

IN THE COURT OF APPEAL
ON APPEAL FROM THE HIGH COURT

CRIMINAL APPEAL AAU 148 of 2015
(High Court HAC 73 of 2014)

BETWEEN : **THE STATE** *Appellant*

AND : **AIDEN ALEC HURTADO** *Respondent*

Coram : **Calanchini P**
Goundar JA
Alfred JA

Counsel : **Mr M Delaney for the Appellant**
Ms S Vaniqi with Ms B Malimali for the Respondent.

Date of Hearing : **18, 23 November and 2 December 2015**

Date of Judgment : **14 December 2015**

JUDGMENT OF THE COURT

- [1] Following a trial in the High Court before a Judge sitting with four assessors the Respondent was acquitted on the charge of unlawful importation of illicit drugs contrary to section 4(1) of the Illicit Drugs Control Act 2004. The particulars of the

offence were that the Respondent between 7 and 10 February 2014 had imported into Fiji 20.5042 kilograms of illicit drugs namely cocaine without lawful authority. In acquitting the Respondent the learned Judge in his judgment dated 17 November 2015 disagreed with the guilty opinions of the majority of the assessors.

- [2] Being dissatisfied with the verdict of acquittal in the High Court the Appellant filed a notice of leave to appeal to this Court on 18 November 2015. Following his acquittal the Respondent was detained by the Director of Immigration as he was by that time unlawfully in the country. The appeal papers were served on the Director of Immigration on 18 November 2015 and no issue is taken with respect to service.
- [3] The matter was listed before the Court ex parte as a matter of urgency at the request of the Appellant on 18 November 2015. On that day the court made the following orders:

- “1 *The Respondent is to appear before the Court on Monday 23 November 2015 at 2.30pm.*
- 2 *The Appellant is to file and serve a notice of motion and an affidavit in support of the application for a “stop” order to be placed on the Respondent by 4.00pm on Friday 20 November 2015.*
- 3 *The Director of Immigration is directed to place an interim stop order on the Respondent preventing him from leaving Fiji to be in effect from the service of this Order on the Director of Immigration until the Court otherwise orders.”*

- [4] The Appellant subsequently filed a notice of motion on 20 November 2015 seeking the following orders:

- “a) *That the Respondent remains subject to the interim “Stop Order” made by this Honourable Court on 18 November 2015 pending the final order by this Honourable Court in the matter of the appeal against the acquittal in HAC 73 of 2014.*
- b) *That the Respondent remains in the custody of the Director of Immigration pending the final order by this Honourable Court in the matter of the Appeal against the acquittal in HAC 73 of 2014.”*

- [5] At the same time the Appellant filed an affidavit in support of its application sworn by Serupepeli Neiko. Both the notice of motion and the affidavit in support were served on the Respondent by delivering the documents to the Director of Immigration on 20 November 2015.
- [6] On 23 November 2015 the Respondent appeared and was represented by Counsel. On that day directions were given for the filing and serving of any further necessary affidavit material. The Appellant's application was listed for hearing on 2 December 2015 and the "Stop Order" was to remain in force until otherwise ordered by the Court.
- [7] An answering affidavit sworn on 25 November 2015 by Aiden Alec Hurtado was filed on behalf of the Respondent. The Respondent also filed written submissions on 1 December 2015. The Appellant did not file any further material.
- [8] At the hearing of the motion Counsel for the Appellant relied upon the State's statutory right of appeal under section 21(2) of the Court of Appeal Act Cap 12 (the Act) which provides:

"(2) The State on a trial held before the High Court may appeal under this Part to the Court of Appeal-

(a) against the acquittal of any person on any ground of appeal which involves a question of law alone;

(b) with the leave of the Court of Appeal ___ against the acquittal on any ground of appeal which involves a question of fact alone or a question of mixed law and fact or any other ground which appears to the Court to be a sufficient ground of appeal; and

(c) ___ "

- [9] It is significant that the right of appeal that is granted to the State in respect of acquittal under section 21(2) (a) and (b) is identical to the right of appeal that is granted to the convicted accused in respect of conviction under section 21(1) (a) and (b) of the Act.

[10] Counsel for the Appellant submitted that the “stop” order should be extended as a rational and proportionate measure to ensure that the State’s appeal is not rendered nugatory and to ensure that it retains its efficacy. It was submitted that this Court had an “implied” jurisdiction to make such an order for this purpose.

[11] Counsel also submitted that the “Stop” order does not breach the freedom of movement right under section 21 of the Constitution. Counsel submitted that the freedom that is expressed in general terms in section 21(1) is qualified by section 21(3) which states:

“(3) *Every citizen and every other person lawfully in Fiji has the right to move freely throughout Fiji and the right to leave Fiji.*”

[12] It was submitted that since the Respondent was not a citizen of Fiji and had been unlawfully in Fiji since the expiration of his visa in June 2014 he did not enjoy the freedom of movement to the extent that was granted in section 21(1). Counsel submitted that apart from this express restriction on the freedom of movement and in keeping with the accepted approach to interpreting constitutional provisions, the Court was not restricted to the limitations set out in section 21.

[13] Finally Counsel submitted that the Appellant was not only seeking the continuation of the “Stop” order but also the on-going supervision of the Respondent by the Director of Immigration so as to prevent the Respondent from leaving Fiji by means other than through recognized ports of departure. Counsel relied on the material deposed to in the supporting affidavit for this application.

[14] Counsel for the Respondent first replied to the Appellant’s submissions. The principal issue raised in the rebuttal submissions touched upon matters which this Court has concluded are not relevant to the present application.

[15] Counsel also submitted that there was no reason why a “stop” order should be imposed since section 15 of the Immigration Act 2003 empowers the Director of Immigration to deport the Respondent as soon as practicable.

[16] Counsel acknowledged that the only obstacle to the Respondent's deportation and hence departure from Fiji was the interim "Stop" order imposed on 18 November 2015 by this Court. Counsel pointed out that the Respondent had been unlawfully in the country since June 2014 when his visa expired. He was not able to rectify that position whilst on remand awaiting his trial which took place in November 2015. The Respondent is a citizen of both the United States and Columbia. He holds passports for both countries and these passports are currently retained by the Appellant.

[17] Counsel submitted that the correct approach to the interpretation of section 21 of the Constitution is that set out in section 7(1)(a) of the Constitution which states:

"(1) _ _ _ when interpreting and applying this Chapter, a court, tribunal or other authority-

(a) must promote the values that underlie a democratic society based on human dignity, equality and freedom; and

(b) _ _ _ "

[18] Counsel for the Respondent acknowledged this Court's inherent jurisdiction to, amongst other things, "exercise control over process by regulating its proceedings, by preventing abuse of process and by compelling the observance of process." (See Respondent submissions paragraph 21 page 4.)

[19] Counsel submitted that the application involved balancing the Respondent's constitutional right to freedom of movement as an acquitted accused against the State's constitutional and statutory right to have its appeal heard and determined by the Court of Appeal in accordance with the requirements prescribed, in this case, by the Court of Appeal Act.

[20] In reply Counsel for the Appellant urged the Court to consider carefully section 15 of the Immigration Act.

[21] The Appellant's application for the continuation of the "stop" order on the Respondent raises an initial question of jurisdiction. Although the Court of Appeal is

established under the Court of Appeal Act the source of its jurisdiction is section 99(3) of the Constitution which provides that:

“The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as prescribed by written law, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by written law.”

- [22] The right to appeal is a statutory right. The requirements for the exercise of that right of appeal by the State are set out in section 21(2) of the Court of Appeal Act. The appeal against the Respondent’s acquittal is as of right on any ground which raises a question of law only (section 21(2) (a) of the Act) and with the leave of the Court on any ground which raises a question of fact alone or a question of mixed law and fact (section 21(2) (b) of the Act.
- [23] The jurisdiction given to the Court of Appeal under section 99(3) of the Constitution and the establishment of the Court of Appeal itself under the Act, by necessary implication, enable the Court of Appeal to exercise what is termed an inherent jurisdiction to effectively exercise its jurisdiction as an intermediate appellate court in both civil and criminal appeals. The Court’s inherent jurisdiction enables it to exercise control over its process by regulating its proceedings, by preventing the abuse of process and by compelling the observance of process: **37 Halsbury’s (4th Ed.) 23**. The inherent jurisdiction is exercised to prevent steps being taken that would otherwise render the State’s appeal nugatory or inefficacious.
- [24] We are satisfied that in order to ensure that the respondent does not depart the jurisdiction prior to the determination of the State’s appeal, thereby rendering the State’s appeal ineffective, futile and inefficacious, this Court, in the exercise of its inherent jurisdiction may order the Director of Immigration to place a “Stop” order on the Respondent. We are also satisfied on the basis of the material in the Appellant’s supporting affidavit that this is a proper case for the exercise of that jurisdiction.
- [25] The Respondent submits that such an order breaches the freedom of movement right under section 21 of the Constitution. Section 21(1) states that “*every person has the right to freedom of movement.*” This can only be regarded as a statement in principle

of a general right which could not reasonably be regarded as a statement of an absolute right. It stands to reason that this right has its limitations. Included in the limitations for which provision is made in the remaining sub-sections of section 21 is section 21(3) which states:

“Every citizen, and every other person lawfully in Fiji, has the right to move freely throughout Fiji and the right to leave Fiji.”

- [26] The right to freedom of movement granted to every person as a human rights principle is limited to every citizen of Fiji and every other person lawfully in Fiji. It is also limited to the right to move freely throughout Fiji and the right to leave Fiji. The freedom of movement right stated in general terms under section 21(1) does not extend to persons who are unlawfully in Fiji under section 21(3) of the Constitution. Therefore a person who is unlawfully in Fiji does not have the right to move freely throughout Fiji and does not have the right to leave Fiji as and when he or she might otherwise seek to do so.
- [27] It was not disputed before this Court that the Respondent was not a citizen of Fiji and had been unlawfully in Fiji since June 2014 albeit on remand until his acquittal after trial on 17 November of this year. His position is to some extent determined by section 15 of the Immigration Act 2003. Under section 15 the Permanent Secretary may order a prohibited immigrant to leave Fiji. It would appear that the authority given to the Permanent Secretary is discretionary and one of the matters that he takes into account is whether the prohibited immigrant is serving a term of imprisonment in Fiji. In our judgment a stop order placed on the Respondent as the result of a court order is a matter that the Permanent Secretary is entitled to consider when exercising the discretion.
- [28] The imposition of a stop order by this Court thereby restraining the Respondent's movement to the extent that he is not permitted to leave Fiji in order to ensure his appearance before the Court of Appeal for the hearing of the State's appeal is a matter that falls to be considered by the Permanent Secretary in the exercise of the discretion given under section 15 of the Immigration Act. The effect of not making a deportation order is that the Respondent is required to remain in Fiji under supervision

until this Court otherwise orders. In our judgment the decision not to make an order for the deportation of the Respondent pursuant to section 15 of the Immigration Act is consistent with the limitation authorised by section 21(6) of the Constitution. Section 21(6), so far as is relevant, states:

“A law, or anything done under the authority of a law is not inconsistent with the rights granted by this section to the extent that the law:

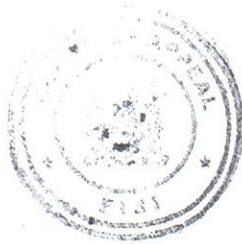
- (a) Provides for the detention of the person or enables a restraint to be place on the person’s movements, whether:*
 - (i) for the purpose of ensuring his or her appearance before a court for trial or other proceedings.”*

[29] In summary, the jurisdiction given to this Court by section 99(3) of the Constitution includes an inherent jurisdiction to ensure that its process remains effective. The State has a statutory right to appeal the acquittal of the Respondent. This Court may invoke its inherent jurisdiction to ensure that the State’s appeal remains efficacious. The Respondent is not a citizen and is presently unlawfully in the country. As a result he does not enjoy the freedom of movement to leave Fiji as he pleases. The Permanent Secretary is empowered to order the deportation of the Respondent and would ordinarily do so. The imposition of the “*stop*” order by this Court is a matter that the Permanent Secretary has, in our opinion, correctly taken into account in exercising his discretion not to deport the Respondent. As a result the Respondent remains under the supervision of the Director of Immigration. The “*stop*” order preventing the deportation of the Respondent and his continued supervision are not inconsistent with section 21 of the Constitution.

[30] Therefore we affirm, the “*stop*” order made on 18 November 2015 and the consequential on-going supervision of the Respondent by the Director of Immigration. The order is to remain in force until this Court otherwise orders. We also confirm the orders made on 2 December 2015 that the Appellant’s submissions on leave and the appeal are to be filed and served no later than 5 January 2016. The Respondent’s submissions on leave and the appeal are to be filed and served no later than 15 January 2016. The leave and appeal hearings are listed for 20 January 2016 at 9.30am.

Orders:

1. *Stop order on the Respondent to remain in force until this court otherwise orders.*
2. *Appellant's submissions to be filed and served by 5 January 2016.*
3. *Respondent's submissions to be filed and served by 15 January 2016.*
4. *Leave and Appeal listed for hearing on 20 January 2016 at 9.30am.*



W. Calanchini

Hon. Mr Justice W D Calanchini
PRESIDENT, COURT OF APPEAL

[Signature]

Hon. Mr Justice Goundar
JUSTICE OF APPEAL

[Signature]

Hon. Mr Justice D Alfred
JUSTICE OF APPEAL