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

CRIMINAL APPEAL NO.AAU0001 OF 1999S
CRIMINAL APPEAL NO.AAU0003 OF 1999S
(High Court Criminal Appeal No.HAM 32 of 1998)

BETWEEN:

RATU OVINI BOKINI

Appellant

AND:

THE STATE

Respondent

Coram: **The Hon. Sir Moti Tikaram, President**
The Hon. Sir Ian Barker, Justice of Appeal

Hearing: **Friday, 5 November 1999, Suva**

Counsel: **Dr. M. S. Sahu Khan for the Appellant**
Mr. J. Naigulevu for the Respondent

Date of Judgment: **Friday, 12 November 1999**

JUDGMENT OF THE COURT

Background

These consolidated appeals were heard by a Court of two Judges under the provisions of s.6 of the Court of Appeal Act (cap 12) (the Act). Although there are, in form, two appeals, both relate to the same decisions made in the High Court: by consent, the appeals were consolidated.

The Respondent faced 32 Counts of official corruption and 32 alternative counts of fraudulent conversion of property. These charges were, by consent, removed from the Magistrate's Court into the High Court for trial. The necessary preliminary inquiry commenced before the Chief Magistrate on 16 November 1998. After some adjournments, the hearing continued until 25 November 1998. After the bulk of prosecution evidence had been given, the preliminary inquiry proceeded no further in circumstances outlined below.

389

On that day of the hearing, there was an exchange between the Chief Magistrate and the Deputy Director of Public Prosecutions, Mr. K.Wilkinson who was appearing as counsel for the prosecution. The Chief Magistrate refused to hear Mr. Wilkinson's application to have the witness, giving evidence at the time, excluded whilst legal argument took place. The Chief Magistrate considered Mr. Wilkinson had committed contempt of Court and ordered him removed from the Court and taken down to the cells for 5 minutes to 'cool off'.

After 5 minutes, the Magistrate ordered the return of Mr. Wilkinson and asked him to resume his seat in Court. Mr. Wilkinson replied that he proposed to withdraw to seek instructions. The Chief Magistrate then delivered a statement purporting to justify his actions. Shortly afterwards, the then Director of Public Prosecutions, Ms. Shameem, ('the DPP') saw the Chief Magistrate in Chambers along with counsel for the defence. She obtained an adjournment of the preliminary inquiry until 30 November 1998. On that date, she sought an order from the Chief Magistrate that the conduct of the preliminary inquiry be given to another Magistrate to conduct the hearing de novo.

The grounds for this application were the perceived bias against the prosecution by the Chief Magistrate (particularly his detention of Mr. Wilkinson) as well as his general conduct of the case. An affidavit in support of the application was filed by an investigator who had been present through out the preliminary inquiry and an affidavit in opposition was filed by the respondent.

The Chief Magistrate, on the same day, delivered a ruling in which he refused to disqualify himself. In his decision, the Chief Magistrate sought to justify his detention of Mr. Wilkinson: He stated that **"The Court's mind is not closed"**. He did not refer at all to the well-

390

known test for presumed bias by the Supreme Court in *Koya v The State* (Criminal Appeal CAV 002/97). He ordered the preliminary inquiry to resume before him on 1 December 1998.

On that date, the DPP filed (a) an appeal to the High Court against the Chief Magistrate's decision not to recuse himself and (b) an application to the High Court for stay of the preliminary inquiry pending resolution of the appeal.

With commendable promptitude, the appeal and the stay application came before Byrne J in the High Court on 1 December 1998. The learned Judge heard extensive argument from the Director and from counsel for the present appellant. In a reserved decision issued on 13 January 1999, Byrne J. granted the stay application. On 20th January 1999, he ordered that the Chief Magistrate disqualify himself from the further hearing of the preliminary inquiry and the inquiry be sent to another Magistrate for a prompt de novo hearing. The respondent now appeals against Byrne J's orders, principally the one requiring the preliminary inquiry to be conducted de novo before another Magistrate.

Right of Appeal to this Court

Counsel for the appellant acknowledged that his right of further appeal to this Court from the High Court was governed by s.22(1) of the Act, as amended in 1998. The relevant subsection provides

"(1) Any party to an appeal from a magistrate's Court to the [High] Court may appeal, under this Part, against the decision of the [High] Court in such appellate jurisdiction to the Court of Appeal on any ground of appeal which involves a question of law only ..."

391

The questions of law proposed by counsel for the appellant are in summary:

[1] What is the jurisdiction to the High Court to entertain an appeal from the Chief Magistrate's refusal to recuse himself from the preliminary inquiry and to issue a consequential stay order?

[2] On a proper consideration of the record of the proceedings before the Chief Magistrate, was Byrne J right to presume bias against the Chief Magistrate?

The first question posed is clearly one of the law. It involves consideration of:

(a) the extent of the right of appeal from a Magistrate to the High Court under s.308 of the Criminal Procedure Code cap 21 ('The CPC')

(b) the extent of the High Court's inherent jurisdiction to control preliminary inquiries and

(c) the jurisdiction of the High Court over inferior Courts under the 1998 Constitution s.120 (6).

The second question is, at best for the appellant, a mixed question of fact and law. Byrne J clearly adopted the correct test for presumed bias set out in Koya's case, a Supreme Court decision binding on all Courts in this country. The only question is whether he applied it correctly to the facts of this case. It is doubtful whether this second question constitutes "**a question of law only**" in the words of s.22(1) quoted above.

392

Jurisdiction of High Court to hear Interlocutory Criminal Appeal

We deal first with whether s.308 of the CPC gave the respondent a right of appeal from the decision of the Chief Magistrate not to abort the preliminary inquiry and to order a fresh inquiry before another Magistrate.

Before the 1998 amendment (to which reference will be made), the question whether interlocutory appeals in criminal cases were possible was open to some confusion. In *Ramesh Patel v The State* (Cr.App. AAV0017 of 1996 and AAU0001 of 1997 - 18 July 1997) this Court expressly refused to follow an earlier decision of this Court in *Tuiqaqa v R* (CA 2/86, 21 March 1986) where the word 'order' s.308 (1) had been interpreted as any order made by a Magistrate in a criminal case. In Patel, the Court relied on the view of Mills-Owen, CJ in *Asgar Ali v R* (1964), 10 F LR 235 that 'order' in s.308 (1) had to read ejusdem generis with 'judgment' and 'sentence' (i.e. final order in the nature of a determination of a case). Patel followed an earlier decision of this Court to similar effect in Southwick v State (Cr. Appeal AAU020 of 1996 14 February 1997). All three cases were decisions of Benches of 3 Judges. There had been no pronouncement on the point either by a Bench of more than 3 Judges in this Court or by the Supreme Court. Some Judges in the High Court had followed Tuiqaqa. We mention these varying interpretations which must be presumed to have been known to the Legislature when it enacted the 1998 amending Act.

Whichever view of s.308 (1) before the amendment be correct, in our view, the Legislature has put the matter beyond doubt with the 1998 amendment. We are inclined to the view, contrary to that of Byrne J, that the orders of the Chief Magistrate under review were 'interlocutory' and not final in that the Chief Magistrate's judgment did not finally dispose of the

393

rights of the parties. See Leece v R (1996), 86 A.Crim. R. 493 s.308, as amended in 1998, draws no distinction between interlocutory and final orders in the Magistrate's Court. The relevant part of s.308 of the CPC as amended reads:

> ***"(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.***
> ***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.....***
> ***(6) An order granting or refusing bail, including any condition or limitation attached to the grant of bail, may be the subject of an appeal to the High Court, either by the person granted or refused bail or by the Director of Public Prosecutions.***
> ***(7) Without limiting the categories or sentence or order which may be appealed against, an appeal may be brought under this section in respect of a sentence or order which includes an order for compensation, restitution, forfeiture, disqualification, costs, binding over, absolute or conditional discharge, probation or community service.***
> ***(8)An order by a court in a case may be the subject of an appeal to the High Court, whether or not the court has proceeded to a conviction in the case."***

The intention of the Legislature in adding subsections (6) to (8) of s.308 must have included

(a) a desire to clarify the law regarding appeal rights in bail applications - a matter discussed by this Court in Southwick's case.

(b) a desire for clarification of the categories of orders of Magistrates which could be the subject of appeal, given the circumstances of conflicting Court of Appeal decisions.

394

In the new subsection 308(8), the Legislature made it clear that an 'order' can be appealed against although there has been no conviction. Obviously, this subsection could apply in a situation where an accused has been found guilty but discharged without conviction - and not uncommon fate for first offenders on less serious charges, for example. But the words of the amendment are not restricted to those sorts of situation. They enhance s.308(1) which speaks of any 'order', a word which one interpretation had restricted to final order. The opening words of s.308(7) reflect the notion that the categories of sentence and order embraced by s.308(1) are wide. We see no warrant for reading down the statute and hold that this order in question of the Chief Magistrate (i.e. the order refusing to disqualify himself) is susceptible to an appeal under s.308 of the CPC, even though it was made in commital proceedings.

We are not impressed with the 'floodgates' argument that interlocutory appeals in criminal matters will increase because of this interpretation. We have sufficient faith in High Court Judges to deal swiftly and severely with frivolous appeals against Magistrates' interlocutory orders, brought merely to buy time or to obstruct the criminal process. Only interlocutory appeals with the degree of seriousness demonstrated by this case should be entertained. Accordingly, we agree with Byrne J that the High Court had jurisdiction to hear the appeal under s.308 of the CPC.

If it had jurisdiction to hear the appeal, then it follows inexorably that the High Court had power to order and stay pending the hearing of the appeal. The High Court has inherent power to control its own process and to ensure that holding measures are taken pending the hearing of the appeal to enable the exercise of its appellate jurisdiction to be meaningful. See for an example, in the context of a statutory right of appeal, Pinson v Pinson (1991) 5 PR NZ

177. There, Smellie J. granted a stay of execution pending the hearing of an appeal from the Family Court to the High Court of New Zealand.

S.120(6) of the 1998 Constitution provides

> ***"The High Court has jurisdiction to supervise any civil or criminal proceedings before a subordinate court and may on an application duly made to it, make such writs, issue such units and give such directions as it considers appropriate to ensure that justice is duly administered by the subordinate court."***

A similar provision is to be found in s.114(1) of the 1990 Constitution, but the words 'on an application duly made to it' did not there appear.

Although that subsection of the Constitution gives authority for judicial review by the High Court of Magistrate's Court proceedings, the fact that it is present in the Constitution gives support to the High Court's general supervisory role. There is ample authority for construing constitutions liberally and not with rigid legalism.

We see no difficulty as did counsel for the present appellant, with reconciling s.120(6) with s.120(3) of the Constitution which provides:

> ***"The High Court has jurisdiction, subject to the conferral by Parliament of rights of appeal and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of subordinate courts."***

That subsection applies to appeals from decisions made in the ordinary course of a subordinate court's business. The s.120(6) jurisdiction is wider and really expresses in clear terms the supervisory jurisdiction of that the High Court as an original court of superior

jurisdiction has always enjoyed over subordinate courts. The subsection assists the interpretation we have given to s.308. We do not find it necessary to discuss the inherent jurisdiction point.

Presumed Bias and Question

Byrne J's judgment sets out in some detail extracts from the record of the course of the preliminary inquiry before the Chief Magistrate. The 'record' comprised a written transcript and tape recordings. Some of the exchanges were omitted from the transcript and were found only on the tapes. Byrne J was critical of the Chief Magistrate because the written transcript was not complete and did not, for example, include the Chief Magistrate's exact words used when ordering the detention of Mr. Wilkinson. We express no view of this and other personal criticisms of the Chief Magistrate which, as we have stated in our reasons for rejecting his application to be joined as a party to this appeal, are matters best considered by the Judicial Service Commission.

Byrne J. listed instances, taken from the record, of alleged rebukes administered by the Chief Magistate to Mr. Wilkinson. He recorded several instances of alleged unfortunate comments from counsel for the accused (present appellant) which provoked no censure from the Chief Magistrate yet which were, in Byrne J's view, derogatory of Mr. Wilkinson.

The Judge was critical of the Chief Magistrate allowing the accused to sit at the bar table without having asked Mr Wilkinson for his comment. We do not think that this minor matter could possibly be taken as an indication of bias against the prosecution. In some jurisdictions, it is not unusual for an accused person to sit alongside or near his counsel in lower

Court proceedings. In New Zealand, for example, accused persons, even in High Court trials, are required to enter the dock only for arraignment and verdict, unless there is a security risk. They are usually seated with escorts in the body of the Court not at the Bar table, relatively close to defence counsel.

The various exchanges mentioned in Byrne J's judgment were unfortunate and avoidable. Possibly, taken on their own, they may not have inclined the reasonable observer to conclude that the Chief Magistrate was biased against the prosecution.

The test stated by the Supreme Court in Koya (supra) is **"there is little difference between asking whether a reasonable and informed observer would consider there was a real danger of bias and asking whether a reasonable and informed observer would reasonably apprehend or suspect bias."** The Supreme Court had there considered various formulations of the test of apparent bias made in other jurisdictions. On the facts in Koya's case, the Supreme Court held that a fair-minded observer, knowing the facts, would not apprehend or suspect that the trial was affected by bias on the part of the presiding Judge.

There may have been scope for greater objection by Mr. Wilkinson to the Chief Magistrate's comments, along the lines discussed by the High Court of Australia in Vakauta v Kelly (1989), 167 C.L.R. 568. We think however that that authority should be applied with caution in the context of a lengthy preliminary inquiry where there were alleged to have been numerous remarks to which objection might have been taken. In *Vakauta,* the trial Judge made remarks critical of the defendant's medical witnesses and of the defendant's indemnifier. There was not a string of ongoing remarks.

However, the decision of the Chief Magistrate to detain Mr Wilkinson and the language used by him on that occasion were, in our opinion, enough on their own to justify a reasonable informed observer suspecting bias by the Chief Magistrate against the prosecution.

From the transcript, it appears that Mr Wilkinson was attempting to have a witness excluded whilst counsel argued about the appropriateness of a question to that witness. Mr Wilkinson tried to make this point to the Chief Magistrate but was told to sit down. The Chief Magistrate stated that he wanted to listen first to counsel for the defence. Mr Wilkinson had no quarrel with that position, so far as the legal objection was concerned, but tried to ask the Magistrate to have the witness excluded, since Mr Wilkinson did not want the witness to hear the question articulated.

Eventually, after Mr Wilkinson said 'I understand that, Sir, but I am asking that the witness not listen to the question' the Chief Magistrate as recorded in the transcript is saying *'Could you please take him downstairs for contempt of court. Take him downstairs for contempt of court for 5 minutes. Let him go and cool downstairs.'* Mr Wilkinson then tried to explain the point once more. The written transcript then shows the Magistrate as saying *'Take him downstairs. I'll take 5 minutes break, you go downstairs now for disobeying my orders. Take him downstairs, 5 minutes downstairs. Cool down downstairs and after 5 minutes bring him up here. I'll take a 5 minutes break.'*

What did not appear in the written transcript, but is on the tape recording are the following further remarks of the Magistrate *"You go downstairs right now. Take him downstairs. Drag him downstairs. Come on, take him downstairs. 5 minutes."*

We think that the perception of the reasonable and informed observer would have been influenced by the following legal matters. First, if only the Magistrate had heard out Mr Wilkinson, he would have discovered that he was not disputing the Magistrate's ruling that he wished to hear first the defence argument over the validity of the question. All Mr Wilkinson was seeking was that the witness be excluded during the argument. We express no view as to whether the Magistrate should or should not have acceded to Mr Wilkinson's request to exclude the witness for the duration of the argument. That is beside the point. The Chief Magistrate should have given Mr Wilkinson the chance to say that he was requesting and order excluding the witness.

Secondly, the summary power of punishing for contempt should be used sparingly and only in serious cases *Izuora v. The Queen* [1953] A.C. 329 The usefulness of the power depends on the wisdom and restraint with which it is exercised: to use it to suppress methods of advocacy which are merely offensive is to use it for a purpose for which it was never intended. *Parashuram Detaram Shamdasani v King Emperor* [1945] A.C. 264, 270.

Thirdly, before any person can be committed for contempt, the Court must tell the alleged contemnor distincly what the contempt is said to have been and then hear submissions from him or her. See Archbold (1998 ed) 28 - 117, quoted by Byrne J.

In our view, the circumstances of Mr Wilkinson's detention, including the intemperate and non-judicial expression of the Magistrate *"Drag him down"*, would inevitably give rise in the reasonable and informed observer to an impression that the Magistrate was biased against the prosecution.

400

We do not consider other matters referred to by Byrne J such as alleged racial references. The detention scenario is enough: the other matters can be dealt with by the Judicial Service Commission if that body thinks it appropriate so to do.

We have referred to the facts because of the importance and unusual nature of this case. As indicated at the start of this judgment, we doubt whether there is a question of law only involved in the second ground of the appeal.

We uphold the decision of Byrne J allowing the appeal from the Chief Magistrate's refusal to recuse himself off the preliminary inquiry and to recommence the inquiry before another Magistrate. In the light of our judgment, a decision on the stay order is now academic.

It is unfortunate that prosecution witnesses will have again to be troubled and there will be extra cost involved for both prosecution and defence. However, this is a necessary consequence of the conduct of the Chief Magistrate described above and in the interests of the proper administration of justice.

Decision

(a) Appeals dismissed.

(b) Orders of Byrne J in the High Court affirmed.

.....
Sir Moti Tikaram
President

.....
Sir Ian Barker
Justice of Appeal

Solicitors:

Messrs. Sahu Khan & Sahu Khan, Ba for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent