

IN THE COURT OF APPEAL, FIJI
[On Appeal from the High Court]

CRIMINAL APPEAL NO. AAU 108 of 2022
[In the High Court at Lautoka Case No. HAM 65 of 2022]

BETWEEN : **AJAY KUMAR**

Appellant

AND : **THE STATE**

Respondent

Coram : **Prematilaka, RJA**

Counsel : **Mr. J. Reddy for the Appellant**
: **Ms. U. M. Tamanikaiyaroi for the Respondent**

Date of Hearing : **16 June 2023**

Date of Ruling : **19 June 2023**

RULING

- [1] The appellant is charged in Lautoka High Court Criminal Case No. HAC 116/2021 with murder of his de-facto wife contrary to Section 237 of the Crimes Act No. 44 of 2009 (“Crimes Act”).
- [2] On the morning of 16 September 2021, the deceased Saleszni Devi (the de-facto wife of the appellant) had been found dead beside her car at Teidamu and she had been bludgeoned and the pathologist had established that she had died of positional asphyxia resulting from multiple traumatic head injuries.
- [3] The state had made an application pursuant to section 11(3) of the Constitution of the Republic of Fiji 2013 (“Constitution”), seeking an order to obtain the bodily sample of the appellant for the purpose of DNA analysis by way of a notice of motion

supported by the affidavit of Detective Sergeant 4943 Netava of the Criminal Investigations Department, Lautoka Police Station. D/Sgt Netava is also the investigating officer in the crime.

- [4] Since there was strong circumstantial evidence against him the appellant had been approached by the investigation team and requested him to provide his bodily sample (his buccal swab) for the purposes of DNA testing as there had been a strong suspicion that the male fraction obtained from the vaginal swab of the deceased belonged to the appellant. According to the state, the purpose of obtaining the buccal swab of the appellant was to match his DNA with the DNA samples collected from the semen found in the genitals of the deceased, the steering wheel of the deceased's vehicle and the car key of the deceased. The appellant had been explained as to the reasons why his buccal swab was needed and its purpose and that his informed consent was needed for obtaining his buccal swab. However, the appellant had refused to consent for the police to obtain his buccal sample required to investigate the case against the appellant him for the murder of the deceased.
- [5] The state had submitted that obtaining of the buccal sample and the DNA analysis was in the interests of justice and obtaining of the buccal sample for DNA analysis did not mean that the appellant was confessing to the alleged murder. Further, the state had argued that the results of the DNA testing may also assist the appellant in his defence of the charge against him. Accordingly, it had been submitted that considering the circumstantial nature of the case, it was in the interests of justice that the High Court would grant an order compelling the appellant to provide his buccal sample for the purpose of DNA analysis.
- [6] The appellant had filed an affidavit in reply stating *inter alia* that the DNA testing by the state would violate his constitutional right of freedom from scientific procedure and compelling him to undergo DNA testing after having being charged for the case and before the hearing of his trial, may infringe his rights against self-incrimination.

[7] In the end the learned High Court judge made the following orders on 17 October 2022:

1. *I direct the Respondent, Ajay Kumar, to provide his buccal sample to the Police for the purpose of DNA analysis.*
2. *For this purpose, the Respondent is to make himself available at the Lautoka Police Station on Monday 24 October 2022, between 8.00 a.m. and 6.00 p.m. The specific time can be mutually agreed between the parties.*
3. *The buccal sample of the Respondent shall be taken by an authorised officer of the Forensic Department of the Fiji Police.*
4. *The said buccal sample of the Respondent is to be taken under the supervision of the Officer in Charge of the Lautoka Police Station or any other officer duly authorized by him.*
5. *Court makes further order that the Respondent is at liberty to have his Counsel or a representative of his choice present at the time his buccal sample is being taken.*

[8] The appellant's appeal before this court is against the said orders of the High Court. On 16 June 2023, both parties agreed to have a ruling on the written submissions already filed.

[9] The state has taken up the position in its written submissions that the impugned order of the High Court is an interlocutory order, not appealable and therefore should be dismissed pursuant to section 35(2) of the Court of Appeal Act.

[10] The counsel for the appellant informed this court that his client is on bail and the trial dates are yet to be fixed by the High Court.

[11] The crucial question in this appeal is whether the impugned orders of the High Court could legitimately be the subject of an appeal to the Court of Appeal.

[12] The appellate jurisdiction of the Court of Appeal in criminal matters is enshrined in section 21 (first tier appeal) and section 22 (second tier appeal) of the Court of Appeal Act. Section 3 of the Court of Appeal Act confers general jurisdiction on the Court of

Appeal which *inter alia* provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.

- [13] 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).
- [14] Gounder, JA (Calanchini P and Fernando JA agreeing) on behalf of 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 and stated:

*'[33] The above interpretation has to be correct. When an appeal is brought by the State under section 21(2) of the Act against an acquittal after a trial in the High Court, then section 23 (1) (b) expressly provides how that appeal can be determined. Similarly, section 22(3) provides how this Court can determine an appeal from the appellate jurisdiction of the High Court on a wrong decision of law only. If section 3(3) was intended to provide a wider more general jurisdiction, then the Act should contain provision for determination of appeals under that section. Since there is no such provision, I agree with Calanchini P's judgment in **Balaggan's** case 'that the general jurisdiction in section 3(3) of the Act must be regarded by necessary implication as having been qualified, so far as criminal appeals are concerned by Part IV of the Act.'*

- [15] Earlier a view different to **Balaggan** and **Chand** had been taken in **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) by Gounder, JA sitting alone (single judge Ruling) where it was held that the Court of Appeal Act provides for three avenues to bring criminal appeals to the Court of Appeal namely under (i) section 21(1) [against conviction, sentence, acquittal or grant or refusal of bail pending trial by HC in its original jurisdiction], (ii) section 22(1) (against decisions by High Court made in its appellate jurisdiction as a second tier appeal) and (iii) section 3(3) of the Court of Appeal Act (general jurisdiction) which *inter alia* provides for a right of appeal from the **final judgments** of the High Court given in the exercise of its original jurisdiction (such as a stay of proceedings of a case pending in the

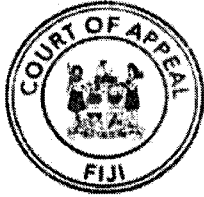
magistrates' court where the order granting stay would be final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act).

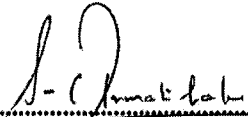
- [16] However, it is clear that Gounder, JA in **Chand** had agreed with Calanchini P's ruling in **Balaggan's** case *'that the general jurisdiction in section 3(3) of the Act must be regarded by necessary implication as having been qualified, so far as criminal appeals are concerned by Part IV of the Act.'* But, if one were to agree with the view taken in **Balaggan** and **Chand**, no appeal could lie to the Court of Appeal against any other orders having the effect of final judgments, for example an order granting permanent stay of magistrates' court proceedings by the High Court in its original jurisdiction where the State is aggrieved by the stay of proceedings.
- [17] Obviously, the order directing the appellant to provide his buccal sample to the police for the purpose of DNA analysis does not come under section 21(1) or 22 (1) of the Court of Appeal Act. Nevertheless, even if one were to consider (for the sake of argument if not anything else) that section 3(3) of the Court of Appeal may permit an appeal against other orders, it is clear that section 3(3) enables appeals to this court as of right only from **final judgments** (or orders having the effect of final judgments) of the High Court given in the exercise of the original jurisdiction of the High Court.
- [18] The tests for determining whether an order is a final judgment or an interlocutory order has been set out by the Full Court in **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002) where the Court of Appeal noted that two schools of thought had developed as to what constituted a final judgment. These were categorized as *'the order approach'* and *'the application approach'*. The "order approach" required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end it was a final order, if it did not it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally determined whichever way the Court decided the application. The Court concluded that it was preferable at least in the criminal jurisdiction for the court to maintain "the order approach"

- [19] The Full Court in **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004) had followed *Nata* and affirmed the ‘order approach’.
- [20] In **Chand v State** [2020] FJCA 221; AAU0130.2019 (9 November 2020) and **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021), I followed *Nata* and *Takiveikata* and dismissed appeals filed against interlocutory orders of the High Court.
- [21] Thus, when the ‘order approach’ is applied to the impugned order directing the appellant to provide his buccal sample to the police for the purpose of DNA analysis and other incidental orders thereof, they could by no means bring the proceedings against the appellant in the High Court to an end and therefore, they were merely interlocutory orders. Even if one were to apply the ‘application approach’ (for the sake of argument), whether the High Court allowed or refused the state’s application seeking an order to obtain the bodily sample of the appellant for the purpose of DNA analysis, it would not in either way finally determine the matter before the High Court. Trial is still pending in the High Court against the appellant. It does not have the effect of a final judgment. Nor has it brought finality to the criminal proceedings against the appellant. Therefore, in this instance, whether this court applies the test of ‘order approach’ or ‘application approach’, the impugned order has to be categorized as an interlocutory order and not as a final judgment.
- [22] Therefore, I hold that an appeal does not lie against the order directing the appellant to provide his buccal sample to the police for the purpose of DNA analysis and other incidental orders thereof and I also hold that therefore his court has no jurisdiction to entertain this appeal. Thus, the appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

Order of the Court:

1. The appeal is dismissed pursuant to section 35(2) of the Court of Appeal Act.




.....
Hon. Mr. Justice C. Prematilaka
RESIDENT JUSTICE OF APPEAL

Solicitors:

Jiten Reddy Lawyers for the Appellant

Office for the Director of Public Prosecutions for the Respondent