IN THE FIJI COURT OF APPEAL

CRIMINAL JURISDICTION

CRIMINAL APPEAL NO. AAU0002 OF 1996
(High Court Case N0.5 of 1996S)

BETWEEN:

PAUL MICHAEL EMBERSON

APPELLANT

- and -

THE STATE

RESPONDENT

Mr. J.R. Reddy for the Appellant
Ms. E. Rice for the State

Date and Place of Hearing : 22 August 1996, Suva
Date of Delivery of Judgment : 30 August 1996, Suva

JUDGMENT OF THE COURT

This is an Appeal against a decision given in the High Court at Suva on 13th February 1996. The Appellant was charged jointly with Masio Wilisoni with rape and was convicted in the Magistrates' Court. He appealed against his conviction to the High Court, the appeal was successful and in the High Court the learned Judge quashed the conviction and ordered that the Appellant be re-tried in the Magistrates' Court.

Section 22 (1) of the Court of the Appeal Act Cap.12 states:

"Any Party to an appeal from a Magistrates' Court to the Supreme Court may appeal under this part against the decision of the Supreme Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only (not including severity of sentence).

Provided no appeal shall lie against the confirmation by the Supreme Court of a verdict of a acquittal by a Magistrates' Court."

The offence was alleged to have occurred on the 3rd of July 1993. The complaint was first made to the Police on the 20th August 1993 and the Appellant first appeared in Court on 22nd October 1993. Thereafter there were 6 adjournments before the hearing commenced. There were a further 12 adjournments until judgment was given by the Magistrate on the 14th of September 1995. The appellant spent from 14 September 1995 to the 7 February 1996 in custody. The decision of High Court was given on 13th of February 1996.

The appellant was represented some of the time in the Magistrates' Court but frequently his Counsel did not appear. We were told he had "other commitments" which prevented his doing so. We make it clear that his counsel in the High Court and before us, Mr. Reddy, was not counsel in the Magistrates' Court.

In the High Court Mr. Reddy put forward 15 grounds of appeal. The 13th ground was as follows:

> "That the learned trial Magistrate erred in law by denying your petitioner his right of election when the offence for which he stood charged was electable thus rendering the proceedings and conviction a nullity".

It was agreed by Counsel for the state in the High Court that the appeal must succeed on this ground. The learned judge in the High Court then went on to consider whether in all the circumstances he should order a re-trial of the appellant. He came to the conclusion that he should.

The problem is that if as is accepted by the State the proceedings and conviction were a nullity, and we think they were, there could not be a re-trial. The accused has never been tried. A similar situation arose in Crane v. D.P.P. 1921 2 AC 299. The appellant was indicted for receiving goods knowing them to have been stolen and another man was charged in a separate indictment with stealing the goods. The two prisoners were tried together and convicted. It was held by the House of Lords that the proceedings were a nullity. Lord Parmoor at page 336 said:

> "a trial void ab initio cannot result either in acquittal or conviction".

It follows that the judgment of the High Court cannot stand in the form in which it was given. That part of it which orders a retrial must be set aside but that part which quashes the conviction can stand as a judicial determination in the Court record to the effect that the conviction is quashed. Ordinarily we would have ordered a venire de novo or new trial before the appropriate Court but that course cannot be followed because the appellant has not yet made his election as to the Court before which he wishes to be tried.

The situation is simply that Appellant has been charged with rape and that charge is still pending. It will be a matter for the Police or the Director of Public Prosecutions to decide whether the charge should be proceeded with.

We think it proper however, to say only that as we mentioned before, Mr. Reddy raised a number of other points in his grounds of appeal. Many of these appear to be matters of importance and leave the evidence against the accused in a situation where we would not have ordered a new trial if that course had been open to us. No doubt the Police or the Director will consider these points in making the decision we have mentioned.

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Mr. Justice Savage
Judge of Appeal

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Mr. Justice Hillyer
Judge of Appeal

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Mr. Justice Dillon
Judge of Appeal

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