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

CRIMINAL APPEAL N0.AAU0012/2004S
HAA056/03

BETWEEN:

SAHADATT ATTAI KHAN 12/04
f/n Sahadatt Khan

APPELLANT

AND:

THE STATE

RESPONDENT

Coram: **Hon. Ward, P**
Hon. Eichelbaum, JA
Hon. Penlington, JA

Hearing: **Tuesday, 13th July 2004, Suva**

Counsel: **Mr. M. Raza for the Appellant**
Mr. J. Naigulevu for the Respondent

Date of Judgment: **Friday, 16th July 2004, Suva**

JUDGMENT OF THE COURT

The appellant has been charged with corruption by a public servant, contrary to section 106(a) of the Penal Code. The case was heard in the Suva Magistrates' Court.

The complainant, one Rajendra Singh, was called as a witness for the prosecution and during cross-examination, was asked about vehicles he had purchased and the method of payment. He stated that he could not answer without the relevant documents and was asked if he was able to produce them.

Following the adjournment, the cross- examination continued and he was asked if he had brought the documents with him. At that moment, prosecuting counsel advised the court that she had spoken to the witness during the adjournment and advised him that he need not bring the documents unless he was subpoenaed to do so.

Following submissions by counsel, the magistrate ruled that the prosecutor had acted improperly as was indeed the case. He went further and speculated, without any evidence to support it, that she might have said more than she had told the court. He concluded:

> "Finally, since I have found that there was interference of this witness by the learned State Counsel, I think it would be appropriate to warn her, as she is pretty well aware of the consequences of her action. I feel that she should do the honourable thing open to her and that is to hand over the conduct of this matter to another officer to handle."

Following that ruling, the Assistant DPP wrote a letter to Shameem J inviting her to review the finding of the magistrate. The learned judge called for the record, heard counsel on 15 March 2004 and gave a detailed judgment the same day. She considered the advisability of reviewing a finding during the course of the trial in the lower court and decided it was justified because "the learned Magistrate's finding that the witness had been 'interfered with' will have direct bearing on that witness' credibility at the end of the trial, and also will determine the conduct of the prosecution by the prosecutor who is the subject of this revisionary action".

Having made some sensible suggestions as to how such an incident should be dealt with in the future and accepting that the prosecutor's conduct had been unwise and improper, the learned judge decided that the advice given to the witness could not constitute an interference and the magistrate's finding that it did amounted to an error of law.

She concluded:

> "In the exercise of the revisionary jurisdiction of this court, I therefore reverse the learned magistrate's finding that there

was an interference with the prosecution witnesses in this case. There was no interference in law. The trial should now proceed on that basis."

This is an appeal from that decision. There were three grounds of appeal filed but, at the hearing, counsel only pursued one:

> "That the Learned Judge erred in law by exercising revisionary jurisdiction when it was not called for and as such there had been a miscarriage of Justice."

Mr Raza explained that the error was the exercise by the judge of her revisionary jurisdiction before the trial in the lower court had been concluded.

The revisionary jurisdiction of the High Court is set out in section 323 of the Criminal Procedure Code:

> "323. The High Court may call for and examine the record of any criminal proceedings before any magistrates' court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of any such magistrates' court."

Despite the reference in the ground of appeal to an error of law, Mr Raza conceded that there is nothing in the section that restricts exercise of the power to the end of the proceeding to be revised. However, he tells the court, it is the normal practice and summarised his position by explaining that the power "ought not to be exercised during the trial except in rare cases".

He also relied on section 325(5):

> "(5) Where an appeal lies from any finding, sentence or order, and no appeal is brought, no proceeding by way of revision shall be entertained at the instance of the party who could have appealed."

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He suggested that the prosecution could have appealed the decision and therefore the Assistant DPP's request for review should not have been entertained.

There is no merit in this appeal. The power to revise is established and limited by the terms of section 323 and the right of a party to seek revision is limited by section 325(5). There is nothing to prevent the power being exercised during a trial and the final words of section 323 clearly suggest the possibility of such an intervention. However, it will only rarely be appropriate and whether it is or not in a particular case is a matter in the discretion of the judge.

In the present case, the learned judge had clearly borne that in mind:

> "Although the State has the ability to move the High Court in this matter, this Court does not normally favour such interlocutory appeals because they fragment the criminal trial, they cause delay and they are capable of interfering with the discretion of the trial magistrate. Interlocutory appeals and revisions should only be entertained in circumstances where the ruling determines the outcome of the trial or will have a direct bearing on the way the trial is conducted."

Those were proper considerations and we see no reason to challenge the exercise of her discretion.

The suggestion that the prosecution had a right of appeal in this case also has no substance. The right of appeal from the magistrates' court is found in section 308 of the Criminal Procedure Code. It gives a right of appeal to the High Court from any "judgment, sentence or order" of the magistrates' court. Section 323, on the other hand, allows revision of any "finding, sentence or order" and of questions as to "the regularity of any proceedings in the magistrates' court".

The ruling by the magistrate in this case was not a judgment, sentence or order; it was a finding from which there was no right of appeal but which was susceptible to revision.

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The appeal must be dismissed.

Order

Appeal dismissed.

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Gordon Ward, P

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Eichelbaum, JA

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Penlington, JA

Solicitors:

Mehboob Raza and Associates for the Appellant
Office of the Director of Public Prosecution, Suva for the Respondent