

IN THE COURT OF APPEAL
[On Appeal from the Magistrates' Court]

Criminal Appeal No. AAU128 of 2013
[Magistrates' Court Case No. 1635 of
2009]

BETWEEN : EMMANUEL SMITH
Appellant

AND : THE STATE
Respondent

Coram : Goundar JA

Counsel : Ms N. Nawasaitoga for the Appellant
Mr. M. Delaney & Ms J. Prasad for the Respondent

Date of Hearing : 25 August 2014

Date of Ruling : 15 September 2014

RULING

- [1] This is an application for leave to appeal against conviction and sentence imposed on the appellant for an offence of being in possession of an illicit drug contrary to section 5(a) of the Illicit Drugs Control Act 2004.
- [2] The State has raised a preliminary issue regarding the jurisdiction of this Court to deal with this appeal. On 18 December 2009, the appellant was charged with being in possession of 415.0 grams of Indian Hemp which is an illicit substance under the Illicit Drugs Control Act. When the charge was filed, the Magistrates' Court lacked jurisdiction to try the case (See, *State v Joseva Lui* [2006] HAA 180/05L Ruling 18 April 2006 Govind J). *Lui* considered the jurisdiction of the Magistrates' Court as provided by the Criminal Procedure Code. Following Govind J's decision in *Lui*, all drug cases were transferred from the Magistrates' Court to the High Court for trial. The sheer number of drug cases had case management implications for the High Court as most cases were minor possession charges which could have been conveniently dealt summarily in the

Magistrates' Court. Initiative to fix the jurisdictional lacuna in the law by the State was slow. To avoid clogging of cases in the High Court, the judges decided to invoke section 4(2) of the Criminal Procedure Code to invest jurisdiction to the Magistrates' Court to try the drug cases despite Govind J's decision in *Lui* which stated that the power under section 4(2) was to be used most sparingly and only in the most exceptional cases brought about by some unseen circumstances. *Lui* was never appealed to the Court of Appeal and therefore the decision was not binding on the High Court. The decision to invest jurisdiction was made so that the cases could be heard in an efficient and timely manner. The procedure adopted was that a High Court judge will make an order investing the Magistrates' Court with jurisdiction before remitting the case for trial. When jurisdiction was invested under section 4(2), the sentencing jurisdiction was limited to the maximum sentencing jurisdiction of the Magistrates' Court. The maximum sentencing discretion was ten years' imprisonment and or a fine of \$15,000.00 (see, section 7 of the Criminal Procedure Code).

- [3] The appellant was charged in the Magistrates' Court on 18 December 2009. He was granted bail and was ordered to appear in court on 27 January 2010. On 27 January 2010, the case was transferred to the High Court for a judge to invest jurisdiction to the Magistrates' Court under section 4(2) of the Criminal Procedure Code to try the case. On 1 February 2010, the Penal Code and the Criminal Procedure Code were repealed and replaced with the Crimes Decree and the Criminal Procedure Decree. On 26 February 2010, Fernando J invested the Magistrates' Court with jurisdiction pursuant to section 4(2) of the Criminal Procedure Decree to try this case.
- [4] Under the Criminal Procedure Decree, the general powers of the courts remained the same. The only significant change is that now the offences are classified into three broad categories. Section 4(1) of the Criminal Procedure Decree gives the High Court power to try any indictable offence under the Crimes Decree. Under the same section, an accused has the right to elect either the High Court or the Magistrates' Court if he or she is charged with an indictable offence triable summarily. Section 4(1) also states that any summary offence shall be heard by a Magistrates' Court.

- [5] Section 4(2) of the Criminal Procedure Decree retained the power of the High Court to invest the Magistrates' Court with jurisdiction to try any offence.
- [6] Section 5 of the Criminal Procedure Decree concerns offences created under other laws. The offences under the Illicit Drugs Control Act fall within the purview of section 5 of the Criminal Procedure Decree. Section 5 provides:
- 5(1) Any offence under any law other than the Crimes Decree 2009 shall be tried by the court that is vested by that law with jurisdiction to hear the matter.
- (2) When no court is prescribed in any law creating an offence and such offence is not stated to be an indictable offence or summary offence, it may be tried in the Magistrates Court in accordance with any limitations placed on the jurisdiction of classes of magistrate prescribed in any law dealing with the administration and jurisdiction of the Magistrates Courts.
- [7] Counsel for the State submits that since the Illicit Drugs Control Act has not prescribed any court to try the drug offences, and that the drugs offences are not classified as indictable or summary offences, section 5(2) of the Criminal Procedure Decree gives the Magistrates' Court power to try the drug offences. This submission of the State is consistent with the decisions of the High Court saying section 5(2) of the Criminal Procedure Decree now gives the Magistrates' Court power to try the offences under the Illicit Drugs Control Act without the High Court investing jurisdiction under section 4(2) of Criminal Procedure Decree (*State v Ilaitia Wakeham High Court Case No. HAC 1 of 2010Lab*, *State v Jepeca Nabuna High Court Case No. HAC 4 of 2010Lab*, *State v Tevita Nabose High Court Case No. HAC 5 of 2010Lab*, *Muskan Balaggan High Court Case No. HAM 67 of 2011Ltk*).
- [8] Counsel for the State submits that by the time the High Court invested the Magistrates' Court with power to try this case on 26 February 2010, the Magistrates' Court had jurisdiction under section 5(2) to try the case. In other words, there was no need for the High Court to invest jurisdiction that had already existed under the law. In terms of

section 4(2), the jurisdiction is only invested if there is no jurisdiction to try the case. In the present case, the Magistrates' Court had already acquired jurisdiction to try this case when the Criminal Procedure Decree came into effect on 1 February 2010. I accept these submissions.

- [9] In my judgment, the appellant was tried by the Magistrates' Court in its original jurisdiction conferred by section 5(2) of the Criminal Procedure Decree. When an appellant appeals against conviction and sentence imposed by the Magistrates' Court exercising original jurisdiction conferred by a legislation, then his right of appeal lies with the High Court and not to the Court of Appeal. A first tier appeal against conviction and sentence imposed in the Magistrates' Court cannot be brought to the Court of Appeal unless the Magistrates' Court's jurisdiction to try the case was invested by the High Court under section 4(2) of the Criminal Procedure Decree (*Avaitia Tulele v State Criminal Miscellaneous Action No. 4 of 2008S*).
- [10] Given my conclusion that the appellant was tried by the Magistrates' Court exercising its original jurisdiction conferred by section 5(2) of the Criminal Procedure Decree, there is no right of appeal to the Court of Appeal. The appellant's right of appeal against conviction and sentence lies with the High Court.
- [11] Section 35(2) of the Court of Appeal Act gives a single judge power to dismiss an appeal that is bound to fail because there is no right to appeal. In this case, I am satisfied that the appellant has no right of appeal. The appeal is dismissed under section 35(2) of the Court of Appeal Act.



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Hon. Justice D. Goundar
JUSTICE OF APPEAL

Solicitors:

Office of the Legal Aid Commission for Appellant
Office of the Director of Public Prosecutions for State