidence".

The file, having come before the learned Chief Justice again, he made the order of summary dismissal now under appeal. How this inadvertance came about we do not know; we think it very unlikely that the new grounds of appeal came to his notice. In any event they ought to have done so, and the order was wrongly made because the condition precedent to which we have referred above was by reason of the new grounds, not fulfilled. However the inadvertance arose, there was no jurisdiction to invoke the summary procedure and the appellant was deprived of the hearing, with its attendant right of submission and argument, to which he was entitled by law.

The appeal is therefore allowed and the matter is remitted to the Supreme Court for re-listing and hearing.

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Vice President

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Judge of Appeal

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Judge of Appeal