

IN THE FIJI COURT OF APPEALCRIMINAL JURISDICTION

CRIMINAL APPEAL NO. 17 OF 1996
(Miscellaneous Action No. 26 of 1996)

BETWEEN:

RAMESH PATEL
f/n Rodjibhai Patel

Appellant/Applicant

-and-

S T A T E

Respondent

Mr. H. Nagin, Mr. M. Raza and Mr. Parshotam for the Appellant
Mr. K. Wilkinson for the Respondent

RULING AND ORDER

On 28 October 1996 the applicant was charged in Suva Magistrates' Court with fraudulent conversion of property to the value of \$86,000.00. Fraudulent conversion is not an electable offence. However, the Director of Public Prosecutions requested under section 4 of the Electable Offences Decree 1988 that the Magistrates' Court proceed by way of committal for trial in the High Court. The learned Chief Magistrate refused the request and set 28 November 1996 as the date on which the trial was to commence in the Magistrates' Court. The applicant had earlier surrendered his passport to the police. His Worship admitted him to bail subject to a condition that he surrender it to the Court.

On 1 November 1996 the Director appealed to the High Court, purportedly under section 308(1) of the Criminal Procedure Code (Cap.21), against the Chief Magistrate's

refusal to have the Magistrates' Court conduct committal proceedings. It was not an application for exercise of an original jurisdiction of the High Court. By 27 November 1996 the appeal had not been heard; on that date the Director applied to Townsley J. for stay of the proceedings in the Magistrates' Court pending the determination of the appeal. His Lordship granted the stay on 28 November 1996.

In the meantime on 7 November 1996 the applicant had applied in the Magistrates' Court for variation of the conditions of bail by revocation of the requirement for surrender of his passport. That application was dismissed by the learned Chief Magistrate on 8 November 1996. However, on 29 November 1996, i.e. a day after Townsley J. had made his order staying the proceedings in the Magistrates' Court, the learned Chief Magistrate varied the conditions of the applicant's bail as previously sought and returned his passport to him.

On the same day the Director applied to Townsley J. to stay the Chief Magistrate's order and to order that the applicant surrender his passport again. The application was made *ex parte*; His Lordship made the orders sought on an interim basis and adjourned the hearing of the application to 2 December 1996. The hearing *inter partes* was commenced on 2 December 1996; it was then adjourned to 3 December 1996 when it was completed. On 5 December 1996 His Lordship ordered that the Chief Magistrate's order varying the bail conditions

should be stayed until further notice.

On 2 December 1996 the applicant filed in this Court a notice of appeal against Townsley J.'s order staying the hearing in the Magistrates' Court. Later on the same day the Director applied to the High Court for a bail order. Mr. Wilkinson submitted that the High Court had jurisdiction under section 108(3) of the Criminal Procedure Code or alternatively, the appeal having been commenced in that Court, an inherent jurisdiction. He handed the applicant's passport to the judge; His Lordship ordered that it be held in the High court until further notice. On 3 December 1996 he dealt with the matter further. Mr. Wilkinson submitted that His Lordship had power to make an order in respect of bail by virtue of the High Court's supervisory jurisdiction. Presumably he was referring to the jurisdiction conferred on the Court by section 114 of the Constitution.

On 5 December 1996 Townsley J. ordered that the Chief Magistrate's order varying the conditions of the applicant's bail be stayed. On 9 December 1996 the applicant applied to this Court by notice of motion in the appeal purportedly commenced on 2 December 1996 for an order that his passport be released to him. That is the matter with which I am now required to deal. Written submissions have been presented; with the consent of the parties no oral submissions were made.

It is my view that this Court has no jurisdiction to entertain the appeal against Townsley J.'s order staying the proceedings in the Magistrates' Court. Section 308(1) gives parties to criminal proceedings in a Magistrates' Court a right to appeal to the High Court against any judgment, sentence or order of the Magistrates' Court. I consider that "order" in that phrase is to be construed *eiusdem generis* with "judgment" and "sentence", that is to say that it must be a final order in the criminal proceedings. (See Asgar Ali v R (1964) 10 FLR 235.) An order refusing a request made under section 4 of the Electable Offences Decree is clearly not such a final order; so, in my view, an appeal does not lie to the High Court against such an order. However, Townsley J. purported to exercise the High Court's appellate jurisdiction. Having regard to this Court's decision today in Southwick v The State (Criminal Appeal No. 20 of 1996), I am of the opinion that this Court does have jurisdiction to entertain an appeal against a decision made in excess of, but in purported exercise of, that jurisdiction. However, the jurisdiction exists only so that this Court may quash the order made in excess of jurisdiction. It is not an appeal in which the application now before me can properly be made. The purported order under appeal is not related to bail or the conditions of bail. The appeal is not against conviction; it is not brought under the provisions of the Court of Appeal Act. So section 35 of that Act is not, in my opinion, available to form a basis for the application. In my view the application cannot be entertained and must be dismissed.

In order to deal with the application I have had to form an opinion as to the nature of the appeal to this Court and as to whether this Court can entertain the application now before me. I have formed the opinion that it cannot. That, however, does not preclude the applicant from presenting arguments on the hearing of the appeal by the Full Court that it has jurisdiction to do more than simply quash Townsley J.'s order. In that event it will be for the Full Court to decide the question conclusively.

Order: The application is dismissed.

I. R. Thompson

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Judge of Appeal

14 February 1997