

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

**CRIMINAL APPEAL NO. AAU 0130 of 2019**  
**[In the Magistrates' Court of Nadi Case No. CF 962 of 2018]**

**BETWEEN** : **ASHWIN CHAND**  
*Appellant*

**AND** : **STATE**  
*Respondent*

**Coram** : **Prematilaka, JA**

**Counsel** : **Appellant in person**  
: **Mr. S. Babitu for the Respondent**

**Date of Hearing** : **06 November 2020**

**Date of Ruling** : **09 November 2020**

**RULING**

- [1] On 14 August 2018, the appellant had been arraigned in the Magistrates court of Nadi on one count of criminal intimidation contrary to section 375 (1)(a)(iv) of the Crimes Act, 2009, one count of damaging property contrary to section 369(1) of the Crimes Act, 2009 and one count of arson contrary to section 362(a) of the Crimes Act, 2009 committed on 09 August 2018 at Nadi in the Western Division.
- [2] As the third count of arson was an indictable offence the learned Magistrate had transferred the case to the High Court in terms of section 191 of the Criminal Procedure Act, 2009 on the same day.

- [3] When the case came up under HAC 153 of 2018 in the High Court of Lautoka on 22 August 2018 the learned High Court judge had forwarded the case to be dealt with by another High Court judge as the appellant had been a known person to the former judge in a client-counsel relationship at the Legal Aid Commission. After a few mention dates, when the case came up on 08 October 2018 before the second High Court judge he had realised that the appellant was facing another charge of murder before him and he had directed that the matter be dealt with by the Magistrates court under extended jurisdiction and remitted it back to Nadi Magistrates court.
- [4] After the case was sent back to the Magistrates court the appellant had made an application on 31 January 2019 to the learned Magistrate requesting *inter alia* that the case be transferred back to Lautoka High Court for the case to be heard in the High Court.
- [5] The learned Magistrate had delivered the ruling/order regarding the appellant's application on 26 July 2019 dismissing his application stating that there is no provision of law permitting the Magistrates court to send back a case which had been transferred to it by the High Court to be heard under extended jurisdiction. In the course of the order the Magistrate had correctly remarked that the offences coming under first and second counts in the charge were summary offences triable by the Magistrates court and the offence under the third count was an indictable offence in respect of which the High Court had made an order under section 4(2) of the Criminal Procedure Act, 2009 vesting the Magistrates Court with jurisdiction to try. Therefore, the extended jurisdiction was relevant only to the third count of arson and the first and second counts were summary offences.
- [6] The appellant had signed a notice of appeal on 01 August 2019 and had it filed in the High Court of Lautoka against the said ruling of the learned Magistrate. The High Court having called the copy records from the Magistrates court had transferred the appeal to the Court of Appeal on 19 August 2019 and the CA registry had registered it under AAU 0130 of 2019 on the basis that it was an extended jurisdiction matter.

- [7] When the matter came up before this court on 25 September 2020 the state raised a preliminary objection to the maintainability of the appeal on the basis that there is no right of appeal to the Court of Appeal against an interlocutory order of the Magistrates court even when it is acting under extended jurisdiction and filed an affidavit on 09 October 2019 in support of the facts. The appellant was directed to reply and he filed his written submissions on 06 November 2020. Both parties were heard orally on 06 November 2020 and the appellant informed this court that CF 962 of 2018 is still pending in the Magistrates Court in Nadi.
- [8] The only issue that has to be determined in this appeal is whether there is a direct appeal against the learned Magistrate's ruling/order dated 26 July 2019 dismissing the appellant's application to transfer the case to the High Court. I will also make relevant observations as to whether the said order dismissing the appellant's application was correct.
- [9] It is clear that the Magistrates Court had correctly transferred the appellant's case to the High Court in the first instance under section 191 of the Criminal Procedure Act, 2009 (read with section 35(2)(b)(i) of the Criminal Procedure Act, 2009) as the third count in the charge (*i.e.* arson) was an indictable offence over which only the High Court had jurisdiction to try [vide section 4(1)(a)]. In fact acting under section 188 and 191 the Magistrates court may transfer even a summary offence to the High Court [vide **Roligalevu v State** [2016] FJCA 165; AAU50.2012 (2 December 2016)].
- [10] The High Court in this instance in exercising its powers under section 4(2) of the Criminal Procedure Act had lawfully vested the Magistrates court with jurisdiction to try the case including the count of arson against the appellant. In another situation where the appellant had pleaded guilty to two counts of robbery with violence (indictable offence) in the Magistrates' Court exercising extended jurisdiction of the High Court, it was held by the Court of Appeal that when the High Court extends the jurisdiction of the Magistrates' Court to hear a matter, the accused's election of the venue is virtually overruled [vide **Rogers v State** [2014] FJCA 129; AAU118.2013 (25 July 2014)]. In fact, as a matter of law an accused has no right of election in the case of an indictable offence under sections 4(1)(a) or 4(2) of the Criminal Procedure

Act. The election is available only under section 4(1)(b) of the Criminal Procedure Act.

- [11] It has already been held in **State v Prasad** [2019] FJCA 18; AAU123.2014 (7 March 2019) that it is the offence that determines the venue.

*'[24] It is the 'offence' for which an accused is charged with, which determines the jurisdiction of the Court. If it is an indictable offence the jurisdiction lies with the High Court (S.4 (1)(a) of the Criminal Procedure Act while in a summary offence the jurisdiction lies with the Magistrate's Court. (S.4 (1)(a) of Criminal Procedure Act. The only exception being the investing of extended jurisdiction on the Magistrate's Court pursuant to section 4(2) of the Criminal Procedure Act in respect of an indictable offence.'*

- [12] In **Batikalou v State** [2015] FJCA 2; AAU31.2011 (2 January 2015) where the appellant was convicted for the offence of robbery contrary to section 310 (1) (a) (i) of the Crimes Decree 2009 (an indictable offence triable summarily) and sentenced in the High Court, the Court of Appeal held

*'[13] Indictable offences are tried in the High Court. However, indictable offences triable summarily, shall be tried by the High Court or Magistrate Court at the election of the accused person (section 4 (1) (b)). Such cases should be transferred to the High Court only if the accused has indicated to the Magistrate Court that he or she wishes to be tried in the High Court (section 35 (2) (b) (II) of the Criminal Procedure Decree 2009).'*

- [13] Therefore, it is clear that arson, not being an indictable offence triable summarily, the appellant had no right of election at all under section 4(1)(b) of the Criminal Procedure Act, 2009 read with section 35(2)(b)(ii) of the Criminal Procedure Act, 2009. He was bound by the order made by the High Court in terms of section 4(2) of the Criminal Procedure Act, 2009 investing the Magistrates court with jurisdiction to try the offence.

- [14] Once the High Court makes an order under section 4(2) of the Criminal Procedure Act, 2009 and transfers an indictable offence to be tried in the Magistrates court, both the accused and the Magistrate court are bound by the order. An accused cannot engage in forum shopping in this instance. Therefore, the leaned Magistrate was

correct in dismissing the appellant's application to transfer the case back again to be tried in the High Court.

- [15] It has been treated as settled law that the right of appeal against a decision of the Magistrates' court made under extended jurisdiction under section 4 (2) of the Criminal Procedure Act lies with the Court of Appeal pursuant to section 21 of the Court of Appeal Act [vide **Kirikiti v State** [2014] FJCA 223; AAU00055.2011 (7 April 2014), **Kumar v State** [2018] FJCA 148; AAU165.2017 (4 October 2018)].
- [16] However, this view is open to debate in the face of clear constitutional provisions. A discussion on this aspect of law can be found in **Tuisamoa v State** [2020] FJCA 155; AAU0076.2017 (28 August 2020).
- [17] Assuming that the appellant's right of appeal against the dismissal of his application is to the Court of Appeal under section 21 of the Court of Appeal Act as the learned Magistrate was exercising extended jurisdiction [as also held in **Charan v State** [2020] FJCA 144; AAU179.2019 (24 August 2020)], the crucial question in this appeal is whether the order of dismissal of the appellant's application to transfer the case to the High Court could legitimately be the subject of an appeal to the Court of Appeal.
- [18] It is clear that the appellate jurisdiction of the Court of Appeal as enshrined in section 21 of the Court of Appeal Act could be invoked only against a conviction, sentence, acquittal or grant or refusal of bail pending trial.
- [19] Even if one were to argue that section 21 should be read with section 3(3) of the Court of Appeal Act dealing with general jurisdiction of the Court of Appeal, section 3(3) enables appeals to this court as of right only from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court. Thus, the impugned order of the learned Magistrate clearly does not come under section 3(3) either.

- [20] In any event in **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) Calanchini AP as single judge had held that criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act effectively ruling out the general jurisdiction under section 3(3). The full court in **State v Chand** [2015] FJCA 64; AAU0085.2012 (28 May 2015) had held that the interpretation of Calanchini P was the correct interpretation.
- [21] Therefore, I determine that the impugned ruling/order of dismissal of the appellant's application by the learned Magistrate to transfer the case to the High Court when the High Court had already invested the Magistrates court with jurisdiction under section 4(2) of the Criminal Procedure Act, 2009 is only an interlocutory order and therefore, not appealable. It does not come under Part IV of the Court of Appeal Act. Therefore, I find that the appellant has no right of appeal against the impugned ruling of the learned Magistrate dated 26 July 2019 and his appeal also has no merits as discussed above.
- [22] Ordinarily I would have dismissed the appeal under section 35(2) of the Court of Appeal for want of right of appeal or leave to appeal or being frivolous and vexatious but I would refrain from doing so as it is not the appellant who had filed it in this court but it had been sent to the Court of Appeal by the High Court simply because it originated from the Magistrates court exercising extended jurisdiction. Instead, the proceedings in appeal AAU 0130 of 2019 would be terminated forthwith and the Court of Appeal registry would be directed to forward the appellant's appeal to the High Court to deal with it according to law and make an appropriate order or decision. For the avoidance of any doubt, I may place on record that since the appellant had no right of appeal to this court against the impugned ruling of the learned Magistrate this appeal bearing AAU 0130 of 2019 cannot be revived or restored under any circumstances in the future in the Court of Appeal upon the delivery of this ruling.

### **Orders**

1. The proceedings in appeal No. AAU 0130 of 2019 is terminated forthwith in the Court of Appeal.

2. The Court of Appeal registry is hereby directed to forward the appellant's appeal to the High Court to deal with it according to law.



  
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Hon. Mr. Justice C. Prematilaka  
JUSTICE OF APPEAL