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

CRIMINAL APPEAL NO. AAU 079 of 2020
[In the High Court at Lautoka Miscellaneous Case No. HAM 81 of 2020]

BETWEEN	:	**BIMLESH SINGH**
		Appellant
AND	:	**STATE**
		Respondent
Coram	:	**Prematilaka, RJA**
Counsel	:	**Mr. S. P. Gosaiy for the Appellant**
	:	**Mr. L. J. Burney for the Respondent**
Date of Hearing	:	**18 January 2023**
Date of Ruling	:	**20 January 2023**

RULING

[1] The appellant had been arraigned in the Magistrates court at Nadi on 96 counts of Larceny by Servant contrary to section 274 of the Penal Code and 96 counts of Fraudulent Falsification of Accounts contrary to section 307 of the Penal Code committed between 01 September 2007 and 01 August 2009.

[2] The appellant is said to have first appeared in the Magistrates court in 2011. Trial had been postponed on 07 occasions and the High Court judge had held the appellant not to be responsible for the adjournments.

[3] The appellant had sought from the High Court a permanent stay of criminal proceedings at Nadi Magistrate court. After hearing counsel for both parties the High Court judge on 16 July 2020 had *inter alia* held in his ruling that:

> *'All in all, though I agree that it has taken a long time to take this up for trial due to no fault of the applicant, I am unable to hold that the said long delay in taking this matter for trial in the Magistrates' Court of Nadi to be unreasonable or undue. Hence I am not convinced that the right granted by Article 15 (3) of the Constitution to the applicant is violated.*
>
> *Therefore, with specific directions to the learned Magistrate and the Respondents to conclude this matter within 3 months from today, this application for stay is refused and dismissed.'*

[4] The appellant had filed a notice of appeal in the Court of Appeal against the said ruling of the High Court seeking leave to appeal on the following grounds of appeal.

> *'**Ground 1***
>
> *THAT the Learned Trial Judge erred in law and fact in holding that he was not convinced that the delay would prejudice the Appellant despite the fact there were overwhelming evidence to the contrary and as such a substantial miscarriage of justice.*
>
> ***Ground 2***
>
> *THAT the Learned Trial Judge erred in law and fact in holding that the long delay in taking this matter for trial in the Magistrate's Court in Nadi to be unreasonable or undue and further that the right granted by Article 15 (3) of the Constitution to the Appellant is violated despite the fact there were overwhelming evidence to the contrary and as such a substantial miscarriage of justice.*
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> ***Ground 3***
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> *THAT the Learned Trial Judge whilst referring to the Fiji Court of Appeal decision in Mohammed Riaz Shameem vs State [2007] FJCA 19 AAU 0096.2005 in his judgment did not adequately apply the legal principles laid down by the Fiji Court of Appeal to the facts of the Appellant's case and as such a substantial miscarriage of justice.*

[5] The respondent had taken up the position that the impugned ruling is an interlocutory order and not appealable and therefore, the appeal must be dismissed pursuant to section 35(2) of the Court of Appeal Act. Therefore, whether there is a right of appeal

against the impugned ruling dated 16 July 2020 by the High Court refusing to issue a permanent stay on criminal proceedings of the proceedings under CF 213/11 at Nadi Magistrate court has to be decided first.

Whether there is a right of appeal against the impugned ruling

[6] In **Nacagi v State** [2014] FJCA 54; Misc Action 0040.2011 (17 April 2014) all three appellants applied in the High Court for a stay of proceedings in the Magistrates' Court on the ground of post charge delay. The applications were made under the inherent and supervisory jurisdiction of the High Court. All three applications for stay were refused by the High Court. The appellants appeal against the High Court judgments refusing stay of proceedings in the Magistrates' Court. The state submitted that a refusal of stay of proceedings is not a final judgment and therefore the appellants had no right of appeal. Gounder J held that all three appeals were bound to fail because the appellants had no right of appeal and accordingly, the appeals were dismissed under section 35(2) of the Court of Appeal Act. Gounder J stated:

> ***'Is there a right of appeal?***
>
> *[8] The Court of Appeal Act provides for three avenues to bring criminal appeals. Section 21(1) of the Court of Appeal Act applies to an appellant convicted on a trial held before the High Court. The appellants have not been convicted on a trial held before the High Court and therefore section 21(1) is not relevant.*
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> *[9] Section 22(1) of the Court of Appeal Act concerns appeals from the High Court in its appellate jurisdiction. The stay applications were not heard by the High Court in its appellate jurisdiction. Section 22 (1) is not relevant.*
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> *[10] Section 3(3) of the Court of Appeal Act provides for a right of appeal from the final judgments of the High Court given in the exercise of its original jurisdiction.*
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> *[11] The High Court judgments refusing stay were given in its original jurisdiction. The issue is whether the judgments are final. The question whether a refusal of stay in criminal proceedings is a final judgment must be determined by the principles enunciated by the Full Court in Takiveikata v State Criminal Appeal No: AAU0030 of 2004S at pp 4-5:*

"The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised 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."

[12] Applying 'the order approach', the question that must be asked is whether the order refusing stay of prosecution brought the proceedings to an end. The answer is obvious. The order refusing stay has not brought the proceedings to an end, as the trials are pending in the Magistrates' Court. It therefore follows the judgments of the High Court are not final. Of course if stay was granted, the proceedings in the Magistrates' Court would have come to end, and the order granting stay would have been final to give the State a right of appeal under section 3 (3) of the Court of Appeal Act.

[7] In **Takiveikata v State** [2004] FJCA 39; AAU0030.2004S (16 July 2004) the Court of Appeal dealt with an appeal against the decision of the High Court judge fixing the trial date where the state had argued that it was an interlocutory decision not subject to appeal.

'Section 3(3) of the Court of Appeal Act, as amended, provides as follows:-

"(3.) Appeals lie to the court as of right from final judgments of the High Court given in the exercise of the original jurisdiction of the High Court."

Section 21 which specifically relates to criminal appeals has no application to this case because there has not been a conviction.

The meaning of the term "final judgment" as used in section 3 has been a matter of dispute. The whole subject was considered in this court in the case of ***Josefa Nata v The State,*** *Criminal appeal No. AAU0015.2002S. In that case a submission made in the High Court that the crime of treason was not a crime under the law of Fiji had been rejected by the trial judge. That determination was made as a preliminary question and at the time the appeal was brought before the Court of Appeal the appellant had not been arraigned nor had assessors been empanelled. The State contended that the judgment of*

the Judge in the High Court was not a final judgment. The Court noted that two schools of thought had developed as to what constituted a final judgment. These were categorised 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". In consequence the court concluded that there was no final judgment before it.

The decision in Nata (supra) would exclude jurisdiction to hear the appeal.

In view of the conclusion at which we have arrived, that this Court does not have jurisdiction to entertain the proceedings before us the appeal will be dismissed.

[8] The Court of Appeal in **Nata v The State** [2002] FJCA 75; AAU0015U.2002S (31 May 2002) considered a notice of motion filed on behalf of the state for an order that an appeal filed on behalf of the appellant be dismissed for want of jurisdiction. The appeal in question was brought against a judgment of the High Court in which the court had rejected a submission made on behalf of the appellant that the crime of treason, with which the appellant has been charged, was not a crime known to the law of Fiji. If the submission had been upheld, the charge would have been dismissed with the consequence that the appellant would have been entitled to be acquitted.

'In the present case nothing turns on these considerations because we are concerned with a criminal matter which will eventually be tried by assessors. The trial cannot be split any more than could a civil case which was being tried by a jury. It is true that the question whether or not the crime of treason exists in Fiji was dealt with as a preliminary issue. It may be thought desirable that the applicable legislation should permit an appeal by leave from a judgment on a preliminary issue which goes to the heart of a criminal case. That is a course which is available in New Zealand and in at least some of the Australian states. But we can find no provision in the relevant legislation or in rules of court here which makes provisions of this kind. Certainly we were referred to none by counsel.

In those circumstances it seems to us to be preferable, at least in the criminal field, for the court to maintain the order approach, which found favour even in

civil cases in former years in England, rather than the application approach. But even if one adopts the application approach as propounded by the Court of Appeal in Charan the order would not be final unless the entire cause or matter would be finally determined whichever way the Court decided the application. On that basis it matters not whether one adopts the order approach or the application approach. On neither basis is there here a final judgment with the consequence that an appeal does not lie under s.121 of the Constitution nor under s.21 of the Court of Appeal Act.'

[9] In **Balaggan v State** [2012] FJLawRp 139; (2012) 2 FLR 92 (25 May 2012) the appellant applied to the Court of Appeal for two orders made by the High Court to be quashed and set aside. The High Court had made an order disqualifying the appellant's counsel from acting for the appellant in the trial, and another ruling on the transfer of the matter to Lautoka High Court. Calanchini, AP held:

(1) Criminal appeals to the Court of Appeal are restricted to the jurisdiction conferred by Part IV of the Court of Appeal Act. Under those circumstances, neither of the orders of the High Court come within s 21 of the Act.

(2) Where criminal proceedings are commenced in the High Court exercising its original jurisdiction and the matter proceeds to trial and the judge proceeds to pronounce judgment, that judgment is the final judgment. Every other application and every order made by the judge on the hearing of that application should be considered interlocutory.

(3) The order refusing the application to transfer the matter was made in a criminal proceeding, was interlocutory in nature and no appeal lies to the Court of Appeal. The disqualification order was an interlocutory order made pursuant to the court's jurisdiction to determine whether a legal practitioner, as an officer of the court, should be permitted to appear for the accused at the trial. No appeal lies to the Court of Appeal.

[10] In **Chand v State** [2020] FJCA 221; AAU0130.2019 (9 November 2020) I came to a similar finding against an interlocutory order (see **Buadromo v Fiji Independent Commission Against Corruption** (FICAC) [2021] FJCA 14; AAU01.2021 (19 January 2021) as well.

'[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 Magistrates 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.

[11] The recent decision by the Court of Final Appeal of The Hong Kong Special Administrative Region in **HKSAR v Yee Wenjye** [2022] HKCFA 6 is also an authority to the proposition that refusal to order a stay of proceedings is not a final decision as it does not dispose of the matter and also because the merits of the decision could be reviewed by the appellate court, if the accused is eventually convicted (it has been authoritatively held that an appeal against a conviction can be brought on the ground that the trial should have been stayed) .

[12] The appellant had made the current appeal pursuant to the Court of Appeal Act and section 99(3) of the Constitution which is as follows:

> *'(3) 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.' (emphasis added)*

[13] Thus, the general jurisdiction of the Court of Appeal '*to hear and determine appeals from all judgments of the High Court'* is subject to '*such requirements as prescribed by written law'.* Thus, it is not an all-encompassing jurisdiction. Section 99(3) has to be read with the Court of Appeal Act and any other enactments as the case may be.

[14] In **Shameem v State** [2007] FJCA 19; AAU0096.2005 (23 March 2007) the appellant was charged with one count of indecent assault contrary to section 154(1) of the Penal Code at Nadi Magistrates' Court. Counsel for the defence moved to have the charge struck out and for the question of the delay to be referred to the High Court under section 41(5) of the Constitution. The Magistrate referred it to the High Court in Lautoka. By this time, it was five years and three months since the first appearance before the Magistrate. The High Court judge thought that it was inappropriate for the proceedings to be stayed. The appellant appealed to the Court of Appeal.

[15] Section 41(5) of the 1997 Constitution of Fiji stated:

> *'If in any proceedings in a subordinate court any question arises as to the contravention of any of the provisions of this Chapter, the member presiding in*

the proceedings may, and must if a party to the proceedings so requests, refer the question to the High Court unless, in the member's opinion (which is final and not subject to appeal), the raising of the question is frivolous or vexatious.'

[16] The alleged contravention appears to be in respect of section 29(3) which stated *'Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time.'*

[17] The Court of Appeal entertained the appeal against the refusal of the High Court judge to stay the proceedings and set aside the order of the High Court refusing the application for a stay. The Court of Appeal stayed the proceedings in the Magistrates' Court and marked it not to be resumed except with the leave of the Court of Appeal or, if it became relevant, of the Supreme Court.

[18] Jurisdiction of the Court of Appeal had been set out in 1997 Constitution of Fiji as follows:

*'**121.**-(1) The Court of Appeal has jurisdiction, subject to this Constitution and to such requirements as the Parliament prescribes, to hear and determine appeals from all judgments of the High Court, and has such other jurisdiction as is conferred by law.*

(2) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any matter arising under this Constitution or involving its interpretation.

(3) The Parliament may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such requirements as the Parliament prescribes.'

[19] Section 121 (1) – (3) of 1997 Constitution are more or less similar to section 99(3)-(5) of 2013 Constitution. Section 99(4) & (5) state:

'(4) Appeals lie to the Court of Appeal as of right from a final judgment of the High Court in any manner arising under this Constitution or involving its interpretation.

(5) A written law may provide that appeals lie to the Court of Appeal, as of right or with leave, from other judgments of the High Court in accordance with such

requirements as prescribed in that written law or under the rules pertaining to the Court of Appeal.

[20] It is clear that what is involved in this appeal has nothing to do with interpretation of the Constitution or has not arisen thereunder and therefore section 99(4) has no application. The written law namely the Court of Appeal has provided three instances where an appeal lies to the Court of Appeal as of right from the High Court as provided for in section 99(5). One is section 3(3) and the others are section 21(1)(a) and 21(2)(a). Under section 3(3) it has to be a final judgment given in the original jurisdiction of the High Court. In the other two instances *i.e*. section 21(1)(a) and 21(2)(a) it has be from a conviction or an acquittal on any ground of appeal involving a question of law only. The appellant's appeal is not from a final judgment as already discussed. Nor is it from a conviction or acquittal.

[21] Section 21 (1) (b) & (c), section 21(2) (b) & (c) relate to right of appeal with leave of the Court of Appeal only against a conviction or an acquittal on questions of fact alone or mixed law and fact. Section 21(3) permits the Court of Appeal to entertain an appeal against refusal of bail by the High Court with leave first had and obtained. The appellant's appeal does not come under any of these provisions.

[22] Unfortunately, the Court of Appeal had not discussed any of the provisions of the then Constitution or applicable law in **Shameem v State** (supra) in entertaining the appeal against refusal of the stay of criminal proceedings by the High Court and determining the matter though it has provided a very useful guidance in terms of applicable principles in consideration of an application for stay of criminal proceedings on account of delay.

[23] Therefore, I prefer not to follow **Shameem v State** (supra) in deciding whether this court has jurisdiction to entertain and determine an appeal against the refusal of the stay of criminal proceedings by the High Court. I would rather follow several other decisions discussed above which have extensively dealt with the issue of jurisdiction. There is a long line of authoritative decision refusing to exercise jurisdiction of the Court of Appeal in respect of interlocutory orders or rulings.

[24] Therefore, in the light of those judicial precedents I hold that the impugned order of the High Court judge dated 16 July 2020 refusing to stay the proceedings in the Magistrates court is only an interlocutory order and not a final judgment. Section 99 of the Constitution of the Republic of Fiji would not make any difference to that position as the jurisdiction conferred on the Court of Appeal is subject to other written law including the Court of Appeal Act. This is the conclusion one could arrive at whether you apply 'order approach' or 'application approach' though at least for criminal matters 'order approach' had been preferred. The impugned ruling of the High Court has not brought the criminal proceedings against the appellant to an end. Nor has it determined the entire cause or matter finally. The case CF 213/11 against the appellant in Nadi Magistrates court is yet to be determined. If the permanent stay had been granted by the High Court as requested by the appellant that order would have become a final judgment and a right of appeal may have accrued to the respondent to appeal against that order to the Court of Appeal under section 3(3) of the Court of Appeal Act, as with a permanent stay, criminal proceedings against the appellant would have finally come to an end.

[25] Therefore, I hold that the appellant has no right of appeal against the ruling of the High Court judge dated 16 July 2020 and his appeal should stand dismissed in terms of section 35(2) of the Court of Appeal Act.

[26] However, before parting with this ruling, I must place on record that I am rather disturbed by the fact that despite the specific directions by the High Court judge to the Magistrate and the State to conclude the case within 03 months from the date of the ruling *i.e.* 16 July 2020 nothing of that sort has happened so far. The counsel for the appellant informed this court at the hearing that the trial against the appellant has not even commenced to date and the next date of mention is 08 May 2023. The appellant is said to have first appeared in the Magistrates court in 2011.

[27] In my view, whether this is a police prosecution or not the Director of Public Prosecutions as the highest quasi-judicial officer of the State should take serious note of this unacceptable and unsatisfactory state of affairs and find out why the High Court judge's direction had been grossly ignored and why the trial against the

appellant is being delayed and advise the police or the prosecuting state counsel accordingly. One must not forget that section 15(3) of the Constitution which states that *'Every person charged with an offence and every party to a civil dispute has the right to have the case determined within a reasonable time'* is not a dead letter but is alive and breathing.

[28] At the same time, I think there is nothing to prevent the appellant from making a fresh application for a permanent stay of case CF 213/11 against him from the High Court if he so desires.

Order of the Court:

1. Appeal is dismissed in terms of section 35(2) of the Court of Appeal Act.

COURT OF APPEAL FIJI

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