IN THE FIJI COURT OF APPEAL

CRIMINAL APPEAL NO. 2 OF 1986

Between:

JOSUA TUIQAQA Appellant

- and -

REGINAM Respondent

Mr. V.P. Maharaj for the Appellant
Director of Public Prosecutions and
Mr. B.I. Singh for the Respondent

Date of Hearing: 7th March, 1986
Delivery of Judgment: 21.3.86

JUDGMENT OF THE COURT

Kermode, J.A.

The appellant was charged in the Magistrate's Court Suva with the offence of Robbery With Violence contrary to Section 293 (1)(b) of the Penal Code.

The accused first appeared before the Chief Magistrate on the 29th May, 1985, when he consented to trial by the Magistrate's Court. He pleaded not guilty. There was then an adjournment to the 29th May, 1985 and a further adjournment on that date to the 24th June, 1985.

The record indicates that on the 24th June, 1985 the Chief Magistrate informed the public prosecutor and the accused that Dr. Cameron, a Senior Magistrate, had spoken to him advising that he, Dr. Cameron, would be giving an alibi.

Before the trial began on the 30th September, 1985 the prosecutor, a Sergeant of police, applied for the case to be heard by a Senior Magistrate because, as he advised the Court, Dr. Cameron would be giving evidence for the Crown. This was apparently a mistake because later, when Mr. Tavaiqia took over conduct of the prosecution and renewed the application which had earlier been declined, he informed the Court that the Crown had subpoenaed Dr. Cameron but did not propose to call him as a witness but would make him available to the defence.

The trial Magistrate was a Magistrate junior in service to Dr. Cameron and we have now been informed shared Chambers with Dr. Cameron. The prosecutor obviously considered it would be desirable in all the circumstances for a more Senior Magistrate to hear the case.

The trial Magistrate obviously did not appreciate the invidious position he would be in if he continued with the trial for he simply dismissed the application stating there was no merit in it.

The prosecution after having called four witnesses then applied for an adjournment to seek advice from the Director of Public Prosecutions. The reason given by the prosecutor was that he sought such advice because of the questions asked by the Magistrate of the prosecution witnesses to which the prosecutor had earlier taken objection alleging that the Court was acting like a defence Counsel.

Quite apart from the fact that the nature of the objection and the terms in which it was expressed displayed a lack of the courtesy which the Magistrate was entitled to expect from a prosecutor, the objection indicates that the prosecutor had little or no appreciation of the duties of a Magistrate when an accused is not represented.

The Magistrate rejected the application.

A fifth prosecution witness was then called and examined and cross-examined.

Mr. Tavaiqia of the Crown Law Office, who from the record appears to have entered the Court during the evidence of the fifth witness, then took over the prosecution. He informed the Magistrate that he believed that Dr. Cameron would be providing alibi evidence for the accused.

This information is somewhat difficult to understand and conflicts with the information previously given to the Court by the prosecution on the 30th September, 1985. At

that time the Court was informed that Dr. Cameron was to give evidence for the prosecution. It is not surprising that the Magistrate appears to have misunderstood the actions of the prosecution when Mr. Tavaiqia then purported to apply under Section 224 of the Criminal Procedure Code for the case to be heard by the Supreme Court.

The Magistrate dismissed this application in a written ruling which indicates that he considered the actions of the prosecution "not only a slur on the judiciary but highly improper and an abuse of the process of the Court" to quote the words used by the Magistrate in his ruling.

While it is now evident to this Court that the prosecution intended no offence and apparently believed the course it adopted was the proper one, the Magistrate can be excused for failing to fully appreciate that the case was one which the Chief Justice later described as an unusual and extraordinary situation.

Refusal of this application led to an appeal by the Director of Public Prosecutions to the Supreme Court. The sole ground advanced by the Director in that appeal was "that the learned trial Magistrate erred in law in not giving effect to the provisions of Section 224 of the Criminal Procedure Code".

The Director in his submissions to the learned Chief Justice conceded that Mr. Tavaiqia's argument based on the interpretation of Section 224 was not tenable, a view the Magistrate appears to have shared. No argument was advanced

in this Court either by Mr. Maharaj or the Director of Public Prosecutions specifically about the ground relied on by the Director in his appeal to the Supreme Court.

That being so we cannot come to any final decision on that issue but it would appear that a further error may have been made by the Director in his appeal to the Supreme Court in referring to Section 224 of the Criminal Procedure Code instead of Section 220.

The two Sections are as follows:-

> "220. If before or during the course of a trial before a magistrates' court it appears to the magistrate that the case is one which ought to be tried by the Supreme Court or if before the commencement of the trial an application in that behalf is made by a public prosecutor that it shall be so tried, the magistrate shall not proceed with the trial but in lieu thereof he shall hold a preliminary inquiry in accordance with the provisions hereinafter contained by a magistrates' court, locally and otherwise competent."

> "224. Whenever any charge has been brought against any person of an offence not triable by a magistrates' court or as to which the magistrate is of opinion that it ought to be tried by the Supreme Court or where an application in that behalf has been made by a public prosecutor a preliminary inquiry shall be held, according to the provisions hereinafter contained, by a magistrates' court, locally and otherwise competent."

Section 220 is an enabling section providing power or authority to stop a summary trial and hold a preliminary enquiry in lieu thereof.

Section 224 appears in Part VII of the Act containing provisions relating to the committal of accused persons for trial before the Supreme Court and appears to duplicate some of the provisions of Section 220.

Section 224, however, is not an enabling section. It sets out three situations where a summary trial can be stopped, two of which are covered by Section 220 and directs that in those cases a preliminary enquiry shall be held according to the provisions later appearing in the act.

The situation never arose which required the Magistrate to give effect to Section 224. He had power under Section 220 to stop the summary trial and hold a preliminary enquiry. He rightly considered that the prosecution at that stage of the trial was not entitled to apply for the case to be heard by the Supreme Court. Section 224 did not enable the prosecution to formally apply for the case to be tried in the Supreme Court in the instant case, but no objection could have been taken to the prosecutor informing the Magistrate of the situation which had arisen and inviting the Magistrate to reconsider his position and to exercise his powers under Section 220.

The Magistrate refused the application. He held that the prosecution should have applied under Section 220 before the commencement of the trial. He did not view the application as a mistaken way of requesting him to reconsider his earlier decision not to exercise his discretion under

Section 220 and even at that late stage of the trial to halt the trial and hold a preliminary enquiry.

The learned Chief Justice explained to the appellant some of the reasons why the case should be heard by the Supreme Court. While the appellant was not represented either in the Magistrate's Court or on the appeal to the Supreme Court, his relevant and effective questioning of prosecution witnesses indicates that he is an intelligent man with some understanding of court procedure and we are in no doubt he understood what the learned Chief Justice explained to him.

It was suggested to the appellant by the Chief Justice after that explanation that the case would be better heard by the Supreme Court and when asked whether he agreed the accused answered in the affirmative.

It is therefore somewhat surprising that the appellant should now appeal against the decision by the Chief Justice to have his case heard by the Supreme Court.

Mr. Maharaj for the appellant points out that his client was not represented and that he was overborne by the views expressed by the Chief Justice and agreed with the Chief Justice.

The appellant has raised legal grounds in this appeal seeking to set aside the decision of the Chief Justice which the appellant is entitled to have considered. The foregoing somewhat prolix recital of the history of the case has been necessary to indicate that the case is indeed a most unusual one.

There was originally one ground of appeal and an alternative ground as follows :-

> "1. That the Learned trial Magistrate's ruling was of an interlocutory character and not an "order" within the meaning of section 308 of the Criminal Procedure Code against which the Respondent had a right of appeal to the Supreme Court.
>
> ALTERNATIVELY:
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> 2. That the Learned Chief Justice erred in law in reversing the discretionary ruling of the trial Magistrate in the absence of any finding that the discretion had been exercised wrongly or on an improper ground."

At the hearing leave was granted to the appellant to raise two further grounds as follows:

> "3. That the Learned Chief Justice further erred in law in that in hearing and deciding the appeal he took into consideration matters of fact which were not the subject of evidence in the Magistrates' Court or conceded in the Supreme Court.
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> 4. That in hearing the appeal the Learned Chief Justice allowed the Director to give unsworn evidence in the guise of submissions on matters which were in issue."

It would appear that the Director of Public Prosecutions may have had some difficulty in deciding what course of action he should follow in this case where he considered justice would be better served if the case was heard by the Supreme Court. The case was part heard. He would have been aware that the prosecutor, should have applied under section 220 before the trial began to have the case heard by the Supreme Court. He would also have appreciated that the prosecution could not legally apply again under section 220 particularly where as in this case a late application had been made and refused. The Director sought to make that refusal the basis for an appeal to the Supreme Court.

The first ground of appeal seeks to challenge the jurisdiction of the Supreme Court to entertain that appeal and in his argument Mr. Maharaj contends the procedure, if the decision could be challenged, should have been by way of an application under Order 53 Rules of the Supreme Court seeking judicial review of the decision and not by way of appeal.

Under section 41 of the Magistrates' Courts Act appeals in Criminal causes shall lie from Magistrate's Court to the Supreme Court in accordance with the provisions of the Criminal Procedure Code. Section 310 of the Code provides that every appeal shall be by way of petition in writing.

The Director of Public Prosecution's appeal was by way of petition in writing. No objection can be taken to the Director adopting that course of action. Under Section 308(5) he is deemed to be a party to any criminal cause or matter in which proceedings were instituted and carried on by a public prosecutor.

The appellant's main ground of appeal is that the learned Chief Justice had no jurisdiction to entertain the appeal because the Magistrate's order was an interlocutory one which could not be made the subject of appeal in a criminal action.

Section 308(1) of the Code provides as follows:-

> "308. (1) Save as hereinafter provided, any person who is dissatisfied with any judgment, sentence or order of a magistrates' court in any criminal cause or matter to which he is a party may appeal to the Supreme Court against such judgment, sentence or order;
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> Provided that no appeal shall lie against an order of acquittal except by, or with the sanction in writing of, the Director of Public Prosecutions."

The issue on the first ground is the interpretation of the word "order". Was the Magistrate's refusal of the prosecution's application an "order" within the meaning of the word as used in the sub-section? Mr. Maharaj contends the refusal was in the nature of an interlocutory order and not a final order and that there can be no appeal from a Magistrate to the Supreme Court. We have considered the authorities referred to by Mr. Maharaj.

In BIJENDRA RAO and PRAKASH WATI AMOS v. DIRECTOR OF PUBLIC PROSECUTIONS C.A. 65 & 68 of 1986 Cullinan J referred to Part X of the Criminal Procedure Code in which Section 308 appears. The Learned Judge was concerned with issues raised in two writs issued in civil actions seeking relief in respect of a ruling made by the learned Chief Justice who was the trial Judge in which the two plaintiffs were accused.

The issue before this Court is not an issue the learned Judge had to consider and his observations must be treated as obiter.

Another case cited by Mr. Maharaj is ASGAR ALI v. REGINAM 10 F.L.R. 235 where Mills Owen C.J. considered Section 314(1) of the then code which is in identical terms to the present Section 308(1).

This case is of no assistance. It was a case where the Magistrate had refused leave to a convicted person who had applied for bail pending his appeal to the Supreme Court. The learned Chief Justice held that there was no right of appeal from that refusal. In coming to that decision the learned Chief Justice had to express his dissent from an earlier decision by the same Court by Sir George Lowe in ISAD ALI v. R. 1958 6 F.L.R. 1. In that case it was held a refusal to grant bail was an "order" within the terms of the subsection.

That an order is also a decision is clear from the use of the word 'decision' in sub-section 1 of the Section 310 which provides as follows:-

"310. (1) Every appeal shall be in the form of a petition in writing signed by the appellant or his barrister and solicitor and shall be presented to the magistrates' court from the decision of which the appeal is lodged within 28 days of the date of the decision appealed against:

Provided that the magistrates' court or the Supreme Court may, at any time, for good cause, enlarge the period of limitation prescribed by this section."

In Police v. S (1977 N.Z.L.R. 1) the New Zealand Court of Appeal considered a challenge to a decision by a Magistrate to refuse to suppress the name of a convicted person. The issue was whether such refusal was an "order" from which an appeal lay to the Supreme Court pursuant to S. 115(1) of the Summary Proceedings Act 1957.

Section 115(1) provides as follows:

"Except as expressly provided by this Act or by any other enactment, where on the determination by a Magistrate's Court of any information or complaint any defendant is convicted or any order is made other than for the payment of costs on the dismissal of the information or complaint, or where any order for the estreat of a bond is made by any such Court, the person convicted or against whom any such order is made may appeal to the Supreme Court."

The word "order" as used in S. 115(1) appears to be limited by the wording of that sub-section to an order made in respect of the hearing of an information or complaint.

There is no such limitation in sub-section (1) of Section 308. The section covers any order of a Magistrates' Court in any Criminal cause or matter subject only to limitations as are thereafter provided in the code.

Section 309 specifically provides for limitation of appeal on plea of guilty and in petty cases.

The New Zealand Court of Appeal held (inter alia) that the word "order" in relation to legal proceedings may have a wide meaning covering the effect of all decisions of courts.

Richmond P. in Police v. S. at p.3 stated as follows:-

> "We, of course, accept the position that a right of appeal is a creature of statute and accordingly that no right of appeal existed in the present case unless the magistrate's refusal was an "order" of a kind which fell within the language of S. 115(1). At the same time our general approach to the case has been that S. 115(1), so far as is reasonably possible, be given a liberal interpretation because it confers rights on individual citizens in the field of criminal and quasi-criminal proceedings."

We accept those comments which can be applied to the issue before us and make the point that the provisions of our Section 308(1) appear wider than the equivalent New Zealand Sections.

The alternative ground in our view has little merit. The Chief Justice was clearly of the view that had the Magistrate had before him the material that was placed before the Supreme Court the Magistrate would have availed himself of the power conferred by Section 220 and exercised his discretion in favour of granting the prosecution's application.

It is clear from the Chief Justice's recorded remarks and his judgment that an unusual and extraordinary situation had arisen whereby a Senior Resident Magistrate might be a witness whose credibility had to be adjudicated upon.

The facts only have to be stated to indicate that this was a case which dictated that the trial Magistrate should have exercised his power to stop the trial and continue an inquiry into the alleged offence with a view to committal of the accused to the Supreme Court if satisfied that there was sufficient evidence to do so.

The learned Chief Justice did consider whether the Magistrate was wrong in refusing to exercise his discretion. He stated as follows:-

> "After listening to submissions made in this Court and the fact that the respondent when asked raises no objection to the trial being removed to the Supreme Court, I am satisfied that if the trial Magistrate had had before him the same material as was placed before this Court he would have exercised his discretion in favour of granting the application."

Apart from the additional facts before the Chief Justice the real problem was that the trial Magistrate did not appreciate the consequences of his continuing to hear the case and rejected the application as "a slur on the Judiciary and a highly improper abuse of the process of the Court" when it was anything but. In short his exercise of discretion was on patently wrong grounds.

The alternative ground fails.

The third and fourth grounds of appeal have their genesis in Mr. Scott having informed the Chief Justice from the bar that the Magistrate, Mr. Khan who was conducting the summary trial and Dr. Cameron shared Chambers.

In our view it was, in the circumstances, proper that such information should be given from the bar. It was relevant to the questions as to whether Mr. Khan should continue to sit. It was material which might not have otherwise become known to the accused. More importantly, it was material which went to the question of fair trial and the proper administration of justice.

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