

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0025 OF 1998S
(High Court Miscellaneous Cause No. HAM0024 of 1998)

BETWEEN:

MARK LAWRENCE MUTCH

Appellant

AND:

THE STATE

Respondent

Coram:

The Hon. Sir Moti Tikaram, President
The Hon. Justice Gordon Ward, Justice of Appeal
The Hon. Justice Ian R. Thompson, Justice of Appeal

Hearing:

Wednesday, 18 August 1999, Suva

Counsel:

Mr. P. Howard for Mr. M. Raza for the Appellant
Ms R. Olutimayin and Mr. N. Bhindi for the Respondent

Date of Judgment:

Friday, 27 August 1999

JUDGMENT OF THE COURT

On 30 April 1998 the appellant was committed by a magistrate sitting in the Suva Magistrates' Court for trial in the High Court on 34 counts of rape and indecent assault. On 25 August 1998 he applied to the High Court by notice of motion for an "order" that the preliminary inquiry conducted by the magistrate was a nullity. He did not seek, as presumably he intended to, a declaration to that effect or certiorari to bring the committal up into the High Court and to quash it. The basis of the application was the failure of the magistrate to have five witnesses sign their depositions until more than a month after she had committed the appellant for trial, and her failure to have one witness sign her deposition at all. Sadal J. dismissed the application. This appeal is against that dismissal. The appellant contends that the learned judge erred in law in not holding that the preliminary inquiry was a nullity.

The appellant's notice of appeal shows that it is made under section 22(1) of the Court of Appeal Act (Cap.12). However, that section relates to appeals against decisions of the High Court in its appellate criminal jurisdiction. It restricts a second appeal to a question of law only. The application to the High Court was not an appeal; it involved the original jurisdiction of that Court conferred on it expressly by section 114(1) of the Constitution promulgated by section 2 of the Constitution of the Sovereign Democratic Republic of Fiji (Promulgation) Decree 1990 ("the 1990 Constitution") and derived also from the High Court of Justice in England by virtue of section 18 of the High Court Act (Cap.13) which continued to have effect by virtue of section 112 of that Constitution.

Section 121 of the Constitution contained in the Constitution Amendment Act 1997 ("the 1997 Constitution") together with section 119 governs the present jurisdiction of this Court and the right of appeal to it. They read as follows:-

"119 Each of the High Court, the Court of Appeal and the Supreme Court has the jurisdiction, including the inherent jurisdiction, conferred on it (or, in the case of the Court of Appeal, conferred on the Fiji Court of Appeal) immediately before the commencement of this Constitution and any further jurisdiction conferred on it by this Constitution or by any written law."

"121 - (1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.

(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this constitution or involving its interpretation.

(3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes."

Their effect is that there is a right of appeal in a case such as the present one, to which section 121(2) clearly does not apply, only if the Parliament has provided for it. The only Act which contains relevant provision is the Court of Appeal Act. Section 119 confers on the Court the jurisdiction which it had when the 1990 Constitution was in force; but it makes no provision relating to a right of appeal to the Court.

Consequently any right which the appellant may have to appeal to this Court against the order of Sadal J. dismissing his application to the High Court for judicial review must, if it exists, be found in the Court of Appeal Act. Only two sections of that Act confer a right to appeal to this Court against a decision of the High Court made in its original jurisdiction. They are sections 12 and 21. Section 12 is in Part III of the Act which governs appeals in civil cases; section 21 is in Part IV, which governs appeals in criminal cases. Section 12 provides that "an appeal shall lie under Part [III] in any cause or matter, not being a criminal proceeding". Section 21(1) confers a right of appeal on persons "convicted on a trial before the High Court; section 21(2) confers a right on the State to appeal against the acquittal of a person by the High Court and against the sentence imposed.

Quite clearly the appellant, who has not yet been tried before the High Court, has no right of appeal under section 21. He can appeal under section 12 only if the proceedings in the High Court were not criminal proceedings. The question whether proceedings for judicial review of decisions made by a magistrate in a preliminary inquiry conducted under the provisions of the Criminal Procedure Act (Cap.21) are criminal or civil proceedings was expressly addressed by the Fiji Court of Appeal in *Himmat Lodhia and Others v. Suva Magistrates' Court*.

(Civil Appeal No.45 of 1982: decided on 19 November 1982). The Court decided that it was a criminal proceeding, that consequently the appeal had been incorrectly commenced under section 12 of the Court of Appeal Act and that, as the appellants had not stood trial and been convicted, no appeal lay under section 21.

In coming to that conclusion the Court noted that the approach in Fiji to such matters as prerogative orders had been modelled upon that of the United Kingdom and that by virtue of section 18 of the High Court Act (then entitled the Supreme Court Act) the Supreme Court, predecessor of the present High Court, possessed and exercised "the jurisdiction, powers and authorities" for the time being vested in the High Court of Justice in England. It noted also that in England there was statutory provision in respect of a case involving a prerogative order for an appeal to lie from the Divisional Court of the High Court of Justice to the Court of Appeal "except in a criminal cause or matter" and that the House of Lords had been required on several occasions to determine the nature of an application for judicial review of an order made in criminal proceedings in an inferior court. It regarded *Amand v. Home Secretary and Minister of Defence of Royal Netherlands Government* [1943] A.C. 147 as a leading case and that its effect was summarised in the headnote to it which read:

"Held, that the case came within section 31, subsection 1 (a), of the Supreme Court of Judicature (Consolidation) Act, 1925, as the judgment appealed from was in "a criminal cause or matter", and that, accordingly, the Court of Appeal had no jurisdiction to hear the appeal.

The distinction between cases in which it is possible to appeal from a refusal to grant a writ of habeas corpus, and cases in which no appeal is possible, turns on the nature and character of the proceedings in which habeas corpus is sought. If the matter is one, the direct outcome of which may be trial of the applicant and his possible punishment for

an alleged offence by a court claiming jurisdiction to do so, the matter is criminal, and there can be no appeal from a refusal to grant the writ."

The Fiji Court of Appeal continued:

"In the following passage from the judgment of Lord Wright, at page 162 he deals with the Clifford and O'Sullivan case (in which the facts concerning the military type tribunal have no relevance in the present case) and expresses his general view on "criminal cause or matter":

"I must, however, cite In re Clifford and O'Sullivan [1921] 2 A.C. 570, where the appeal was dismissed on the ground that the order impeached was not made in proceedings before a military court or court martial or, it appears, any court at all, and could not be described as made in a 'criminal cause or matter'. Viscount Cave Ibid 580 said there must be two conditions fulfilled to satisfy the word 'criminal'. There must be the consideration of some criminal offence charged under criminal law, and the charge must be preferred or about to be preferred before some court or judicial tribunal having or claiming jurisdiction to impose punishment for the offence or alleged offence. What I think Viscount Cave was particularly emphasizing was the latter condition. In his opinion, the military officers who purported to try the men and pass sentence, were in no possible sense a court martial or a court of any kind.

The principle which I deduce from the authorities I have cited and the other relevant authorities which I have considered, is that if the cause or matter is one which, if carried to its conclusion, might result in the conviction of the person charged and in a sentence of some punishment, such as imprisonment or fine, it is a 'criminal cause or matter'. The person charged is thus put in jeopardy. Every order made in such a cause or matter by an English court, is an order in a criminal cause or matter, even though the order, taken by itself, is neutral in character and might equally have been made in a cause or matter which is not criminal. The order may not involve punishment by the law of this country, but if the effect of the order is to subject by means of the operation of English law the persons charged to the criminal jurisdiction of a foreign country, the order is, in the eyes of English law for the purposes being considered, an order in a criminal cause or matter, as is shown by Ex parte Woodhall 20 Q.B.D. 832 and Rex v. Brixton Prison (Governor of) Ex parte Savarkar [1910] 2 K.B. 1056. These conditions are fulfilled by the order in the present case."

To the authorities quoted there might be added a decision of the Court of Appeal for Eastern Africa in Kenya, where the Criminal Procedure Code is not identical with but resembles closely that used in Fiji. It is the case of In re Keshavlal Punja Parbat Shah (1955) 22 E.A.C.A. 381. The Kenya code had classified the prerogative writs under the Criminal Procedure Code and the question again was whether an appeal lay to the Court of Appeal. If the writ was civil an appeal lay as it resulted in a 'decree,' which was appealable. If it was criminal, appeal lay, as in Fiji, only from conviction after a trial. It was held that the Supreme Court had jurisdiction to entertain prerogative writs on either its civil or its criminal side according to the nature of the proceeding. On the civil side an appeal lay but not on the criminal.

No point has been taken in this court that because a preliminary inquiry does not terminate of itself in a conviction or acquittal it is not a criminal proceeding. Had it been, it would have been effectively negative by Amand's case in which the court of final adjudication was a Dutch court.

In our opinion the proceedings before the Chief Magistrate were criminal in nature and on the authorities their criminal nature resulted in the cause or matter in the Supreme Court being a criminal proceeding."

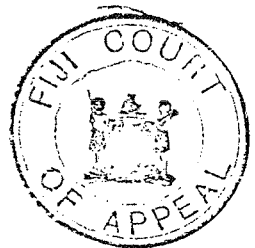
In *Fred Wehrenberg v. The State* the Fiji Court of Appeal again applied the test stated in *Amand* to determine whether proceedings in an inferior court were criminal proceedings. With respect we regard the test applied in *Himmat Lodhia* and *Wehrenberg* to have been correct for the reasons stated in *Himmat Lodhia* and are satisfied that it is still the correct test apply.

Section 21(1) of the Court of Appeal Act gives a right of appeal only to a person convicted on a trial in the High Court; section 21(2) is concerned only with appeals by the State. As the appellant has not been tried yet in the High Court and, therefore, not convicted in such a trial, he has no right of appeal against the decision of Sadal J. Accordingly his appeal must be dismissed for want of jurisdiction.

Before completing this judgment we consider it necessary to draw attention to the long time that has now elapsed since the dates of the alleged offences. Their nature was such that the appellant should have been brought to trial on an early date. The delays have occurred first because of adjournments of the preliminary inquiry, next because application was made for judicial review (although that was decided with commendable promptness by Sadal J.) instead of the matter being raised at the commencement of the trial in the High Court, then because the court record was not provided to the registry of this Court as quickly as it should have been for preparation of the appeal book, and finally because of Mr. Raza's illness. Those delays, not all avoidable, are most unfortunate. It is time now, however, for the trial to be held without any further delay. Accordingly we direct the Registrar to bring these comments to the attention of the Honourable Chief Justice so that he can issue such directions as he thinks fit to ensure an early date for the trial.

Decision

Appeal dismissed



Moti Tikaram

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Sir Moti Tikaram
President

Gordon Ward

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Justice Gordon Ward
Justice of Appeal

I.R. Thompson

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Justice I R Thompson
Justice of Appeal

Solicitors:

Messrs. M. Raza and Associates, Suva for the Appellant
 Office of the Director of Public Prosecutions, Suva for the Respondent