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

CRIMINAL APPEAL NO. AAU0025/99S
(High Court Criminal Appeal No. HAA104 of 1998)
(Suva Magistrates' Court Criminal Case No. 520/97)

BETWEEN:	JOHN YOGENDRA SINGH (f/n Sam Kuar Singh)	*Appellant*
AND:	THE STATE	*Respondent*

Coram: The Rt Hon Sir Maurice Casey, Presiding Judge
The Hon Sir Rodney Gallen, Justice of Appeal
The Hon Justice John E. Byrne, Judge of Appeal

Hearing: Tuesday 15 May, 2001

Counsel: Mr. V. Mishra for the Appellant
Mr. J. Naigulevu for the Respondent

Date of Judgment: Thursday 24 May 2001

JUDGMENT OF THE COURT

On 22 October 1997 the Appellant was convicted on a count of larceny in the Magistrate's Court at Suva. He was present and represented at the trial by counsel and was bailed to appear for sentence on 24 November. On that date he did not appear and his counsel (Mr Lateef) explained that his client was unwell and sought further time, which was granted by an adjournment to 2 December. Mr Lateef also intimated that there would be an appeal. On the adjourned date the appellant again did not appear and a medical certificate was tendered, stating that he had experienced a mild stroke. On the next date (11 December) he appeared, but in response to Mr Lateef's request the matter was adjourned to 29 January

1998 to enable preparation of submissions in mitigation. On that date there was a further medical certificate explaining the appellant's absence and the Court granted what it said would be a a final adjournment to 19 February, when Mr Lateef explained he had lost contact with his client and a bench warrant was issued. Finally, after several further adjournments when the appellant failed to appear, his counsel made a plea in mitigation on 25 March, and he was sentenced in his absence to 12 months' imprisonment on 9 June 1998, to be effective from the date of his apprehension on the bench warrant. Mr Lateef was present on his behalf and in the circumstances we see nothing to criticise in the way sentence was passed.

In the meantime the appellant had instructed Mr Gates (now Justice Gates) on 15 January 1998 to appeal against his conviction, and he also received what was described by Surman J as an "imprecise request" to appeal against a prison sentence if one was imposed. After sentence, a petition of appeal to the High Court against conviction and sentence was signed by Mr Gates as counsel on 30 June and duly filed. At all material times the appellant has been at large; his whereabouts are unknown to the authorities and the bench warrant has not been executed. The appeal came before Surman J and after a full argument he declined to hear it, relying principally on the statement by the English Court of Appeal in R v Jones [1971] 2 QB 456, that in all but the most exceptional cases, the proper time for a defendant to give instructions to initiate appeal proceedings was after he had been convicted and sentenced. In that case the defendant had absconded before conviction, after instructing his solicitors during the trial to appeal.

The matter comes to this Court by way of an appeal on questions of law pursuant to s22(1) of the Court of Appeal Act (Cap 12) against Surman Js' decision. There is a distinction between the present case and Jones in that here the defendant gave instructions to appeal against conviction after it had been entered. Mr Mishra submitted that a custodial sentence was inevitable, whether or not it was suspended (as he had sought in mitigation); and that the defendant's request to Mr Gates to appeal against a prison sentence was sufficient to give counsel authority to do this after it was imposed, notwithstanding that he had by then absconded.

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In the present circumstances we think the approach adopted in Jones may be too rigid and somewhat out of touch with reality. We see the issue as really one of public policy. Should the Court entertain an appeal from a person who is deliberately evading its jurisdiction and thereby flouting its orders? The answer can be found in the following statement of the practice of the Court of Criminal Appeal in R v Flower [1966] 1 QB 146, 151

> *"..... The practice of this court where an appellant escapes, and for that reason is not present when an appeal is called on, is either to adjourn the appeal or dismiss it, according to the justice of the case."*

We adopt this as appropriate practice in the present circumstances, and are not persuaded to the contrary by Mr Mishra's invocation of the Constitutional right to appeal to a higher Court in s28 (1)(l). That right is always available to citizens, but to avail themselves of it they must be prepared to subject themselves to the lawful jurisdiction of duly established Courts. Where that jurisdiction is rejected, the right must be taken to have been waived or abandoned.

Surman J decided not to hear the appeals against either conviction or sentence, commenting that if the Applicant surrenders to the Police and should then decide to apply for leave to appeal out of time, it will be open for him to do so. We think the appeal should be finally disposed of rather than be left indefinitely. The appellant should be given an opportunity to consider his position in the light of this judgment by an adjournment of the appeal to the High Court for three months, and if he has not by then surrendered to the police or prison authorities it is to be dismissed.

Result

The appeal to this Court is allowed to the extent of adjourning the appeal from the Magistrate's Court to the High Court for three months from the date of this judgment. If the Appellant has not before then surrendered to the police or prison authorities, that appeal is to be dismissed.

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M. Casey

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Sir Maurice Casey
Presiding Judge

FIJI COURT OF APPEAL

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Sir Rodney Gallen
Justice of Appeal

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Justice John E. Byrne
Judge of Appeal

Solicitors:

Messrs Mishra, Prakash & Associates, Suva for the Appellant
Office of the Director of Public Prosecutions, Suva for the Respondent

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